ELECTIONS: Requirements for filing -- §43.18, 1962 Code. There is no requirement for a candidate to file a declaration of party affiliation in addition to the affidavit of candidacy required by §43.18.

February 6, 1964

Mr. R. T. Smith
County Attorney
O'Brien County
Primghar, Iowa

Dear Mr. Smith:

This is to acknowledge receipt of your letter of January 17, 1964, in which you asked the following two questions:

> "1. At the top of a nomination paper, it states as follows: I, the undersigned hereby nominate ----- of ----- County, who has affiliated with and is a member of the ----- party. Does a candidate need to file a declaration of party with his nomination papers if the poll books for the last ten years do not indicate that he has voted in that time?
>
> "2. The last legislature changed the length of terms of supervisors and township officers. (Chapter 77, Laws of the Sixtieth General Assembly) At the present time the terms of our supervisors are as follows:
>
> "District 1 --- 1962, 1963, 1964
> 2 --- 1963, 1964, 1965
> 3 --- 1963, 1964, 1965
> 4 --- 1963, 1964, 1965
> 5 --- 1964, 1965, 1966
>
> "Sec. 4 states that supervisors taking office in 1963 will be elected to a three year term and others to a four year term. If this is correct, four of our supervisors will have terms that expire at the same time. This was discussed at a School of Instruction recently and there were many ideas on this change. Please let me know your opinion."

In answer to your first question posed, I would advise that there is no requirement that a special "declaration of party" be filed. The statute involved, §43.14, Code of 1962, contains no such provision.

"The Court cannot write into a statute provisions which it does not possess." Hessel vs. Bank, 205 Ia. 508.

Thus, it is sufficient if a candidate as described will file his affidavit as provided in §43.18 along with his nomination papers.

The second question is answered by the Burdette opinion, a copy of which was previously forwarded to you.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:vw

COUNTIES AND COUNTY OFFICERS: Incompatibility -- The offices of member of the County Conservation Commission and mayor of a city are incompatible, and the election of the mayor after the appointment of the person to the County Conservation Commission creates a vacancy in the County Conservation Commission.

April 16, 1964

Mr. Henry L. Elwood
Howard County Attorney
P.O. Box 377
Cresco, Iowa

Dear Mr. Elwood:

This is in reply to your recent letter in which you submitted the following:

> "First, a member of the board of directors of the Howard-Winneshiek Community School District, who was elected to office on September 10th, 1962, and has served continuously since that time, is also serving as Mayor of a town in this same community school district. He was first elected Mayor in 1952 and has been re-elected and has served continuously since that time. Both of these offices, as mentioned aforesaid, are elective offices.
>
> "The same individual was appointed as a member of the Howard County Conservation Board at the time of its inception, which was in 1956, and has served on that board continuously since that time. He is presently serving on said board under a term which expires December 31, 1965. The conservation board is concerned with conservation matters in Howard County, the county where the same person serves as Mayor and Director of the School Board.
>
> "1. Whether the elective positions of mayor and school director, and the appointive position as member of the conservation board, are incompatible, and if so, which offices should be vacated by this individual?

In reply thereto, I would advise as follows:

1. Insofar as the incompatibility of holding office of membership in the County Conservation Commission, appointed in 1956, and mayor of a city, elected after that date, based upon the opinion of this department issued to Mr. Jack M. Fulton on January 27, 1964, a copy of which is attached hereto, these offices are incompatible. In that view, and based upon the authority of State ex. rel. Crawford vs. Anderson, 155 Iowa 271, this results that where incompatibility exists between offices, acceptance of the last office, being that of mayor, operates automatically to create a vacancy in the first office, that of a member of the County Conservation Commission. Under that rule, the office of a member of the County Conservation Board would be vacated.

2. The office of membership in the Conservation Board being vacated, the question is whether there is incompatibility between the office of mayor and member of the Community School Board. These offices are incompatible. Incompatibility is based upon the fact that both the city council and the Community School Board are certifying bodies and conflict arises when the same person is participating in both budgets and levies of these agencies. It would appear under the rule of the cited case that the office of mayor being the first office accepted, would be vacated.

COUNTIES AND COUNTY OFFICERS: Recorder--Notice of personal property tax lien. §§445.6, 558.51, 558.60, 1962 Code. Indexing of treasurer's notice of personal property tax lien by recorder is neither authorized nor required.

April 15, 1964

Mr. Robert W. Burdette
Decatur County Attorney
Leon, Iowa

Dear Sir:

Reference is herein made to yours of the 19th ult., in which you stated:

> "The County Treasurer has filed in the office Notice of Personal Tax Lien. The Code does not give any instructions as to recording this lien or as to any fee charged. This lien is filed in accordance with Section 1, Chapter 306 Acts of the 58th General Assembly. This lien has been filed and indexed in the Chattel Mortgage record. This probably would be OK except where the party has real estate and the County wants to hold its lien for the personal property tax against the real estate, mortgagees and purchasers.
>
> "I would appreciate it very much if you would advise the proper filing of this lien and where is the proper place to index it. There isn't any index book in the office that would cover this particular situation."

In reply thereto, I advise the following: The lien involved herein is created by §1 of Chapter 306, Laws of the 58th General Assembly, and now part of §445.6, Code of 1962, and provides the following:

> "Whenever the county treasurer shall have reason to believe that any owner of taxable personal property, who is a resident of the state of Iowa and against whom personal property taxes have been assessed, is about to remove from the

> county or is about to dispose of his personal property, he shall immediately regard and declare the taxes due and payable, shall file a notice of such lien with the county recorder, and shall proceed immediately to collect such taxes, together with costs and any interest and penalty that may be due, by distress and sale of the personal property so assessed which is not exempt from taxation. In the event the county treasurer proceeds to collect such taxes prior to date of levy, the amount of such taxes shall be presumed to be the taxable value of such property multiplied by the tax rate established at the date of levy next preceding."

