COUNTIES AND COUNTY OFFICERS - DOMESTIC ANIMAL FUND: Section 352.1, of the 1962 Code of Iowa. Only damages caused by wolves, or by dogs not owned by the owner of the damaged property, give rise to a claim under Code Section 352.1.

January 21, 1965

The Honorable John Holmes
Jones County Representative
LOCAL

Dear Sir:

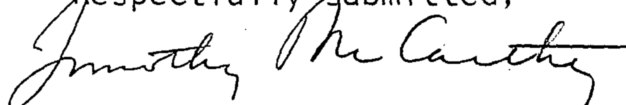
You have made an oral request for an opinion in regard to whether a County Board of Supervisors may pay a farmer's claim under the Domestic Animal Fund chapter of the 1962 Code of Iowa, in a situation where a rabid skunk bit a cow which caused the cow to die. Apparently, there is getting to be a statewide problem in this particular area.

Section 352.1 applies and reads as follows:

> Any person damaged by the killing or injury of any domestic animal or fowl by wolves, or by dogs not owned by said person, may, within ten days from the time he or his agent has knowledge of such killing or injury, file with the county auditor of the county in which such killing or injury occurred a claim for such damage.

The statute provides that to present a claim, the domestic animal must be killed or injured by either wolves, or dogs not owned by the party making the claim. The Domestic Animal Fund is a purely statutory fund and the only rights obtained are through the statutes. Inasmuch as claims only arise when injury is caused by wolves or unowned dogs, it is my opinion that only injury or death caused by these animals would give rise to a claim under Section 352.1. Extension of the statute by legislation is the only way this type of claim can be honored by a county Board of Supervisors.

Respectfully submitted,



TIMOTHY McCARTHY
Solicitor General

TMcC/cm

65-1-1

POLITICAL PARTY: Sections 43.1, 43.2, 43.4, 43.5, 43.26, 43.112, 43.114, 363.11, 1962 Code of Iowa. What is a political party; political party has right to exist in a charter city as well as in a county. Each organization is independent of the other.

January 29, 1965

Mr. James D. Resnick
Scott County Representative
House of Representatives
State House
L O C A L

Dear Mr. Resnick:

This is in reply to your letter of January 22, 1965 wherein you request an opinion in regard to the following:

> 1. Would you please define political party? Does a charter city in Iowa have any special ruling that permits an independent political party to exist outside of this definition?
>
> 2. Can a Democratic organization in such a charter city legally exist without the express permission of the county organization?
>
> For example: A certain county with a charter city has both a county and a city organization with separate functions and different leaders being the same in name only.
>
> 3. Are both organizations legally independent?
>
> 4. Can one be dissolved merely at the discretion of one or the other?

A political party is defined in Section 43.2 to read as follows:

> The term "political party" shall mean a party which, at the last preceding general election, cast for its candidate for governor at least two percent of the total vote case at said election.

This definition is state wide. There is nothing in the statute

(Chapter 43) which prevents a charter city from having its own political city organization. As a matter of fact, Section 43.112 provides as follows:

> This chapter shall, so far as applicable, govern the nominations of candidates by political parties for all offices to be filled by a direct vote of the people in cities of the first class and cities acting under a special charter having a population of over fifteen thousand, except all such cities as adopt a plan of municipal government which specifically provides for a non-partisan primary election.

In special charter cities holding a municipal primary election, such primary is to be held in the first Monday in October. (Section 43.114) (Also see Section 363.11 as to provisions for filing nominations in cities.)

Accordingly, a political party may exist in a charter city as in any county for political purposes. The answer to the first question is that there is no ruling which forbids a political party to exist in a city and carry out a city political program.

The city within a certain county and the county may have both a city and county organization with separate functions. However, political party county committeemen can only be elected at the primary election held for that purpose in the county. (See Sections 43.4, 43.5.) The county affairs are to be administered by county committeemen elected at the county primary in the various precincts and also by delegates to the county convention who have been elected at the precinct caucuses. The county convention also has a series of duties to be performed listed under Section 43.97 (six specified duties). These duties, however, do not interfere with the organization and operation of a democratic organization within the charter city for city purposes.

My answer to the third question is that both organizations are legally independent.

In answer to your fourth question, there is no statutory authority permitting either organization to dissolve the other at the discretion of the other organization. Each organization is fully independent and may discharge its own duties and obligations, except it is well to remember that the duties of the county organization are specifically set forth in various provisions of Chapter 43, and relate to the county primarily.

Very truly yours,

/S/ JOSEPH W. ZELLER

JOSEPH W. ZELLER
Assistant Attorney General

JWZ:jtm

CITIES AND TOWNS-MUNICIPAL REVENUE: Sec. 404.10 (14), Code of Iowa 1962. Is not limited by the 3/8's mill limitation set out in Section 386A.1 of the 1962 Code of Iowa.

January 29, 1965

The Honorable James V. Gallagher
Black Hawk County Representative
L O C A L

Dear Sir:

This is to acknowledge receipt of your recent letter in which you requested an opinion on the following matter:

> "Section 386A.1 of the Iowa Code states that municipalities may vote taxes not to exceed one-eighth (1/8) mill for aid to the public transportation company operating within said municipality or district. Would the 1/8's mill limitation of 386A.1 apply to Section 404.10 (14) of the Iowa Code of 1962?"

It is my opinion that the 58th General Assembly intended to provide municipal corporations with an alternative to Section 386A.1 when they adopted subsection 14 of 404.10 in 1959.

Section 404.10 (14), which is clear on its face, provides in part:

> "Municipal corporations shall have power to annually cause to be levied . . . an annual tax not to exceed ten mills on the dollar on all taxable property within the corporate limit and allocate the proceeds thereof to be spent for the following purposes:
>
> > '(14) To operate and maintain a transit system and to create a reserve fund therefor or to contract with any privately owned and operated intercity transit system for the purpose of obtaining regularly scheduled intercity bus service for the inhabitants of the municipal corporation or the continuation or establishment of intercity routes of an urban transit system.'"

The above statute is capable of but one meaning. Under the well-defined rules of statutory construction a Code provision which is clear on its face and admits only one meaning is not subject to interpretation. Hindman v. Reaser, 246 Iowa 1375, 75 N.W. 2d 559. Michel v. State Board of Social Welfare, 245 Iowa 961, 65 N.W. 2d 89.

On May 5, 1949, a Joint Resolution of the 53rd General Assembly created the Municipal Statutes Study Committee. This six member committee was authorized by the General Assembly

> "to make a comprehensive study of the laws relating to the construction and financing of public improvements within municipalities, and other laws relating to the conduct of the business of the municipalities, and to make such recommendations as it sees fit as to the codification, simplification and modification of such laws to the end that the business of municipalities may be more expeditiously and efficiently conducted."

The Municipal Statutes Study Committee was also directed to include in its report drafts of proposed bills.

In its report to the Governor of the State of Iowa, on or about November 15, 1950, the study committee stated:

> "3. That municipal corporations should be given broad latitude in determining the amount needed to finance the several activities that fall within a function of municipal government. There is a wide difference in the local conditions in the 935 municipal corporations of Iowa. The state should not specify arbitrary limitations on tax levies for specific purposes that are so low that it is not possible for municipal officials to successfully cope with their local problems.
>
> "4. The taxpayers interests can be protected by specifying a reasonable maximum over-all limitation on total millage levies, and by retaining all existing controls in the form of public hearings at the time that budgets and levies are determined for the ensuing fiscal year."

The proposals of the Municipal Statutes Study Committee which included 404.10 subsection 1-13 were then passed by the 54th General Assembly as Chapter 159. Although, 404.10 (14) was not enacted until 1959. I believe that its passage was intended to further liberalize Iowa's laws on municipal financing in accord with the expressed recommendations of the study committee.

Section 404.10 (14) of the Iowa Code of 1962, is not in conflict with Section 386A.1 of the Iowa Code of 1962 nor is it limited to the 1/8 mill limitation of the latter section of the Code.

It is my conclusion that Section 404.10 (14) of the Iowa Code of 1962 was enacted to provide municipalities with an additional method of municipal financing to enable them to meet the conditions of today. Yarn v. City of Des Moines, 243 Iowa 291, 298. 54 N.W. 2d 439, 443.

Very truly yours,

/S/ NOLDEN GENTRY

NOLDEN GENTRY
Assistant Attorney General

NG:ms

TAXATION: Sales Tax - Sections 422.43, 422.42(10), 422.45(1), 422.42, 1962 Code; Sales and Use Tax Regulation No. 147. (1) Under Regulation 147, no sales tax need be paid by retailer - builder on materials purchased in Iowa and used by it in Minnesota construction projects. (2) Sales tax is not applicable to materials delivered by retailer to purchaser outside of Iowa for use in construction outside of Iowa. (3) Illinois may properly impose use tax on materials delivered in Illinois for use in Illinois. (4) Differential between sales at invoice price and retailer's net cost (invoice price less cash discount) is sufficient "gain" to constitute doing "business" by retailer.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

LAWRENCE F. SCALISE
ATTORNEY GENERAL

February 4, 1965

Mr. Donald E. Cunningham
Director, Sales & Use Tax Division
Iowa State Tax Commission
L O C A L

Dear Mr. Cunningham:

You have referred to us copies of a letter of inquiry submitted by Attorney Robert E. Mannheimer dated January 13, 1965, your reply dated January 19, 1965, and a subsequent letter from Mr. Mannheimer to you dated February 1, 1965. You have requested an opinion concerning the existing sales tax practices used by three (3) corporations, designated for the purpose of discussion as "A", "B" and "C".

"A" corporation is an Iowa corporation. It has a fleet of trucks and does a considerable amount of trucking, builds homes in Minnesota with materials purchased for the most part

in Iowa, and also purchases a considerable amount of additional materials which it sells to "B" corporation and to "C" corporation. "A" corporation's deliveries to "B" corporation are mostly made in the State of Iowa, but some of the deliveries to "B" corporation are made outside the State of Iowa by the use of the trucks owned by "A" corporation. "B" corporation is an Iowa corporation, and engages in the contracting and building business in the States of Iowa, Nebraska, Missouri, Wisconsin, South Dakota and North Dakota. "C" corporation is an Illinois corporation, and engages in the contracting and building business only in the State of Illinois.

"A" corporation pays no sales tax on its purchases since it views itself as a retailer and has a sales tax permit. Ninety-five per cent (95%) of the materials purchased by "A" corporation are resold at retail.

(1) Approximately five per cent (5%) of the materials purchased by "A" corporation are used by it in the building of homes in Minnesota. No sales tax is paid on these materials. Under Rule No. 147 of the Iowa State Tax Commission with reference to retail sales tax and use tax, no sales tax need be paid on these materials. We believe that this is a "loophole" in the present regulations and that imposition of sales tax is authorized by the statutes, Iowa Code, 1962, Sections 422.43

and 422.42(10). Consideration should be given to a revision of Rule 147 to cover this situation.

(2) "A" corporation charges sales tax to "B" corporation on materials purchased by "B" corporation for use on Iowa jobs, but does not charge "B" corporation sales tax on deliveries of materials outside of Iowa. This would appear to be a correct procedure in the light of Section 422.45(1), because these materials are delivered outside Iowa and in interstate commerce, and the State of Iowa is therefore prohibited from taxing them under the commerce clause of the Constitution of the United States.

(3) "A" corporation charges no sales tax to "C" corporation on the purchases of "C" corporation which are delivered by "A" corporation in Illinois, but "C" corporation does pay Illinois use tax on such purchases. This appears to be a correct procedure since the use, and thus the incidence of taxation is in Illinois.

(4) "A" corporation sells to "B" and "C" corporations at "A"'s invoice cost. However, "A" corporation does not pass on to "B" and "C" the cash discounts taken from the various firms from which "A" corporation purchases. We believe that this differential between the net cost to "A" and the selling price to "B" and "C" corporations is sufficient to constitute

"gain" for the purposes of putting "A" corporation in "business" as defined in Section 422.42(4).

Yours very truly,

Thomas W. McKay
Special Assistant Attorney General

TWM:dj

TAXATION: Homestead Tax Credit - Section 425.11, Code 1962; Chapter 18, Section 5, Acts, 60 G.A. (1) Enclosed porch attached to mobile home qualifies as "dwelling house." (2) Addition and garage appurtenant to mobile home qualifies as "dwelling house." (3) Mobile home itself does not qualify as "dwelling house."

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

LAWRENCE F. SCALISE
ATTORNEY GENERAL

February 8, 1965

Mr. Ballard Tipton
Property Tax Division
Iowa State Tax Commission
L O C A L

Dear Mr. Tipton:

This is in response to your opinion request in which you state:

> "The Property Tax Division in recent weeks has received questions from field auditors assigned to inspecting applications for Homestead Tax Credit throughout the state, and also from some of the assessors in the state, as to whether where such applicants occupy a mobile home that is located on lands or lots owned by the applicant, and which mobile home has not been converted to real estate in accordance with Section 5, Chapter 118, laws of the 60th G.A., the Homestead Tax Credit can be allowed to such applicant provided other requirements of the Homestead Tax Credit Law are complied with. Said mobile home owners are paying the required registration fee and semi-annual tax on their mobile home. It appears that such questions deserve and necessitate an official legal opinion, and it will be appreciated by the Property Tax Division if you will kindly in turn request such a legal opinion from the legal staff. Upon receipt of same, we will advise all city and county assessors and county auditors in the state of the ruling on the matter.

"Hereinafter are three (3) factual situations that recently were submitted to the Property Tax Division, which have with them the questions that have been recently propounded.

"#1. In the first case, the claimant owns a farm which includes a forty acre tract on which a mobile home is located. The mobile home is not being assessed as real estate. The claimant is paying the registration fees and semi-annual tax required under Chapter 118, Laws of the 60th G.A. to the County Treasurer. An enclosed porch has been attached to the mobile home. A sizeable patio and sidewalks have also been constructed. According to the records of the Assessor, the latter items have been assessed as real estate. The 60% value of the building and improvements is listed at $275. The 60% value of the land is listed at $2,432. The owner occupies the mobile home and the addition thereto as a home. Due to its size, the mobile home cannot be moved on the highways without special permits. Can Homestead Credit be allowed, assuming other requirements are met, on the land value and the building value exclusive of the value of the mobile home?

"#2. In the second case, the claimant owns a tract in an Auditor's Subdivision in a rural area. A mobile home occupied by the claimant as a home and an addition thereto are located on the tract. The mobile home is not being assessed as real estate. A one-car garage is also located on the tract. According to the records of the Assessor, the addition and the garage have been assessed at $400; the land at $25 (60% figures). Registration fees and semi-annual tax required under Chapter 118, Laws of the 60th G.A., are being paid to the County Treasurer. Assuming that other requirements are complied with, can Homestead Credit be allowed on the land value plus the value of the addition and garage?

"#3. In the third case, the claimant owns a tract in an Auditor's Subdivision in a rural area. A mobile home occupied by the claimant as a home is located on the tract. It is not being assessed as real estate. There are no other buildings on the tract. The land value, according to the records, is $20 (60% figure).

Registration fees and semi-annual tax required under Chapter 118, Laws of the 60th G.A. are being paid by the owner to the County Treasurer. Assuming that other requirements are met, can Homestead Credit be allowed on the land value?"

The availability of the homestead tax credit is governed by Section 425.11, Iowa Code, 1962, which provides in pertinent part:

"For the purpose of this chapter and wherever used in this chapter:

'1. The word, "homestead", shall have the following meaning:

'a. The homestead must embrace the dwelling house in which the owner is living at the time of filing the application and said application must contain an affidavit of his intention to occupy said dwelling house, in good faith, as a home for six months or more in the year for which the credit is claimed.....

* * * *

'd. If outside a city or town, it must not contain more than forty acres:

'e. It must not embrace more than one dwelling house, but where a homestead outside of a city or town has more than one dwelling house situated thereon, the millage credit provided for in this chapter shall apply to forty acres, the home and buildings used by the owner, but shall not apply to any other dwelling house and building appurtenant thereto situated upon said forty acres.

'f. The words "dwelling house" shall embrace any building occupied wholly or in part by the claimant as a home."

Regarding the availability of the homestead tax credit on mobile homes. Section 5 of Chapter 118, Acts, 60th G.A. provides:

> "No mobile home shall be assessed for property tax nor be eligible for homestead tax credit or military service tax credit unless:
>
> 1. The mobile home owner intends to convert his mobile home to real estate and does so by:
>
> a. Attaching his unencumbered mobile home to a permanent foundation on real estate owned by him. Encumbered mobile homes shall not be converted to real property.
>
> b. Destruction or modification of the vehicular frame rendering it impossible to reconvert the real property thus created to a mobile home.
>
> 2. After converting a mobile home to real estate, the owner shall notify the assessor who shall inspect the new premises for compliance with the provisions of this section and if the mobile home is properly converted, the assessor shall then collect the mobile home vehicle title, registration, and license plates from the owner and enter the property upon the tax rolls."