Note that the requirement of this statute, after describing the situation under which the lien may arise, provides for its preservation by filing notice of such lien with the County Recorder. No authority is conferred, nor duty imposed upon the Recorder to index this notice of lien. When the foregoing provision of §1, Chapter 306 is complied with, it constitutes constructive notice to the world of this lien.

This is the view of the Supreme Court of Iowa, wherein the case Fleck v. Iowa Employment Security Commission, 233 Iowa 67, 8 N.W. 2d 703, there was a lien of the State for unpaid employment security contributions, and indexing thereof was required. In holding the notice of lien and indexing were sufficient, the court stated:

> ". . . Also, that when the prerequisites of the statute, whatever they may be, are substantially complied with, the law declares that

> the world has notice and will not allow any individual to show that he did not in fact have notice. The presumption of notice which the law in such cases raises is conclusive and incontrovertible. This case holds that the whole law must be looked at. If any distinction is made, the record book, after all, is the main one. The chief object of the index book is that which its name implies; its function is, in the first place, to indicate the existence of all instruments which are recorded or on file to be recorded. If there is no index of an instrument, the searcher after titles has a right to assume that none such is on file or on the record. This case further holds that the index serves as a sort of finger board to direct the inquirer and must not mislead him by giving a totally wrong description of the land."

Thus, there being no duty imposed upon the Recorder to index this particular lien, and there being no such general duty in the Recorder to index, it is to be said that the filing of the notice, if in proper form, provides constructive notice of the lien, that indexing of recorded or filed instruments is directed by legislative action applicable to the character of the lien filed or recorded. Such directions appear in §558.51, Code of 1962, where:

> "Separate index books shall be kept for mortgages and satisfactions or releases of same, one for those containing descriptions of lots, and one for those containing land; and separate books for other conveyances of real estate, one for lots, and one for lands; and an index book shall be kept for powers of attorney, affidavits, and certifled copies of petitions in bankruptcy with or without the schedules appended,

of decrees or adjudication in bankruptcy, and of orders approving trustees' bonds in bankruptcy; all of above indexes to be arranged alphabetically as provided in section 558.52."

A direction for indexing transfers of real estate is contained in §558.60, Code of 1962. An index is required by §335.11 for the filing of federal tax liens, and §335.9 provides for indexing the names of military personnel and their discharge. Section 96.14(3) requires an index for unpaid contributions to the Employment Security Commission. Section 422.26 provides for indexing the liens of unpaid income taxes.

In view of the foregoing, indexing of the described lien is neither authorized nor required.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:vw

STATE OFFICERS AND DEPARTMENTS: Comptroller - Inter-office financial agreements -- Ch. 8, §§13.5, 13.6, 1962 Code. Where an agency or department of the state pays from its fund a statutory obligation of another department or agency, the relationship of debtor and creditor arises and payment from one agency to the other is in order.

May 27, 1964

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

Dear Marvin:

In connection with the opinion issued to you of even date respecting the status of amplifying appropriations, I advise that while this amplifying money is not the subject of appropriation, it is still the subject of reimbursement from one agency of the state to another. According to 81 C.J.S., Page 1085, title, States:

> "Generally state agencies have authority to contract with each other in so far as necessary to administer duties within the scope of their authority."

Citing in support thereof, the case of State of Fla v. Florida State Imp. Commission, 30 So. 2d 97, 158 Fla. 743. See Preston v. Clements, 232 S.W. 2d 85, 313 Ky 479. This rule has statutory sanction.

Typical thereof are provisions of §13.5, Code of 1962, which provides that the salary and traveling expenses of the assistant attorney general assigned to the Social Welfare Department shall be paid from the appropriation of that agency. A like provision, according to §13.5, directs

#64-5

that the payment of the salary and expenses of an assistant attorney general for the tax commission shall be paid from the appropriation made to the said tax commission. In so far as these payments are concerned when made by the Department of Justice, they are mere arrangements between two agencies of government whereby reimbursement will be made for any payment made pursuant to the foregoing statutes.

The foregoing situation gives rise to the relationship of debtor and creditor as between two state agencies.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:vw

STATE OFFICERS AND DEPARTMENTS: Comptroller--Appropriations, reimbursement -- Ch. 8, 1962 Code. Certainty of amount is essential in the appropriation of state money and therefore an appropriation of a fixed amount of state money "amplified by estimated reimbursement" - the amount of estimated reimbursement is not the subject of appropriation.

May 27, 1964

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

Dear Marvin:

I acknowledge receipt of yours of the 10th inst., in which you submit the following:

"Several sections of Chapter 1, Acts of the 60th General Assembly make reference to the 'amplification' of a specific appropriation by estimated reimbursements of a specific amount. Specifically, Chapter 1, Section 9, Acts of the 60th General Assembly reads as follows:

"'Sec. 9. For the office of the executive council 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, 1964, the sum of nine hundred fifteen thousand four hundred dollars ($915,400.00), or so much thereof as may be necessary to be used in the following manner:

For salary of the secretary of the executive council	$ 8,900.00
For other salaries	115,340.00
For support, maintenance and miscellaneous purposes (amplified by estimated reimbursements of $150,000.00)	791,160.00
Grand total of all appropriations for all purposes for each year of the biennium for the office of the executive council	$915,400.00'

"Further, Chapter 1, Section 4, Acts of the 60th General Assembly, reads as follows:

"'Sec. 4. For the office of auditor of state 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 three hundred eighty-two thousand two hundred ten dollars ($382.210.00), or so much thereof as may be necessary to be used in the following manner:

For salary of state auditor	$12,000.00
For other salaries (amplified by estimated reimbursements of $20,000.00)	300,700.00
For support, maintenance and miscellaneous purposes	49,650.00
Total for general office	$362,350.00
BUILDING AND LOAN DIVISION	
For salaries (amplified by estimated reimbursements of $8,000.00)	$14,550.00
For support, maintenance and miscellaneous purposes	5,310.00
Total for building and loan division	$19,860.00
Grand total of all appropriations for all purposes for each year of the biennium for the office of auditor of state	$382,210.00'

"Several other sections of Chapter 1, Acts of the 60th General Assembly have the same terminology relative to estimated reimbursements. Previous departmental appropriations bills have not contained such wording.