In answer to questions 1 and 2, it should be noted that the definition of "dwelling house" in Section 425.11 indicates the inclusion of any building which is occupied <u>wholly or in part</u> by the claimant as a home. The enclosed porch, or addition, attached to the mobile home would qualify as a building used in

part by the claimant as a home and, therefore, be classified as a "dwelling house" as that term is used in Section 425.11. Thus, since a "dwelling house" exists and the amount of land involved is in an amount authorized by Section 425.11 (d), it would appear that a homestead tax credit can properly be allowed on the land value and the building value exclusive of the value of the mobile home. The value of the garage in the second question would also be included as being an appurtenant building located on the same tract and used by the owner. These conclusions assume, of course, that the other requirements for establishing a homestead tax credit have been complied with.

In regard to your third question, it is the opinion of this office that a mobile home in and of itself does not qualify as a "dwelling house" as that term is defined in 425.11. The legislative intent as manifested in Section 5, Acts, 60th G.A. clearly indicates that a mobile home should not be taxed as real estate or be eligible for the homestead tax credit or qualify property upon which it is located for the homestead tax credit unless the mobile home has met the requirements of said section.

This being the case, the answer to question three is in the negative.

Yours very truly,

Thomas W. McKay
Special Assistant Attorney General

TWM:dj

DEPUTY-SHERIFF COUNTY MUNICIPAL CIVIL DEFENSE DIRECTOR. The duties of a duly acting and qualified Deputy Sheriff and part time salaried County-Municipal Civil Defense Director appointed pursuant to Code Section 28A.7 as amended are incompatible. §341.1 1962 Code of Iowa, 28A.7 60th G.A., 4.1 (19).

February 8, 1965

Mr. Phil Gross
Bremer County Attorney
Bremer County Court House
Waverly, Iowa

Dear Mr. Gross:

I have your letter under date of January 13, 1965, in which you inquire:

> "1. Is a joint County-Municipal Civil Defense Administration created pursuant to Code Section 28A, as amended, authorized and empowered to appoint a duly acting and qualified Deputy Sheriff as part time salaried County-Municipal Civil Defense Director?
>
> "2. Are the duties of a duly acting and qualified Deputy Sheriff and part time salaried County-Municipal Civil Defense Director appointed pursuant to Code Section 28A, as amended, compatible?"

Chapter 72, Acts Regular Session 60th G.A. amending Chapter 28A, specifically 28A.7, relates to the establishment of joint County-Municipal Civil Defense Administrations. The Act provides:

> "Such joint administration shall be composed of a member of the county board of supervisors and the mayor or his representative of the city or town governments within the county. One member of the joint administration shall be designated as chairman and one as vice-chairman. The joint administration shall appoint a director who shall be responsible to the joint administration for the administration and coordination of all civil defense matters throughout the county, subject to the direction and control of the joint administration."

This act gives no prohibition as to who the Administration can appoint, nor does it set out the qualifications of the Director. It does state, however, that the Director shall be "subject to the direction and control of the joint administration."

Chapter 341 of the 1962 Code of Iowa as amended, specifically, Section 341.1, permits County Officers to appoint deputies or assistants subject to the approval of the Board of Supervisors. Such County Officers, however, are prohibited from appointing a deputy who is "holding a county office." A Deputy Sheriff has been defined as a public officer not an employee.

> "That one is called a 'deputy' carries with it the fact that he is an alter ego for his superior charged with all the duties as well as the responsibilities of his superior and empowered to perform the acts and discharge the duties of the superior himself in the superior's absence, and if the superior is denominated an 'officer' then the deputy is also an 'officer.' Bigham v. State, 148 S.W.2d 835, 839, 840, 141 Tex.Cr.R. 332.

The term Sheriff may be extended to a Deputy Sheriff. Section 4.1 (19) 1962 Code of Iowa as amended.

A Civil Defense Director of the joint Municipal-County Administration holds a "county office."

> "The word 'officer' when used in sense of one who holds 'office' which entitles him to salary for entire term, carries with it the idea of tenure for definite duration, definite emoluments and definite duties which are fixed by Statute. Wise v. City of Knoxville, 250 S.W.2d 29, 31, 194 Tenn. 90."

It is my opinion that the wording "not holding a county office" not only prohibits the Sheriff from appointing a deputy presently "holding a county office," is equally contemplative of a situation where a duly qualified and acting deputy sheriff might hold a county office in the future. Under common law theory of dual incompatible offices, upon assuming the second office he would lose all rights to the first office.

"By the common law a person occupying one office, who accepts another uncompatible with it, ipso facto vacates the first office, and hence the vacancy so existing is not confined to statutory causes. State v. Anderson, 1912, 155 Iowa 271, 136 N.W. 128, Ann. Cas. 1915A, 523."

You also inquired as to whether the office of deputy sheriff and director of a joint Municipal-County Civil Defense Administration would be compatible.

"Under common-law doctrine prohibiting dual holding of incompatible offices, phrase 'incompatibility' is usually understood to mean a conflict or inconsistency in functions of an office and is to be found when, in established governmental scheme, one office is subordinate to another or subject to its supervision or control, or when the duties clash. Reilly v. Ozzard, 166 A.2d 360, 367, 33 N.J. 529.

Additionally it has been stated in Iowa:

"Incompatibility between offices depends upon whether one is subordinate to the other, and whether the duties of the two are inherently inconsistent, with regard to the public interest. State v. Anderson, 1912, 155 Iowa 271, 136 N.W. 128, Ann. Cas. 1915A, 523."

The office of mayor and deputy sheriff are incompatible and the acceptance of the second office has the effect of creating a vacancy in the first. OP. Atty. Gen. 1911-1912, p. 276.

Because the Director is charged with carrying out the duties of Civil Defense in his county, "subject to the direction and control of the joint administration" and a deputy sheriff is charged with duties subject to direction and control by the sheriff, it would seem readily apparent then, that many situations would arise where the two offices would be conflicting or incompatible.

It would also be my opinion that the office of deputy sheriff and director of joint Municipal-County Defense Administration are inconsistent and thus incompatible.

Respectfully submitted,

/S/ Michael S. McCauley

MICHAEL S. McCAULEY
Assistant Attorney General

MSMcC:ms

LEGAL SETTLEMENT OF MINOR: A minor, adjudicated to be dependent and neglected under Chp. 232 and ordered to an institution under 232.21 (3) in different county than that of committing court, assumes the legal settlement of the committing court inasmuch as this court retains final jurisdiction over the minor whose derivative settlement of the parents is terminated by the court's action under Chap. 232. 232.21 (3), 232.21 (5), 232.23, 1962 Code of Iowa.

February 12, 1965

Mr. Lawrence B. Gilchrist
Franklin County Attorney
Hampton State Bank Building
Hampton, Iowa

Dear Mr. Gilchrist:

You have requested an opinion as to what county would be responsible for the care of one Alice Masiker at the institutions based on the facts as you have submitted:

> "In October of 1948, the Rudolf Masiker family moved to Franklin County from Wright County. Immediately upon their arrival the Masikers were served with a non-residence notice and Wright County continued to furnish limited assistance. On September 3, 1958, upon application of the Franklin County Attorney, the Franklin County Juvenile Court declared the Masiker's daughter, Alice, then age 14, to be dependent taking the child from her parents and ordering her placed in St. Anthony's Home in Sioux City, Iowa, per exhibit 'A' attached. On September 2, 1959 the Franklin County Juvenile Court changed her custody from St. Anthony's Home to the Catholic Charities Home of Sioux City and she was ordered transferred to the Boys and Girls Home in Sioux City, as per exhibit 'B' attached. Then on August 17, 1960 the Franklin County Juvenile Court granted custody to the Boys and Girls Home of Sioux City as per exhibit 'C' attached. Because of the change in Section 252.16 of the Code of Iowa by the 58th General Assembly, the Masikers gained legal settlement in Franklin County on July 1, 1961.
>
> "Question: Under the above factual situation what county would be responsible for the Alice Masiker care at the institutions?"

The child, Alice Masiker, was found to be dependent and neglected "within the means of Paragraph 232 of the 1958 Code of Iowa," by the Franklin County Juvenile Court. Although the order of commitment does not state specifically, she apparently was committed under §232.21, entitled "Alternative commitments." Subsection 3 of this section provides:

> "3. Commit said child to any institution in the state, incorporated or maintained for the purpose of caring for such children." (Underline added).

Subsection 5 of the above states:

> "5. At any time, terminate the proceedings and order the child released from the control of the court." (Underline added).

The committing court retains jurisdiction over the proceedings and the child "until the child is legally adopted, or until the child is committed to a state institution, or until the court shall order the proceedings terminated and the child released from its control." Section 232.23, 1962 Code of Iowa as amended. According to your facts, none of these conditions have been met, so the Franklin County Juvenile court has jurisdiction and control of the minor. The Court order placing the child in the institution severs the normal parent-child relationship. The parents no longer had custody or control of the child. The legal settlement of a child is a derivative one.

> "A parent's legal control of person of child and parent's right to child's services gives child a settlement derived from parent." Town of Washington v. Town of Warren, 193A.751, 123 Conn. 268.

It is my opinion that when the Juvenile Court severs the parent-child relationship and prohibits the parents from legal custody or control, that the child can no longer derive settlement from a legal relationship which does not exist. Rankin v. Peisen, 1943, 233 Iowa 865, 10 N.W. 2d 645.

The child's final legal relationship is with the committing court. As indicated above, Section 232.23 provides that the committing court retains jurisdiction over the proceedings and the child until one of the three conditions contained therein are met. According to your facts, the Juvenile Court of Franklin County has retained jurisdiction over Alice Masiker and is the proper court to do so. It is apparent that the committing court

can and did in this instance, exercise continuing jurisdiction over the minor. The child has never been released from control of this court.

> "The juvenile court retains jurisdiction over delinquent child until child becomes 21 years of age, unless child is legally adopted or committed to a state institution." Op. Atty. Gen. 1932, p. 39.

Additionally it has been the opinion of the Attorney General:

> "Where jurisdiction of the Juvenile Court has been properly invoked and the Court upon hearing undertakes to and does determine that child is in fact neglected, dependent or delinquent, and in its discretion determines that child shall be committed in one or another alternative ways specified in §232.21 such child is thereafter in protective custody of the Court and continues therein until it is legally adopted or is committed to a state institution or until it has reached its majority." (Underline added) Op. Atty. Gen. 1938, p. 899.

In summary then, based on the fact that the child is in the protective custody of the committing court, and its retention of jurisdiction over the child which jurisdiction continues until one of the three conditions stated in Section 232.23 have been met, it is my opinion that the child has the settlement of the court having legal control over her which in your case would be the Franklin County Juvenile Court, and Franklin County would be responsible for the Alice Masiker's care at the institutions.

Respectfully submitted,

/s/ Michael S. McCauley

MICHAEL S. McCAULEY
Assistant Attorney General

MSMc:ms

Section 368A.22, Code of 1962 - A member of City Council is barred from performing services for the City for which compensation is paid him.

February 15, 1965

Honorable Wayne J. Fullmer
State Representative, Jasper County
House of Representatives
L O C A L

My dear Mr. Fullmer:

Reference is herein made to yours of the 1st inst., in which you requested an opinion regarding the legality of the City of Newton paying a claim of Councilman Wendell Woods for services rendered by him in the servicing of parking meters during the months of March and April.

I am of the opinion that this described situation is prohibited by Section 368A.22, Code of 1962, providing as follows:

> "No officer, including members of the city council, shall be interested, directly or indirectly in any contract or job of work or material or the profits thereof or services to be furnished or performed for the city or town."

Support for this view is found in an opinion of this office appearing in the Report of Attorney General for 1911-12 at page 222, where in interpreting this same

statute in substantially its present form, it was stated:

> "Our supreme court has even gone farther than the terms of this section, and held that, even though this section does not apply, that a contract for the sale of lumber used by the city for the construction of sidewalks and crossings, even where the town received the benefit of the contract, and even though the councilman who furnished the lumber did not vote upon the proposition of making the contract, that such contract was void as being against public policy and that the city should be enjoined from paying him for the lumber.
>
> "Bay vs. Davidson, 133 Iowa, 688.
>
> "In the last cited case the court said:
>
>> 'Now, by general law contracts of sale as here shown cannot be upheld because they are not only violative of the fundamental law of agency, but are contrary to public policy. The defendant Binning was an officer and agent of the town, and the duty and obligation which the law cast upon him in such relation forbade him from acting in any transaction for himself as an individual on the one part, and as an officer and agent of the town on the other part. And it can make no difference that in the particular transaction he refrained from voting for the purchase of goods as made. It was his duty to vote, and he could not reap an advantage by avoiding that duty.'
>
> "So it would seem that subdivision 14 above referred to would prevent a councilman from rendering service as an employe of the city, and whether or not this section would apply, he could not lawfully be paid for any services he might render, even though he work at the same wages which were paid other laborers. It is not a question of whether or not in either or both instances the city is paying more than it should pay, because the party

to whom it is paid for services rendered or material furnished is a member of the council, but it is because of the fact that opportunity is afforded for the councilman as such and as a representative of the city, to make with himself as an individual, a contract that would not be advantageous to the city, that the law steps in and says that no such contract shall be valid."

Very truly yours,

/s/ Oscar Strauss

OSCAR STRAUSS
First Assistant Attorney General

OS:ew

MOTOR VEHICLES: Chauffeur's License, County employees whose regular employment entails the operation of road maintainers are required to possess a chauffeur's license. Section 321.1(2), 321.1(4), 321.1(17), 321.1(43). Code of Iowa, 1962.

February 15, 1965

Mr. Frank Krohn, County Attorney
Jasper County Court House
Newton, Iowa

Dear Mr. Krohn:

I am in receipt of your letter of February 1, 1965 to the Attorney General in which you solicit the opinion of this office in regard to the following question:

> "Under the provisions of Section 321.1(43) 1962, Code of Iowa, are the operators of road maintainers required to possess chauffeur's license?"

Section 321.1(43) 1962, Code of Iowa provides:

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

You state in your letter that the road maintainers in question weigh more than five tons and that it is the regular function of these county employees to operate these vehicles.

The key point in interpretation of this Code Section relative to the factual situation submitted by you, seems to be whether or not a road maintainer falls within the definition of "any such motor vehicle exempt from registration which would be within such weight classification if not so exempt."

Section 321.1(2) 1962, Code of Iowa, defines motor vehicle as including every vehicle which is self-propelled.

Section 321.1(17) 1962, Code of Iowa, classifies road construction or maintenance machinery as "special mobile equipment."

Section 321.118(4) 1962, Code of Iowa, exempts special mobile equipment from the registration provisions of Chapter 321.

It is reasonable to conclude that a road maintainer is a motor vehicle as contemplated under Section 321.1(43) as it is most certainly a self-propelled vehicle. Secondly, a road maintainer comes within the definition of special mobile equipment which would be required to be registered at a gross weight classification exceeding five tons, if it were not expressedly exempted by statute.

Based on the aforesaid conslusions I feel that an operator of a county road maintainer is a person "who operates any such motor vehicle exempt from registration which would be within such gross weight classification if not so exempt," within the statutory meaning of Section 321.1(43).

It is therefore my opinion that county employees whose regular employment entails the operation of raod maintainers are required to possess valid chauffeur's licenses.

Very truly yours,

/S/ Joseph S. Brick

JOSEPH S. BRICK
Assistant Attorney General

JSB/mrs

AID TO THE BLIND-LEGAL SETTLEMENT NOT CONTROLLING AS TO COUNTY LIABILITY BUT RATHER RESIDENCE: One who is "residing" in a county at the time of making application under this chapter, does not need to show legal settlement in that county, but the fact he "resides" there is controlling as to which county is liable for assistance under §241.20 of the 1962 Code of Iowa as amended. §241.1, 241.6, 241.20 and 241.22.

February 17, 1965

Mr. Ira Skinner, Jr.
Buena Vista County Attorney
Storm Lake, Iowa

Dear Mr. Skinner:

You have requested an opinion as to which county, Polk or Buena Vista, would be responsible for blind assistance benefits under the following set of facts:

> "'A', a minor, whose parents had legal settlement in Buena Vista County, was admitted to the children's unit of the Mental Health Institute at Independence, Iowa on August 31, 1960. On October 16, 1961, it was felt she had received maximum benefits from treatment at the Mental Health Institute and they recommended that she be discharged and admitted directly to a foster home in Des Moines, Polk County, Iowa under the supervision of the Iowa Children's Home Society of Des Moines.
>
> "'A' was discharged to the care and custody of the Iowa Children's Home Society on December 14, 1961 and was placed in a foster home in Des Moines, Polk County, Iowa. She began attending the child guidance center in Des Moines on June 3, 1963. At that time she was also transferred from the foster home to Farrant Hall, a group home operated by the Iowa Children's Home Society in Des Moines, Polk County, Iowa.
>
> "In March of 1964, 'A' was referred to the Iowa Commission for the Blind by the Iowa Children's Home Society. At that time she was discovered to be legally blind and has been perhaps legally blind all of her life.