"We respectfully request an Opinion as to the following:

"1. Does the wording above place a budget ceiling on the various appropriations to which it has been added. In other words, would they be allowed to spend their reimbursements in excess of the estimated amount referred to in the various sections of Chapter 1, Acts of the 60th G.A.?

"2. What constitutes 'reimbursements' as referred to in #1 above?

"3. If the wording above does establish or constitute a budget ceiling, what authority remains with the Governor and Comptroller to transfer appropriations in or out of such funds in keeping with the provisions of Section 8.39, Code of Iowa, 1962?

> "4. If there is a budget ceiling established and if the Governor and Comptroller have the authority to transfer funds to these accounts, is there a new ceiling created by the amount transferred by the Governor and Comptroller or does the ceiling remain as determined to be established by the appropriation Act?"

In reply thereto, I advise as follows: Your letter revolves about the following underscored language in the statutes set forth in your letter, to-wit:

" * * (<u>amplified by estimated reimbursements</u> * * "

As it appears therefrom, the money sought is that amplified by estimated reimbursements. It is to be observed that such language plainly implies:

1. That the money thus appropriated is not now appropriated by an agency of the state that is doing the amplifying, but insofar as this money is concerned, it is an anticipated future allocation.

2. The amount of the purported appropriation is uncertain. To that situation, the textbook applicable rule is stated in 42 Amer. Jur. §46, which reads as follows:

> "§46. Certainty as to Amount.--Certainty in the amount appropriated is essential to a valid appropriation of public moneys. Sometimes constitutional provisions expressly require appropriation acts to distinctly specify the sum appropriated. A bill cannot be certain or specific where the amount is to be ascertained only by requisitions which may be made by the recipients. However, it has been held that an appropriation bill is not void for uncertainty in not specifying a stated amount if it fixes the extent to which the treasury will be drawn upon."

Supporting the foregoing rule is the following:

"2 Ingram v. Colgan, 106 Cal 113, 38 P 315, 39 P 437. 28 LRA 187, 46 Am St. Rep 221; Henderson v. Hovey, 46 Kan 691, 27 P 177, 13 LRA 222; State ex rel. Davis v. Eggers, 29 Nev 469, 91 P 819, 16 LRA(NS) 630. See also Baltimore v. O'Conor, 147 Md 639, 128 A 759, 40 ALR 1058. No appropriation is made by a statute providing for the payment of a bounty of $5 out of the general fund in the treasury for each coyote which shall be destroyed, since the total amount which may be devoted to such purpose is not specified. Ingram v. Colgan, 106 Cal 113, 38 P 315, 39 P 437, 28 LRA 187, 46 Am St Rep 221.

Wells v. Childers, 196 Okla 339, 165 P. 2d 358. While not appearing to have been determined by the Supreme Court of Iowa, the foregoing situation and rule is controlling and the purported appropriation of this estimated reimbursement is an invalid law and inoperative. This money constituting an estimated reimbursement is not the subject of constitutional appropriation.

In view of the fact that such money is not the subject of appropriation and does not, as such, become the subject of administration by you, there appears to be no necessity of answering your several questions.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:vw

ELECTIONS: Absentee ballots -- §§ 43.7, 53.2, 53.17, 53.18, 53.19 53.20, 1962 Code. Notwithstanding fact that Saturday and Sunday immediately preceding election day are holidays, they are included in the days upon which absentee ballots may be voted.

May 22, 1964

Honorable Melvin D. Synhorst
Secretary of State
L O C A L

Dear Mr. Synhorst:

Reference is herein made to your request for an opinion as to the last day for filing absentee ballots in the primary election of June 1, 1964, in view of the fact that the preceding day, May 30, is a holiday, and the 31st day of May is Sunday. I would advise that §43.7, Code of Iowa, 1962, fixes the time of holding the primary election as the first Monday in June in each even-numbered year.

Voting by absentee ballot is permitted at such primary elections, and §53.2, Code of Iowa, 1962, provides the time to make application for such voting as follows:

> "Application for ballot. Any voter, under the circumstances specified in section 53.1, may, on any day not Sunday, election day, or a holiday and not more than twenty days prior to the date of election, make application to the county auditor, or to the city or town clerk, as the case may be, for an official ballot to be voted at such election."

An absentee ballot delivered to the voter must be delivered by the voter to the County Auditor prior to election day, or if mailed by the voter, it must reach the Auditor likewise prior to election day. Section 53.17, Code of Iowa, 1962, provides:

> "Mailing or delivering ballot. The sealed envelope containing the said ballot or ballots may be personally delivered by the voter to the auditor, deputy, or clerk at the office of said auditor or clerk, prior to election day. If not so delivered, said envelope shall be enclosed in a carrier envelope, which shall also be securely sealed, and mailed by the voter, postage paid, to reach said auditor, or clerk prior to election day."

Thus, while application for an absentee ballot can be made on any day except Sunday, election day, or a holiday, there is no such provision attached to the time within which the absentee ballot should be in the hands of the County Auditor. Since such days are not excluded from the time fixed for such delivery, §53.17, they are obviously included in the time allowed for the delivery of the ballot to the County Auditor.

Section 4.1(23), Code of Iowa, 1962, and Rule of Civil Procedure No. 366, both dealing with Sundays and holidays as they effect the computation of time, have no bearing on this problem. Neither has any provision with respect to voting. The foregoing situation has been considered in the case of Clark v. Stubbs, 131 SW 2d 663, where the Texas court of Civil Appeals stated:

> "The next group of voters challenged by appellant are Herman Young, Julia Mae Stubbs and Nolan Lathan, all of whom voted absentee votes on Sunday before the election on Tuesday. Appellant attacks these votes as being in violation of the spirit of the

> statutes which prohibit the doing of certain acts on Sunday. Art. 286, Texas Penal Code; Art. 1974, R.S. 1925. These statutes do not relate to voting, and since the election law authorizes the absentee voting for a period of from 20 to 3 days before the election, Sunday would necessarily be included where the election is held on the first Tuesday in November as required by law; and we find no statute prohibiting the voting of absentee votes on Sunday."