"The question for determination is whether the fact 'A' was not a 'recipient' as defined in Section 241.1 at the time she commenced residing in Polk County requiring Buena Vista County, as 'A's' county of legal settlement, to pay one-half of the assistance benefits for the first six months after 'A' is approved for Aid to the Blind or would Polk County, the county in which 'A' has resided since December 14, 1962, be responsible under the provisions of Section 241.20 of the 1962 Code of Iowa as amended."

It is my opinion that the fact that "A" was not a "recipient" as defined in Section 241.1 at the time of commencing residence in Polk County is not determinative of this situation. The fact remains that she was a "resident" of Polk County, for the required period of time before making application for assistance to the Blind to the Polk County Department of Social Welfare under §241.6:

"241.6. Application for assistance. Application for assistance under this chapter shall be filed with the county board of the county in which the applicant resides. The application shall be in writing upon the form prescribed by the State Board. Such application shall contain a statement of the amount of property, both personal and real, in which the applicant has an interest and of all sources and amounts of income which he may have, either in existence or expectancy, at the time of the filing of the application, and such other information as may be required by the State Board."

The applicant indeed could not meet the "residence" requirements to receive benefits from Buena Vista County, and to hold "A" could not receive benefits from Polk County would be to thwart the very purpose of this act.

By a clear reading of the Statute:

"241.22. Removal to another county. When any recipient moves to another county he shall be entitled to continue to receive assistance which shall be chargeable to the county from which he has removed until such recipient has resided in another county in the state for a period of six consecutive months, at which time assistance shall be charged to the county in which he then resides."

This is contemplative of a situation where a blind person is already receiving assistance and removes to another county. Op. Atty. Gen., Jan. 23, 1963. Such is not the case according to your facts.

This office has stated before that an "applicant" need not show legal settlement before making application for assistance under this chapter:

> "'Residing' and 'residence' within §241.2 did not mean legal settlement as set out in §252.16, and applicant, to file for blind assistance, did not need to show legal settlement in county in order that county might be charged with one-fourth of administration and assistance granted, and if recipient moved, the county to which he moved was chargeable with costs after six months residence." (Underline added) Op. Atty. Gen. 1938, p. 667.

It might be added that this opinion is set out in the Iowa Code Annotated in "Notes of Decisions" under both Sections 241.20 and 241.22.

Additionally, it has been the opinion of this office that one year's residency in a county fulfills the residence requirements of Section 241.6.

> "Applicant who, by residing in county for one year, immediately preceeding application, fulfilled residence requirements of this section, and whether such aid should be authorized is determinable by Board of Supervisors." Op. Atty. Gen. 1938, p. 139.

This opinion also states:

> "Aid for the blind as provided for in §241.2 and this section is not in the same category as relief furnished to poor persons and is not subject to the general provisions of sections 252.16, 252.20 and 252.24, dealing with support of the poor." Op. Atty. Gen. 1938, p. 139.

Concluding then, it would appear "residence" as contemplated in the chapter providing for Aid to the Blind does not anticipate legal settlement requirements. It is my opinion that Polk County, where "A" has resided since December 14, 1961, is the proper county responsible under the provisions of Section 241.20 of the 1962 Code of Iowa as amended.

Respectfully submitted,

/S/ Michael S. McCauley
MICHAEL S. McCAULEY
Assistant Attorney General

CRIMINAL PROCEDURE: Counties, towns, and cities, power to enter into agreements for the operation and maintenance of supplemental police communications systems, 750.6, 1962 Code. A county and cities and towns may by agreement constitute one of their number agent for the collection of pro-rated costs and for the payment, out of the special fund thus created, of the costs of maintaining the supplemental police communications system provided for in the foregoing statute.

February 18, 1965

Mr. Don Kliebenstein
County Attorney
Grundy County
Grundy Center, Iowa

Dear Sir:

In your recent letter requesting an opinion from this office, you stated a factual situation as follows:

> "We have the following problem here in Grundy County: The Board of Supervisors has agreed to appropriate a sum of money to partially finance an all-night police radio service to be operated under the supervision of the County Sheriff. Each city and town in the county has agreed to contribute the balance needed to defray the cost of operation of the radio service, their contributions to be based on population. All of the operating costs of the radio service will consist of wages, as the county presently owns all of the equipment necessary to provide the service.
>
> "Iowa Code Section 750.6 (2) provides that counties,cities, and towns may jointly operate radio communications systems. Can Grundy County legally accept the contributions of the cities and towns within the county, place the same with county funds in a special account, and pay all of the operating expenses therefrom?"

Section 750.6 of the 1962 Code is as follows:

> "750.6. Additional communications systems. The council of any city or town and the board of supervisors of any county shall have in addition to the foregoing the discretionary authority:

> '1. To purchase, lease, own and maintain additional radio, electronic communications and telecommunications systems as may be deemed necessary by said agency for the efficient operation of the law-enforcement agencies under its jurisdiction, and to pay the cost thereof from the general fund of said county, or the public safety fund of said city or town.
>
> '2. To enter into lease or contract arrangements for the joint ownership, maintenance, acquisition or leasing of said equipment with any other city, town or county and may jointly operate the same with such cooperating agency for the mutual economy and efficiency of both.'"

Section 750.6 (2), as quoted above, expressly grants authority to counties, cities and towns to enter into contracts for the joint maintenance of supplementary police communications equipment. It says they "may jointly operate the same." It does not require that the agreements take a specific form. Section 750.6 (1), however, requires that the costs of such a joint operation come from the general fund of the participating county, or, in respect to cities and towns, from their public safety fund.

Within these limitations, the question is whether by contract the participating county and cities and towns may constitute one of them their agent for the purposes of implementing such an agreement empowering it to accept pro-rata payments from participating governmental units and accepting responsibility for administering the fund thus created. The power to do this, if present at all, is present by implication.

In Stoner-McCray System v. Des Moines, 247 Iowa 1313, 1322, 78 N.W. 2d 843 (1956), the Court said:

> "Powers granted by the Legislature must be granted in express words, and implied powers must be more than simply convenient - they must be indispensable to the exercise of express powers."

It seems clear that for the exercise of the express powers granted by Section 750.6, an agreement similar to the one contemplated in Grundy Center is indispensable. The General Assembly

did not intend to act in futility. And we are mindful of Section 4.2 of the 1962 Code, which says in part that "Its (the Code's) provisions and all proceedings under it shall be liberally construed with a view to promote its objects..." This same intendment has often found expression in the decisions of the Iowa Supreme Court.

It is the opinion of this office, therefore, that such an agreement as contemplated in Grundy Center would be legal, all other statutory dictates being satisfied.

Respectfully submitted,

/S/ Robert B. Scism

ROBERT B. SCISM
Assistant Attorney General

RBS:mrs

ELECTIONS. 49.3, 49.4, 49.5, 49.7, 49.8, 49.9, 49.10, 49.11, 1962 Code of Iowa. City divided by township lines is correctly in different precincts, but Section 49.7 and 49.10(2), provide for methods of changing the precincts.

February 19, 1965

Hon. Charles E. Grassley
House of Representatives
LOCAL

Dear Sir:

You have asked the following question:

"The Town of Allison is unequally divided by a township line. The result of this division is that the large majority of residents of Allison are in Supervisor District No. 1 and the remaining residents in Supervisor District No. 2. For purposes of special, municipal, and school elections the residents of Allison vote in the City Hall of Allison. But in National, State, and County elections (the November elections of even-numbered years) the county auditor requires that the few residents of Allison who live in Supervisor District No. 2 vote at the rural voting precinct of Jackson township.

"I want to know whether the county auditor's order is legal and correct. And whether or not some residents of Allison can be made to vote outside the municipal boundaries in some elections and inside the municipalities in other elections. All of the residents of Allison would like to vote in Allison regardless of what supervisor district they live in.

"If an attorney general's opinion will not solve this problem and legislation is necessary to permit all residents of Allison to vote in Allison, please write such a bill so I can introduce it."