In view of the foregoing, the duties of the County Auditor in connection with the voting of an absentee ballot involved in the primary election of June 1, 1964, as prescribed by §§53.17, 53.18, 53.19 and 53.20, Code of Iowa, 1962, shall be performed by him on May 30th and May 31st, 1964, notwithstanding that May 30, 1964 is a holiday and May 31, 1964 is a Sunday.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:vw

COUNTY AND COUNTY OFFICERS: Tax Sale Certificate as to property of old age assistance recipient. §§ 446.18, 446.19 H.F. 110, 60th G.A., Chapt. 446. When the three elements of H.F. 110 are present on and after July 4, 1963, it is mandatory that County Treasurer issue a public bidder tax sale certificate to the County Auditor.

June 10, 1964.

Mr. Norman R. Hays, Jr.
Marion County Attorney
112½ South Second St.
Knoxville, Iowa

Dear Mr. Hays:

In your letter of April 13, 1964, you request an opinion as to whether a property that had previously been advertised for sale for two years may be offered for sale under Section 446.18 and purchased by the county even though it would fall within the class of property described in House File 110.

The question which you have submitted is in essence whether, since the enactment of House File 110, there can be an election as to proceeding under the provisions of Sections 446.18 and 446.19, or whether on and after July 4, 1963, in all cases where taxes have been suspended for four years or more upon the property of a deceased old age assistance recipient and no estate for such recipient opened within ninety days after the recipient's death, and the surviving spouse of the recipient is not occupying the property, the County Treasurer must issue a public bidders tax sale certificate to the County Auditor to the exclusion of the procedures in Sections 446.18 and 446.19.

House File 110, approved on April 22, 1963, provides:

> "AN ACT relating to old age pensioners' homes. Be It Enacted by the General Assembly of the State of Iowa:
> "Section 1. Chapter four hundred forty-six (446), Code 1962, is hereby amended by adding thereto the following new section:
> 'In cases where taxes have been suspended four years or more upon the property of

> a deceased old age assistance recipient and no estate was opened within ninety (90) days after the death of the recipient and the surviving spouse of the recipient is not occupying the property, the county treasurer shall issue a public bidder tax sale certificate to the county auditor.'"

Section 446.18 of the Code of Iowa, 1962, provides:

> "'Scavenger sale' - notice. Each treasurer shall, on the day of the regular tax sale each year or any adjournment thereof, offer and sell at public sale, to the highest bidder, all real estate which remains liable to sale for delinquent taxes, and shall have previously been advertised and offered for two years or more and remained unsold for want of bidders, general notice of such sale being given at the same time and in the same manner as that given of the regular sale."

and Section 446.19 of the Code of Iowa, 1962 provides in part as follows:

> "When property is offered at a tax sale under the provisions of section 446.18, and no bid is received, or if the bid received is less than the total amount of the delinquent general taxes, interest, penalties and costs, the county in which said real estate is located, through its board of supervisors, shall bid for the said real estate a sum equal to the total amount of all delinquent general taxes, interest, penalties and costs charged against said real estate."

The Supreme Court of Iowa in the case of DINGMAN vs. CITY OF COUNCIL BLUFFS, 249 Ia. 112, said:

> "If the language given its plain and rational meaning is precise and free from ambiguity, no

> more is necessary than to apply to the words used their natural and ordinary sense in connection with the subject considered."

It is our considered opinion that the language in House File 110 is free from ambiguity so that on and after July 4, 1963, in all cases involving the three elements specified in House File 110, namely, (1) where taxes have been suspended for four years or more upon the property of a deceased old age assistance recipient; (2) no estate for such recipient opened within ninety days after recipient's death; (3) the surviving spouse of the recipient is not occupying the property, it is mandatory that the county treasurer issue a public bidder tax sale certificate to the county auditor and that the procedures of Sections 446.18 and 446.19 are not available to the county in such cases.

Very truly yours,

Bruce M. Snell, Jr.
Assistant Attorney General

BMS/JTH/sp

COUNTIES AND COUNTY OFFICERS: Bonds, allocation of interest -- §453.7, 1962 Code. Interest or earnings on fund created by direct vote of people must be credited to fund to retire indebtedness.

July 20, 1964

Mr. Robert S. Bruner
Carroll County Attorney
126 East Fifth Street
Carroll, Iowa

Dear Bob:

Reference is herein made to yours of the 2nd inst., in which you submitted the following:

> "The voters of Carroll County have recently approved the issuance of $750,000.00 in bonds for the construction of a new court house. The bonds have been issued and sold and the proceeds have been invested in short term government securities pending their disbursement at various stages of the construction.
>
> "The opinion of your office is requested as to whether the interest earned by these bond proceeds may be used for additional building purposes or whether it must be allocated to and used in the fund for the retirement of the bonds."

In answer thereto, I would advise that the foregoing interest shall be used to pay the interest and principal of the bonds created by the vote of the people. Section 453.7(2) so provides.

Referring to the interest or earnings on investments and time deposits, it is said:

> " . . . Such interest or earnings on any fund created by direct vote of the people

shall be credited to the fund to retire any such indebtedness after which the fund itself shall be credited."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:vw

STATE OFFICERS AND DEPARTMENTS: Articles and supplies -- §19.25, 1962 Code. The obligation of the Executive Council to furnish articles and supplies to the several offices and departments as required by §19.25, Code of 1962, is limited to such articles and supplies as are used and usable in the normal conduct of such offices and departments.

August 14, 1964

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

Dear Mr. Wellman:

This will acknowledge receipt of yours of the 11th inst., in which you submitted the following:

> "The Executive Council, has on numerous occasions in the past, approved purchases of items of protective clothing for use by department personnel in the pursuance of their jobs. Specifically, I refer to the purchase of protective safety glasses for the Department of Labor personnel, protective coveralls for Laboratory personnel and overshoes for Inspectors employed by the Department of Agriculture.
>
> "In the Executive Council meeting of this date, there was a Purchase Order presented by the Division of Animal Industry, covering the purchase of twenty-seven (27) pairs of one-piece coveralls.
>
> "The question now in their minds is in regard to the State's responsibility of furnishing this type of protective covering. Is the State obligated to supply, at State expense, items such as have been described?"

In reply thereto, I call your attention to §19.25, Code of Iowa, 1962, which provides as follows:

> "Officers entitled to supplies. The council shall, unless otherwise provided, furnish the following officers and departments with all articles and supplies required for the public use and necessary to enable them to perform the duties imposed upon them by law: . . ."

Articles and supplies in the context of the foregoing statute is difficult of specific definition. However, there is implication of their meaning in that the obligation of the Council as set forth in that section is to furnish the articles and supplies to 37 agencies and departments of the state government and to such other officers and departments as may be entitled thereto by other provisions of law.

That the several officers and departments named as entitled to such articles and supplies justifies the plain implication that such articles and supplies are such as are used and usable by such officers and departments in the normal conduct of these offices and departments. This view is fortified by an opinion of this department appearing in the Report for 1936 at page 220, where the character of the articles and supplies is designated by the following:

> "Section 302 of the 1931 Code of Iowa provides in part as follows:
>
> "'The council shall, unless otherwise provided, furnish the following officers and departments with all articles and supplies required for the public use and necessary to enable them to perform the duties imposed upon them by law: ... "
>
> "At a recent conference with the head of the administrative department of the Conservation Commission, we are advised that it is the thought of the commission that furniture, fixtures, office equipment, rent and necessary supplies should be furnished by the Executive Council and also telephone service, but the expressed thought was that the commission would pay long distance calls out of its own funds.

> "In accordance with the two sections of the Iowa State Conservation Commission law quoted above, it is the opinion of this department that said commission is entitled, by the express intent of the Legislature, to receive those things enumerated."

Further legislative support for this view of the statute, Section 19.25, is found in the amendment enacted by the 60th General Assembly, Chapter 67, Section 2, providing as follows:

> "Amend section nineteen point twenty-eight (19.28), Code 1962, by adding at the end thereof the following:
>
> "'1. At the end of each month commencing with July, 1965, the council shall render a statement to each official, board, department, commission or agency of the state for the actual cost of such supplies drawn during such month. Such expense shall be paid by the official, board, department, commission or agency in the same manner as other expenses are paid from their appropriation.
>
> "'2. Each official, board, department, commission or agency of the state shall file as part of its budget its estimate of expenditures for such articles and supplies commencing for the biennium beginning July 1, 1965, and each ensuing biennium.'"

thus plainly implying that the articles and supplies in normal use and requirement are such as may be budgeted. Such statutory situation would evidence the plain intent that articles and supplies named by §19.25 are those in normal use in serving the public and necessary to the performance of duty imposed

upon them by law. This duty on the Council would not, therefore, include the supplying of such special articles and supplies as are named in your letter.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:vw

ELECTIONS: Assessors' employees as political candidates -- §§441.53, 441.54, 441.55, 740.16, 740.17, 1962 Code. Employees of city or county assessors may not conduct any campaign, including their own, for elective office.

October 22, 1964

Mr. Frank M. Krohn
Jasper County Attorney
Newton, Iowa

Dear Mr. Krohn:

This is in reply to your recent request for an opinion, in which you state:

> "This is to request an interpretation of two sections of the Code of Iowa that may be in conflict.
>
> "Section 740.17 of the Code permits an officer or employee to campaign at any time or at any place for himself.
>
> "Section 441.53 of the Code prohibits an assessor or employee of the assessor to take an active part in any political campaign, except to cast his vote or to express his personal opinion.
>
> "Question 1. Is an employee (clerk) in the office of the County Assessor or the City Assessor prohibited from conducting his campaign for a county office?
>
> "Question 2. Does the Iowa law prohibit an employee of the assessor from campaigning -- even during his off-duty hours?"

Section 740.16 provides:

> "State employees not to participate. It shall be unlawful for any state officer, any state appointive officer, or state employee to leave the place of his or her employment or the duties of his or her office for the purpose of soliciting votes or engaging in campaign work during the hours of employment of any such officer or employee."

Section 740.17 provides:

> "Exception. The provisions of sections 740.12 to 740.16, inclusive, shall not be construed as prohibiting any such officer or employee who is a candidate for political office to engage in campaign at any time or at any place for himself."

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Section 740.16, and therefore the exception of §740.17, is applicable only to state officers or employees. The county or city assessors and their employees do not fall within that classification.

However, Section 441.53 provides:

> "Political activity prohibited. Neither the assessor nor any employee of the assessor's office shall directly or indirectly contribute any money or anything of value to any candidate, his agent or personal representative, for nomination or election to any office, or to any campaign or political committee, or to take an active part in any political campaign, except to cast his vote, or to express his personal opinion, nor shall any such candidate, person, representative, agent, or committee, solicit such contribution or active political support from any such officer or employee. Any person convicted of violating any provision of this chapter shall immediately be dismissed from office or may be punished as for an indictable misdemeanor."

In addition, §441.55 provides:

> "Conflicting laws. If any of the provisions of this chapter shall be in conflict with any of the laws of this state, then the provisions of this chapter shall prevail."

Since, under §441.54, the term "assessor" as used in §441.53 refers to city and county assessors, any interpretation of §441.53 must apply equally to both.

It is clear that §441.53 is a special statute, which must be jealously guarded. There is no exception to §441.53, as is provided in §740.17.