The following Code sections apply:

49.3. ELECTION PRECINCTS. Election precincts shall, except as otherwise provided, be as follows:

1. Each township when there is no part of a city therein.

2. The portion of a township outside the limits of any city.

3. Such divisions of cities as may be fixed by the council by ordinance.

4. Each incorporated town, for town elections.

49.4. CHANGE IN PRECINCTS BY SUPERVISORS. The board of supervisors may divide a township, or part thereof, into two or more precincts, or change or abolish such division. An order establishing precincts shall define their boundaries.

49.5 CITY PRECINCTS. The council of a city may, from time to time, by ordinance definitely fixing the boundaries, divide the city into such number of election precincts as will best serve the convenience of the voters.

49.7. PORTIONS OF TOWNSHIPS COMBINED. No precinct shall contain different townships or parts thereof, except where, by reason of the existence of a village or incorporated town on or near a township line, the board of supervisors may create a voting precinct in compact form, from said town or village, and may include therein territory adjoining and adjacent to said village or town, which is situated in two or more townships.

49.8. CHANGES IN PRECINCTS. In cases contemplated in section 49.7, the board may, from time to time, make such changes in said boundaries as the convenience of the voters may require.

49.9. PROPER PLACE OF VOTING. No person shall vote in any precinct but that of his residence, except as provided in section 363.21.

49.10. POLLING PLACES FOR CERTAIN PRECINCTS.

1. Polling places for precincts outside the limits of a city, but within the township, or originally within and set off as a separate township from the township in which the city is in whole or in part situated, and a polling place for a township which entirely surrounds another township containing a city, may be fixed at some room or rooms in the courthouse or in some other building within the limits of the city as the board of supervisors may provide.

2. If a petition be filed with the county supervisors ninety days before any primary, general or special election stating that there is no suitable or adequate polling place within a township constituting a voting precinct and that it is desirable and to the interest of the voters of such township voting precinct that a voting place therefore be designated outside

> the territorial limits of such township precinct, the board of supervisors shall fix as a polling place for such township precinct, such polling place outside the township precinct as the board deems most convenient to the electors of the township precinct. Such petition must be signed by voters of the precinct exceeding in number one-half the total number of votes cast in the township precinct for the office of governor at the last preceding general election. When the board of supervisors has fixed such a polling place it shall remain the polling place at all subsequent primary, general and special elections, until such time as the county board of supervisors, upon its own motion, shall fix a polling place within said precinct.
>
> 49.11. NOTICE OF BOUNDARIES OF PRECINCTS. The board of supervisors or council shall number or name the several precincts established, and cause the boundaries of each to be recorded in the records of said board of supervisors or council, as the case may be, and publish notice thereof in some newspaper of general circulation, published in such county or city, once each week for three consecutive weeks, the last to be made at least thirty days before the next general election. The precincts thus established shall continue until changed.

It appears that your situation does not quite come under 49.3. In the 1962 Code of Iowa, it is noted underneath 49.3, that the exceptions are 49.4 through 49.7.

An analysis of the above Code sections indicates that the Auditor is correct in his present orders. It is to be noted that the power to fix precinct lines is basically with the Board of Supervisors and the Auditor merely acts as their clerk.

It is well that the method of change that the Board of Supervisors would have to follow is under 49.11, which is cited above.

It is to be noted in 49.7, that the Board "may create a voting precinct in compact form, from said town or village, and may include therein territory adjoining and adjacent to said village or town, which is situated in two or more townships."

It is also to be noted that Section 49.10(2) provides a remedy if the Board of Supervisors does not act which would also correct your situation.

Very truly yours,

/s/ Timothy McCarthy

TIMOTHY McCARTHY
Solicitor General

TMcC/mm

TRIAL BY JURY ON OBLIGATION AND ABILITY TO PAY SUPPORT IN ACTION BROUGHT UNDER CHAPTER 230: The jury trial provision of 252.12 "Support of the Poor" can be availed of by a person in an action brought under 230.15 of the 1962 Code of Iowa and this provision is not restricted to Chapter 252. Under 230.15 there is a 5 year Statute of Limitations 252.1, 252.12, 230.15.

February 19, 1965

Mr. Earl E. Hoover
Clay County Attorney
Spencer, Iowa

Dear Mr. Hoover:

You have requested an opinion of this office on the following questions:

> "1. If action is brought to enforce liability or mother for the care given to son in a state hospital, under Section 230.15, is the mother entitled to a jury trial to determine the question of obligation and ability to render such support as set forth in Section 252.12?
>
> "2. Does Section 252.12 give right to trial by jury only with respect to support given for poor relief under Chapter 252?
>
> "3. Is there any statute of limitations on right to recover from persons legally liable under Chapter 230.15?"

Chapter 252 of the 1962 Code of Iowa as amended, specifically §252.1 has defined "Poor Person" as follows:

> "252.1 'Poor Person' defined. The words 'poor' and 'poor person' as used in this chapter shall be construed to mean those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor; but this section shall not be construed to forbid aid to needy persons who have some means, when the board shall be of the opinion that the same will be conducive to their welfare and the best interests of the public." (Underline added)

Section 252.12 provides as follows:

> "252.12 Trial by jury. In all cases the party sought to be charged with the support of another may demand a jury trial upon the question of his obligation and ability to render such support, the alleged abandonment, and the liability of the person abandoned to become a public charge; such trial to be had upon demand, which may be made at the hearing of the application for the order, or at such other time as may be directed by the court, upon notice to the defendant." (Underline added).

Section 230.15 of chapter entitled "Support of Mentally Ill" provides as follows:

> "230.15 Personal liability. Mentally ill persons and persons legally liable for their support shall remain liable for the support of such mentally ill. Persons legally liable for the support of a mentally ill or mentally retarded person shall include the spouse, father, mother, and adult children of such mentally ill or mentally retarded person, and any person, firm, or corporation bound by contract hereafter made for support. The county auditor, subject to the direction of the board of supervisors, shall enforce the obligation herein created as to all sums advanced by the county." (Underline added)

This writer feels the wording of the two sections cited of Chapter 252 are significant in that a person who is "mentally disabled" is included in the definition of "Poor person" in Section 252.1, and Section 252.12 provides "In all cases the part sought to be charged with the support of another. This section does not make reference to "parties sought to be charged" under this chapter (Chapter 252), nor does it make reference to "Poor Person" as defined by this chapter. It would not appear from a clear reading to be restrictive to this chapter (252) alone.

The following excerpt of an Attorney General's opinion is cited under Section 230.15 "Personal liability" of Iowa Code Annotations:

> "Liability for relief and maintenance of an adult insane patient may be established as against the father, mother, children, grandchildren, and with qualifications, grandparents, of such insane patient provided procedure contemplated by §252.2 et seq. has been pursued." (Underline Added) Op. Atty. Gen. 1938, p. 785.

There is also language to be found in a letter opinion issued in 1957 which would appear to make Chapter 252 applicable to "Support of the Insane' found in Report of Attorney General, 1958 at page 159:

> "15.13 Insane Persons - Support by adult child - Action to compel - Liability under both common law and statutes - (Strauss to Williamson, Co. Atty., Greenfield, Iowa, 2/13/57) #57-2-7
>
> "The adult son of an insane patient committed to a state hospital for the insane may be held liable for the support and maintenance of such person in an ordinary action at law without the joinder of other adult children of such insane person in the proceedings. The adult child of a parent who is unable to support herself because of mental and physical disabilities is made liable for her support under common law as well as Chapter 252, Code 1954. However recovery against the adult child under the statutes (Chapter 252) is limited to expenses and charges incurred subsequent to July 4, 1939." (Underline added)

A review of Section 252.12 discloses no annotations to this specific application of this section to an action brought under 230.15, but these two prior opinions contemplate the provisions of Chapter 252 applying to the enforcement of obligation of care and support of insane persons. Additionally, a clear reading of 252.12, does not seem to be restrictive to that chapter (252) alone and could be availed to by a person on the question of the obligation and ability to pay.

Specifically then, I would answer your first two questions:

1. Yes, the mother is entitled to a jury trial to determine the question of the obligation and ability to pay in an action brought under Section 230.15.

2. No, right to jury trial is not restricted to poor relief support under Chapter 252.

In answer to your third question, "Yes " there is a five year statute of limitations on right to recover from persons legally liable under 230.15. This five year limit begins from the date of the last item entered. See Scott County v. Townsley, 174 Iowa 192, 156 N.W. 291, and Op. Atty. Gen. 1944, p. 15.