It is therefore our opinion that an employee in the office of county assessor, or the city assessor, is prohibited from conducting any campaign, including his own, for any elective political office; and that this prohibition applies even though he were to campaign only during his off-duty hours.

Yours very truly,

GEORGE J. KNOKE
Assistant Attorney General

GJK:mch

STATE OFFICERS AND DEPARTMENTS: Veterinary Inspectors -- §§163.3, 211.3, 1962 Code. Veterinary inspectors as provided by §211.3 are not state officers or employees, nor veterinary assistants under §163.3.

October 28, 1964

Mr. L. B. Liddy
Secretary of Agriculture
L O C A L

Dear Mr. Liddy:

This will acknowledge receipt of your request for an opinion in which you state:

> "Section 163.3 states: 'The Department may appoint one or more licensed veterinarians in each county as assistant veterinarians. It may also appoint such special assistants as may be necessary in cases of emergency.' Section 211.13 of the 1962 Code of Iowa states: 'The State Department of Agriculture shall collect a veterinary inspection fee agreed upon by the marketing unit operator and a qualified veterinary inspector, recommended by the marketing unit operator and approved by the Secretary of Agriculture, plus a cost of administration not to exceed two dollars per month per marketing unit, on all animals marketed through sale yards, sale barns, auction markets or other marketing agencies required to hold permits issued by the Department. Such fees, when collected, shall be placed by the secretary in an "Inspection fee revolving fund" under his jurisdiction. The Department shall pay fees to each such approved veterinary inspector for inspection services in accordance with agreements between such veterinarians and the marketing units where inspectors are accomplished, reduced by the allowable amounts for administration. Such fees shall be adjusted from time to time so that the amount collected will not exceed the costs of said veterinary inspections and the administration thereof.
>
> "The provisions of this section shall also apply to all sale yards, sale barns, and marketing agencies receiving livestock moved into the state of Iowa for sale through said sale yards, sale barns, and marketing agencies, except meat processing establishments or terminal markets where full time federal inspections are required and such requirement is complied with. Sale yards, sale barns and marketing agencies not handling livestock shipped into the state of Iowa for resale shall be exempt from the provisions of this section as well as livestock

meeting federal and state requirements for interstate shipment as to health at the time of entry into Iowa.

"Recently question has arisen by owners, operators and managers of auction markets as to whether or not a veterinarian approved under section 211.3 would be construed as being a state employee. We are enclosing a copy of an opinion written by Ed Jones of the firm Gibson, Stewart and Garrett governing this subject which we feel might be of interest to you.

"Our specific question is, are the veterinarians described in Section 211.3 of the 1962 Code of Iowa state employees? Also, we would like to know if they could be classified as assistant veterinarians under Section 163.3."

Your opinion request concerns the meaning of Sections 163.3 and 211.3, Code of Iowa, 1962, which provide:

"163.3. Veterinary assistants. The department may appoint one or more licensed veterinarians in each county as assistant veterinarians. It may also appoint such special assistants as may be necessary in cases of emergency."

"211.3. Veterinary inspection fee. The state department of agriculture shall collect a veterinary inspection fee agreed upon by the marketing unit operator and a qualified veterinary inspector, recommended by the marketing unit operator and approved by the secretary of agriculture, plus a cost of administration not to exceed two dollars per month per marketing unit, on all animals marketed through sale yards, sale barns, auction markets, or other marketing agencies required to hold permits issued by the department. Such fees, when collected, shall be placed by the secretary in an 'inspection fee revolving fund' under his jurisdiction. The department shall pay fees to each such approved veterinary inspector for inspection services in accordance with agreements between such veterinarians and the marketing units where inspections are accomplished, reduced by the allowable amounts for administration. Such fees shall be adjusted from time to time so that the amount collected will not exceed the costs of said veterinary inspections and the administration thereof. The provisions of this Act shall also apply to all sale yards,

> sale barns, and marketing agencies, except meat processing establishments or terminal markets where full time federal inspections are required and such requirement is complied with. Sale yards, sale barns and marketing agencies not handling livestock shipped into the state of Iowa for resale shall be exempt from the provisions of this Act, as well as livestock meeting federal and state requirements for interstate shipment as to health at the time of entry into Iowa."

(1) A veterinary inspector is not a state employee. Section 211.3 provides for an inspection fee revolving fund out of which the inspectors are paid. The fee is set by agreement between the marketing unit operator and the veterinary inspector. The State of Iowa is not a party to the agreement between the marketing unit operator and veterinary inspector. The state's only concern in this area is to "approve" the veterinary inspector and to see that the fees charged by agreement do not exceed the costs of the required inspections plus administration. In addition, the Department of Agriculture acts as the custodian of the fees until they are returned to the inspector.

As a general rule, a person must be paid by the state in order to be a state employee. In 61 C.J.S. 973, the rule is stated:

> "State Employees. A state employee is one engaged in a merely transient or incidental employment, and is not a state officer. A state employee is one engaged in a merely transient or incidental employment, is not a state officer, and has been distinguished from a state officer. Payment of particular persons by the state is a very strong circumstance showing that they are state employees, and it has been held that one becomes a civil servant or employee only when he furnishes his services or labor for compensation directly paid to him by the state."

The nature of the agreement between the marketing unit operator and veterinary inspector is not one of employer-employee. Rather, the veterinary inspector is an independent contractor. Veterinarians are generally held to be independent contractors and not employees by nature of their "professional" status. Such is the rule under the Federal Social Security System, 20 Code of Federal Regulations, §403.804(c):

> §403.804. Who are employees. (a) Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.
>
> "(c) Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees."

This rule is not altered by the fact the state is custodian of certain fees, collected in the veterinary inspector's behalf and the "approval" which the Department of Agriculture must give qualified veterinary inspectors.

(2) Pursuant to a further clarification of your request, it follows that a veterinary inspector is not a state officer.

Veterinary inspectors do not have the fixed tenure, independence and sovereign power and are not required to take an oath and file bond -- the elements that distinguish a state officer.

In holding that a member of the General Assembly was not disqualified from being a food inspector under §21, Article III of

the Iowa Constitution, which prohibits members of the legislature from holding other civil offices for profit, 1919-1920, O.A.G. stated:

> "A civil office is the grant and possession of the sovereign power and contemplates the exercise of sovereign acts. It also contemplates a fixed tenure, definite duties, the taking of an oath and the filing of a bond. Such was the holding in the case of State v. Spaulding, 102 Iowa 639.
>
> "In 2 Words and Phrases, page 1199, it is said:
>
> > "An 'officer' is distinguished from an 'employe' by the greater importance, dignity and independence of his position, in being required to take an official oath, and perhaps to give an official bond, in the liability of misfeasance in office, and usually, though not necessarily, in the tenure of his office. City of Baltimore v. Lyman, 48 Atl. 145, 146; 92 Md. 591."
>
> "Now, section 4999-a31b, supplement to the code, 1913, provides, among other things, that the dairy and food commissioner may, with the consent of the executive council, appoint such assistants as he may deem necessary,
>
> > 'and they shall perform such duties as may be assigned to them by the state food and dairy commissioner.'
>
> "There is nothing in that employment that even savors of a civil office, for assistants are not appointed for any definite term, nor do they exercise any sovereign powers, but on the contrary, they are required to perform such duties as are assigned to them by the state dairy and food commissioner."

Requirements for a public officer were stated in Francis v. Iowa Employment Security Commission, (1959) 250 Iowa 1300, 1303, 98 N.W. 2d 733:

> "I. The general rule is that there is a clear distinction between a 'public officer' and an 'employee.' In McKinley v. Clarke County, 228 Iowa 1185, 1189, 1190, 293 N.W. 449, 451, we held that a county engineer is a public officer rather than an employee, citing and discussing the principles laid down in State v. Spaulding,

> 102 Iowa 639, 72 N.W. 288. We said: ' * * * a position created by direct act of the legislature, or by a board of commissions duly authorized so to do, in a proper case, by the legislature, is a public office; that to constitute one a public officer his duties must either be prescribed by the Constitution or the statutes, or necessarily inhere in and pertain to the administration of the office itself; that the duties of the position must embrace the exercise of public powers or trusts; that is there must be a delegation to the individual of some of the sovereign functions of Government, to be exercised by him for the benefit of the public; and that among other requirements the following are usually, though not necessarily, attached to a public office: a. an oath of office; b. salary or fees; c. a fixed term of duration or continuance."

Also applicable is Hulton v. State (1944) 235 Iowa 52, 16 N.W. 2d 25, where it was said:

> "It has been said that it is difficult to define with accuracy the term 'public officer' as distinguished from 'employee'. One definition approved by various courts is that to make a public employment a public office five elements are indispensable:
>
> (1) It must be created by the constitution or legislature or through authority conferred by the legislature. (2) It must possess a delegation of a portion of the sovereign power of government. (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, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body. (5) The office must have some permanency and continuity, and not be only temporary and occasional. State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411, 53 A.L.R. 583. See, also, annotations 53 A.L.R. 595, 93 A.L.R. 333, and 140 A.L.R. 1076.

(3) A veterinary inspector as defined by §211.3 is not a veterinary assistant as defined by §163.3.

An entirely different procedure is set out in the Code for these two separate groups of personnel. The Department of Agriculture "approves" inspectors under §211.3; it "appoints" assistants under §163.3.

Also, the inspector under §211.3 receives his fees from the "inspection fee revolving fund". An assistant veterinarian under §163.3 "shall be paid out of the appropriation for the eradication of infectious disease among animals."

An inspector under §211.3 is not paid by virtue of an appropriation, but by contract with a private marketing unit operator. The assistant's pay is provided for by funds appropriated by the General Assembly by Chapter 1, Acts of the 60th General Assembly.

This separation of monies clearly illustrates the difference in purpose, status, and duties of such personnel. It represents the legislative intent.

In summary, it is my opinion that a veterinary inspector as provided for in §211.3 is not an assistant veterinarian as defined by §163.3, nor a state officer or employee.

Very truly yours,

OS:vw

OSCAR STRAUSS
First Assistant Attorney General

SCHOOLS: School bus garages, construction -- §§278.1, 285.10, 285.11, 291.13, 297.5, 1962 Code. Ch. 178, Acts 60th G.A. Only method for financing purchase of site and building for school bus garage is general obligation bond; cannot be done by use of tax money.

Mr. Jack W. Frye
Floyd County Attorney
Charles City, Iowa

Dear Jack:

Reference is herein made to yours of the 17th inst., in which you state:

> "A Community School District has an opportunity to purchase a building and appurtenant land, the building to be used primarily for storage of school busses. The proposed cost of this real property is $25,000. The District has on hand approximately $12,500 in its schoolhouse fund obtained through proper levy under the site fund provisions of Chapter 297.5 of the Code of Iowa. The one mill maximum which may be levied under that Section yields about $30,000 per annum.
>
> "We would appreciate an opinion from your office as to the proper method of financing and purchasing this facility."

Where authorized by the electors, a school corporation may purchase a building and procure a site for a school bus garage to be paid for by the avails of a bond issue. Chapter 178, Laws of the 60th General Assembly so provides. However, no such express provision for a building and a site for a bus garage to be paid for by taxation exists. It is true by opinion of this department, authority for the purchase of a site of such garage may be

implied. See opinion of this department appearing in the Report for 1962 at page 341. On the other hand, such opinion holds that the district is without authority to expend funds arising from the levy of tax provided by Section 278.1(7) for building a bus garage.

Specific sections of the Code provide for tax money and authority to use such money for sites and buildings. Section 297.5 (being of limited application) and Section 291.13 both relate to the use of tax money for the purchase of sites, but do not expressly provide for the purchase of the site or for a storage building for school busses, nor do they provide for its use for that purpose.