Respectfully submitted,

/S/ Michael S. McCauley

MICHAEL S. McCAULEY
Assistant Attorney General

MSMcC:mrs

SOIL CONSERVATION COMMITTEE: Alienation of real property interests. §467A.7, 1962 Code. A county Soil Conservation District may not grant an easement in its easement for a dam, when such a diminition in its property interest does not further statutory Soil Conservation purposes.

February 19, 1965

Mr. William Greiner
Executive Secretary
Soil Conservation Commission
L O C A L

Dear Mr. Greiner:

In a recent letter to this office, you asked for an opinion on questions raised by the Monona County Soil Conservation District. You enclosed copies of correspondence in which the factual situation is stated. Since no one letter embraces fully the factual situation and the questions promoted by it, I will summarize as follows:

The Monona County Soil Conservation District maintains a dam on the farm of Carl and Ellen Dahl, having been granted an easement for that purpose. The Northwestern Bell Telephone Company, in the course of expanding its facilities and the "stormproofing" of long distance lines, plans to bury cable alongside county roads and state highways where possible. Because of a slide area in the Highway 37 right-of-way contiguous to the Dahl farm, however, the company proposes to place its cable across and below the surface of the Dahl property and faces the necessity of crossing a drainage ditch. This crossing the company proposes to achieve by routing the cable across the Soil District's Dam. I quote from a letter from Mr. P. B. Davison, District Engineer of the Telephone Company at Sioux City, Iowa, to Mr. Ralph Armstrong, Chairman of the Soil District:

> "This letter constitutes our application for a permit to place the buried cable in the soil conservation dam crossing the drainage ditch as shown on the attached sketch. It is proposed to bury the cable about thirty incles deep in the berm area of the dam by trenching, thence refilling and compacting the trench to your specifications and satisfaction.
>
> "It is understood that the Northwestern Bell Telephone Company will assume liability for any damage arising from, or incident to, the construction of this plant. In case that rearrangement or maintenance on the dam structure is likely to expose or disturb

this underground plant, the soil conservation district will endeavor to give the telephone company sufficient notice so that we may arrange to protect our plant. The Soil Conservation District will inform contractors and others who may be working on the dam of the presence of the buried plant so that reasonable care may be taken to avoid damage or interruption of service.

"Attached find a duplicate copy of the standard right-of-way form signed by Mr. and Mrs. Carl Dahl granting an easement for the placement of the proposed buried plant on their property subject to the approval of the crossing of the dam structure by the Monona County Soil Conservation District.

"We expect to have materials and equipment available to complete this work in the summer of 1965. If this proposed plan meets with your approval please return one approved copy of this letter to this office.

Sincerely,

P.B. Davison, District Engineer
NORTHWESTERN BELL TELEPHONE CO.
P. O. Box 867
Sioux City, Iowa 51102

CJS/dm

APPROVED:

____________________________ __________________,
Chairman, Monona County Soil Conservation District 196__"

The questions raised in respect to these facts are:

1. "Can the Soil Conservation District give its approval?"

2. If it can and does give approval, could it be held liable for damage to the cable installation arising from maintenance work on the dam even though it gives notice as requested?

3. Could it be held liable for damages if the dam failed, broke, and washed away the cable?

We will consider the first question first. If the answer to it is in the negative, the others need not be answered.

Section 467A.7 of the 1962 Code obtains. A portion of it reads as follows:

> "467A.7 Powers of districts and commissioners. A soil conservation district organized under the provisions of this chapter shall have the following powers, in addition to others granted in other sections of this chapter:
>
> "5. To obtain options upon and to acquire, by purchase, exchange, lease, gift, grant, bequest, devise or otherwise, any property, real or personal, or rights or interests therein; to maintain, administer, and improve any properties acquired, to receive income from such properties and to expend such income in carrying out the purposes and provisions of this chapter; and to sell, lease or otherwise dispose of any of its property or interests therein in furtherance of the purposes and provisions of this chapter."

In this section is found the power of the District to acquire an easement, such as it possesses in respect to the Dahl property; "to obtain options upon and to acquire ... any property, real or personal, or rights or interests therein ..." An easement has been defined as a liberty, privilege, or advantage in land without profit, existing distinct from the ownership of the soil. Stakes v. Maxson, 113 Iowa 122, 84 NW 949, 86 AM St. Rep. 367; Dubuque v. Maloney, 9 Iowa 450, 74 AM, Dec. 358.

> "While it is always distinct from the occupation and enjoyment of the land itself, and does not confer title to the land, or constitute a lien thereon, an easement is property, and partakes of the nature of land. It is an incorporeal right - an incorporeal hereditament, and although only an incorporeal right and appurtenant to another, the dominant tenement, it is yet properly denominated an interest in land which constitutes the servient tenement. The expression, 'estate or interest in lands,' or 'fee or a freehold estate,' when used in a statute, is broad enough to include such rights." 28 C.J.S. 620, 621.

What is sought here is an easement in an easement, not a tenancy in common of the same easement. Despite an absence of consideration of the nature of such an interest in treatises on the subject, and of applicable case law, we do not doubt that such an interest can be created. But what controls here is not whether it can be created, or by whom and how, but whether the Soil Conservation District has the statutory power, express or implied, to subtract from the interest it has acquired in the Dahl lands.

We return to the language of Section 467A.7 (5), which, after the final semi-colon, reads: "and to sell, lease or otherwise dispose of any of its property or interests therein in furtherance of the purposes and provisions of this chapter." This language restricts the circumstances under which a district can dispose of its property or interests therein to those which serve a soil conservation purpose. By granting an "easement in an easement" to the Northwestern Bell Telephone Company, and thus lessening its own property interest, the Monona County Soil Conservation District would not be furthering the "purposes and provisions of this chapter."

It is the opinion of this office, therefore, that the Soil District is without authority to approve the request of the telephone company, and it becomes unnecessary to answer the questions relating to potential liability for damages.

Respectfully submitted,

/S/ ROBERT B. SCISM

ROBERT B. SCISM
Assistant Attorney General

RBS:ms

CITIES AND TOWNS: Waterworks Trustees: Budget reporting - Sections 24.2, 24.3, 368A.5, 368A.6, 368A.7, 398.1, 398.9, 298.10 and 398.11 of the 1962 Code of Iowa. It is the ultimate duty of the city to file a budget each year under Chapter 24 in regard to the waterworks fund. Chapter 398 requires the waterworks trustees to furnish most of the budget information to the City Clerk.

February 24, 1965

Honorable Lorne Worthington
Auditor of State
State House
L O C A L

Dear Mr. Worthington:

You have submitted the following question:

> "During the course of a recent audit, a state field auditor from this department was questioned by a water board, operating under Chapter 398 of the 1962 Code of Iowa, regarding the local budget law as provided for in Chapter 24 of the 1962 Code of Iowa.
>
> "I would appreciate an official opinion on the following: In a city with a population of over 30,000 and less than 75,000, is the water board required, by Statute, to file a budget each year with the city council showing the anticipated receipts, expenditures, etc.?"

Chapter 398 of the 1962 Code of Iowa refers to the purchase and construction of water works in certain cities. Section 398.1 reads as follows:

> "Cities having a population of over ten thousand, shall have power to levy, in addition to the regular water tax authorized by law, a tax of one-half mill upon the dollar upon all the property within the corporate limits of said cities, excepting lots greater than ten acres in area used for horticultural or agricultural purposes, for the purpose of creating a sinking fund to be used as provided in this chapter for the

> purchase or erection of waterworks in such cities, or for the payment of any indebtedness incurred by such cities for waterworks now owned by the same. The proceeds of such one-half mill levy, together with such other surplus funds as may be set aside as a sinking fund by the board of waterworks trustees, shall be deposited in one or more solvent banks or trust companies of the city making such levy, at a rate of interest not less than three percent per annum, compounded semiannually, and payble, principal and interest, on demand, after sixty days notice in writing. The city treasurer depositing the proceeds of such tax shall exact from the bank or trust company wherein such money is deposited a satisfactory bond, payable to the city, to be approved by the treasurer and mayor of such city, and to be filed in the office of the city treasurer."

You will notice this deals with the proceeds of the tax levy and you will notice the City Treasurer deposits these funds.