Such language is not present in Section 275.32, Code of 1962. Authority is conferred upon the board of school corporations to secure sites and purchase school buildings. Section 285.10 and Section 285.11, Code of 1962, authorize the local school board "to purchase or lease busses and other transportation facilities, and maintain same, and to enter into contracts for transportation subject to any provisions of law affecting same". These sections do not expressly provide for the building or purchase of a bus garage, and, at most, may be the subject of such an implication.

In view of the foregoing, I am of the opinion the only method of financing the purchase of a site and a building

for use as a bus garage is by use of money derived from a general obligation bond. Legislation to finance the purchase of such site and building by the use of tax money is required.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:vw

COUNTIES AND COUNTY OFFICERS: Board of Supervisors, Composition --§39.14
~~52~~ Code. Discussion of residence of board members in separate townships.
1962

December 18, 1964

Mr. James D. Jenkins
Monroe County Attorney
Albia, Iowa

Dear Mr. Jenkins:

Reference is herein made to yours of the 11th in which you submitted the following:

> "I have been asked to seek an opinion of your office, with respect to the following situation.
>
> "On the 9th day of November, 1964, a member of the Board of Supervisors took office. He was a resident of Wayne Township, at the time of his election, and took over for a resident of Monroe Township, who was fulfilling an unexpired term. On the 5th day of December, 1964, the incumbent officer moved to the City of Albia, located in Troy Township. Another member of the Board of Supervisors was elected from Troy Township and will take office on the 2nd day of January, 1964. He will replace a member who was and is a resident of Guildord Township. Our third member of the Board of Supervisors will take office on the 2nd day of January, 1966. He ran as a resident of Troy Township and will succeed a resident of Pleasant Township. Therefore, on the 2nd day of January, 1965, we will have two members of the three-member Board of Supervisors serving, who reside in Troy Township, and on the 2nd day of January, 1966, all three members of the Board of Supervisors will be from Troy Township.
>
> "My question, therefore, is as follows: Can three supervisors legally serve as members of the board, when they are all living in one township at the same time?"

In reply thereto, I would advise you:

1. That the member of the board elected from Wayne Township remained a resident of Wayne Township for Board of Supervisors purposes throughout the term of his service, notwithstanding the fact that he has moved his residence to Troy Township on the 5th day of December, 1964, and, therefore, on January 2, 1965, the Board will have only one member from Troy Township, one from Wayne Township, and one from Pleasant Township.

2. Insofar as your second situation is concerned, I am of the opinion that on January 2, 1966:

(a) the candidate resident of Wayne Township will still be a member as a Wayne Township resident;

(b) another member elected in 1964 from Troy Township will likewise remain a member of the Board from Troy Township, and there will be a hold-over member of the Board;

(c) the third member of the Board who was elected in the 1964 election as a resident of Troy Township to take office in January, 1966, will not be able to qualify for that office because at the time of such qualification there will already be a member of the Board from Troy Township. The bar of the statute is applicable to this situation.

These conclusions are based upon §39.19, Code of 1962, providing as follows:

> "No person shall be elected a member of the board of supervisors who is a resident of the same township with any of the members holding over, except that:
>
> "1. A member-elect may be a resident of the same township as a member he is elected to succeed.
>
> "2. In counties having five or seven supervisors two members may be residents of a township which embraces a city of thirty-five thousand population."

and the cases of Arp v. Lage, 236 Iowa 775, 20 N.W. 2d 12, State ex rel. Stewart v. Boyles, 199 Iowa 398, 202 N.W. 92, Opinion of the Attorney General, 1940, page 599.

Yours very truly,

OSCAR STRAUSS
Assistant Attorney General

OS:vw

COUNTIES AND COUNTY OFFICERS: Sheriff's mileage -- §§127.19, 337.11(10), 1962 Code. Mileage accumulated by the Sheriff is allowed under §337.11(10), regardless of the ownership of the automobile used in such accumulation. He cannot accumulate mileage in the use of a publicly owned conveyance.

December 2, 1964

Mr. Wm. Stuart Charlton
Delaware County Attorney
Manchester, Iowa

Dear Mr. Charlton:

Reference is herein made to yours of the 17th inst., in which you submitted the following:

> "Enclosed find copy of claim filed by former Sheriff of Delaware County, Iowa, which upon presentment to the Board of Supervisors has been questioned on the grounds of the allowability of same because at least a portion of the mileage claimed for was performed in an auto, upon which there were dealer plates, the agency furnishing the auto being at least partially owned at the time by the then Sheriff.
>
> "Request is hereby made for an opinion, formal or informal, as to the allowability of a claim by a peace officer for mileage performed by him in his official capacity, regardless of the ownership of the vehicle."

In reply thereto, I would advise the following:

1. For the use of a publicly owned car, the Sheriff is entitled to no mileage. Section 127.19, Code of 1962, so provides:

> "No officer of any county or city shall be allowed mileage for the performance of any official duty wherein he uses a publicly owned car."

2. The statutory authority for charging mileage by the Sheriff is Section 337.11(10), providing as follows:

> "Mileage in all cases required by law, going and returning, nine cents per mile, provided that this subsection shall not apply where provision is made for expenses, and in no case shall the law be construed to allow both mileage and expenses for the same services and for the same trip. In case the sheriff transports by auto, one or more persons to any state institution or any other destination required by law, or in case one or more legal papers are served on the same trip, he shall be entitled to but one mileage at the rate prescribed herein, the mileage cost thereof to be prorated to the respective persons transported and also in the case of separate papers served. Provided, however, that in the serving of original notices in civil cases the sheriff shall be allowed mileage at the rate of nine cents per mile in each action wherein such original notices are served, and, he may refuse to serve original notices in civil cases until the statutory fees and mileage for service have been paid."

Mileage accumulated by the Sheriff is allowed under the above quoted section to him, regardless of the ownership of the automobile used in such accumulation.

Very truly yours,

OS:vw

OSCAR STRAUSS
First Assistant Attorney General