Section 398.9 reads as follows:

> "The said board of trustees shall have the power to carry into execution the contract or contracts for the purchase or erection of such waterworks, and to employ a superintendent and such other employees as may be necessary and proper for the operation of such works, for the collection of water rentals, and for the conduct of the business incident to the operation thereof. The said board of trustees shall require of the superintendent, and of the other employees as they may deem proper, good and sufficient bonds, the amount thereof to be fixed and approved by said board, for the faithful performance of their duty, such bonds to run in the name of the city and to be filed with the city treasurer and kept in his office. All money collected by the board of water-

works trustees shall be deposited at least weekly by them, with the city treasurer; and all money so deposited and all tax money received by the city treasurer from any source, levied and collected for and on account of the waterworks, shall be kept by the city treasurer as a separate and distinct fund. The city treasurer shall be liable on his official bond for such funds the same as for other funds received by him as such treasurer. Such moneys shall be paid out by the city treasurer only on the written order of the board of waterworks trustees, who shall have full and absolute control of the application and disbursement thereof for the purposes prescribed by law, including the payment of all indebtedness arising in the construction of such works, and the maintenance, operation, and extension thereof."

It is noted that all money collected shall be deposited at least weekly by the Waterworks Trustees with the City Treasurer and that the City Treasurer shall keep all money from any source in a separate and distinct fund.

Section 398.10 reads as follows:

"The board of trustees shall from time to time fix the water rentals or rates to be charged for the furnishing of water, and such rates, with the proceeds of the one and one-fourth mill water levy and the sinking fund levy of one-half mill, shall be sufficient for the maintenance and operation of such works, and the proper and necessary extension thereof, for all repairs, and for the payment of the purchase price or cost, principal and interest, incurred in the purchase or erection of such works, as the same falls due, according to the tenor of the mortgage and bonds given to secure the payment of such purchase price or cost. The board shall make quarterly statements giving full and complete reports of the receipts and disbursements of the board for the first

> three quarters of the fiscal year. Said reports shall be filed in the office of the city clerk on the second Monday in April, July and October, for the quarters preceding the first day of said months. The reports shall be audited by the city council."

You will note this requires the board to make quarterly statements giving full and complete reports of records and disbursements of the board.

Section 398.11 reads as follows:

> "Said trustees shall, immediately after the close of each municipal fiscal year, file with the city clerk, a detailed written report of all money received and disbursed by said board for said fiscal year."

This requires further reporting.

Chapter 24 of the 1962 Code of Iowa refers to local budget law and Sections 24.2 and 24.3 are as follows:

> "24.2 Definition of terms. As used in this chapter and unless otherwise required by the context:
>
> "1. The word 'municipality' shall mean the county, city, town, school district, and all other public bodies or corporations that have power to levy or certify a tax or sum of money to be collected by taxation, but shall not include any drainage district, township, or road district.
>
> "2. The words 'levying board' shall mean board of supervisors of the county and any other public body or corporation that has the power to levy a tax.
>
> "3. The words 'certifying board' shall mean any public body which has the power or duty to certify any tax to be levied or sum of money to be collected by taxation.

"4. The words 'fiscal year' shall mean the year ending on the thirtieth day of June, and any other period of twelve months constituting a fiscal period, and ending at any other time, except in the case of school districts it shall be the period of twelve months beginning on the first day of July of the current calendar year.

"5. The word 'tax' shall mean any general or special tax levied against persons, property, or business, for public purposes as provided by law, but shall not include any special assessment nor any tax certified or levied by township trustees.

"6. The words 'state board' shall mean the state appeal board as created by section 24.26.

"24.3 Requirements of local budget. No municipality shall certify or levy in any year any tax on property subject to taxation unless and until the following estimates have been made, filed, and considered as hereinafter provided:

"1. The amount of income thereof for the several funds from sources other than taxation.

"2. The amount proposed to be raised by taxation.

"3. The amount proposed to be expended in each and every fund and for each and every general purpose during the fiscal year next ensuing, which in the case of school districts shall be the period of twelve months beginning on the first day of July of the current calendar year.

"4. A comparison of such amounts so proposed to be expended with the amounts expended for like purposes for the two preceding years."

These require certain reports before any tax can be levied. This requires a municipality, defined in Section 24.2(1), before it can certify or levy any tax to file as required in Section 24.3(3) "<u>the amount proposed to</u>

be expended in each and every fund for each and every general purpose during the fiscal year next ensuing ..." (Emphasis supplied)

Sections 368A.5 and 368A.6 read as follows:

> "368A.5 Accounts. All cities and towns shall establish and keep their accounts so the same shall exhibit a true and detailed statement of all public funds collected, received and expended on account of such municipal corporation for any purpose whatever, by any and all public officers, employees or other persons. Such accounts shall show the receipt, use and disposition of all public property, and the income, if any, derived therefrom, and of all sources of public income and the amount due and received from each source. All receipts, vouchers, and other documents kept, or that may be required to be kept, necessary to prove the validity of every transaction and the identity of every person having any beneficial relation thereto, shall be filed and preserved in the office of the clerk or recorder as the case may be.
>
> "368A.6 Separate accounts. Separate accounts shall be kept for every appropriation, showing date and manner of each payment made out of the funds provided by such appropriation, the name and address of each person or corporation to whom paid, and for what purpose paid.
>
> "Separate accounts shall be kept for each department, public improvement or undertaking, and for each public utility owned or operated by the said municipality.
>
> "Said separate accounts for each public utility shall show the true and entire cost of the said utility and the operation thereof, the amount collected annually by general or special taxation for the services rendered to the public, and the amount and character of the services rendered therefor, and the amount

and character of the services rendered therefor."

You will note the following language of Section 368A.6:

"Separate accounts shall be kept for each department, public improvement, or undertaking, and each public utility owner and operator by said municipality.

"Said separate accounts for each public utility shall show the true and entire cost of said utility and the operation thereof, the amount collected annually by general or special taxation for the services rendered to the public, and the amount and character of the service rendered and the amount therefor, and the amount collected annually from several users, if any, for the services rendered to them, and the amount and character of the services rendered therefor."

The case of Martin-Straelau Company vs. City of Dubuque, 149 Iowa 1 (1910), states at pages 3 and 4 as follows:

"In other words, the board of trustees may fix the rates on the basis of a five-mill levy, and it is then the duty of the city council to make a levy in accordance with the provisions of paragraph 7 of section 1005. In our judgment the Legislature intended to give the board of trustees the power to determine what, if any, levy would be necessary, and gave the council power to make such levy within the limitation named."

It is the opinion of this office that the statutes are clear in that the city involved must file in its budget a complete report in regard to the account which is of the entire waterworks operation, showing the interest paid, the receipts, expenditures, etc. This is required by Sections 368A.6, 368A.7 and Chapter 24. Statutory duties of the trustees are set out in Chapter 398 and most of the information required for budget must be furnished by the board of trustees to the city clerk. It is the opinion of this office the ultimate responsibility is that of the City as set out by the Iowa statutes.

Respectfully submitted,

/S/ Timothy McCarthy
TIMOTHY McCARTHY
Solicitor General

STATE OFFICERS AND DEPARTMENTS: Conservation Commission, prison industries - Sections 246.18, 246.21, 246.23, 246.24, 1962 Code of Iowa. The Conservation Commission has no authority to give to the Highway Commission picnic tables manufactured by convict labor detached by the Board of Control for service in State parks.

February 18, 1965

State Conservation Commission
E. 7th and Court Avenue
L O C A L

Attention: E. B. Speaker, Director

Dear Sir:

We have your letter of January 27, 1965, in which you state a factual situation and request an opinion as follows:

> "There is a general consensus of opinion that picnic tables would be an asset to the rest areas along the Iowa Interstate Highway System. However, the Highway Commission by law cannot spend road funds for this type of facility.
>
> "As a result of an informal discussion between Chairman Fisher of our Commission and Chairman Bradley of the Highway Commission, the question arose as to the possibilities of the Conservation Commission furnishing the Highway Commission enough tables to take care of the rest areas along the Interstate System.
>
> "These tables would be made from lumber produced at the State-owned sawmill at the Yellow River Forest in Northeast Iowa. Workers from the prison labor camp located in the forest would be used to produce the logs, saw the lumber and build the tables.
>
> "At the request of our Commission, would you give us a ruling as to whether the Conservation Commission can legally give the picnic tables to another State Agency such as the Highway Commission?

Iowa Code Section 246.18 (1962) provides:

> "246.18 Employment of prisoners - institutions and parks. Prisoners in the penitentiary or men's reformatory shall be employed only on

> state account in the maintenance of the institutions, in the erection, repair, or operation of buildings and works used in connection with said institutions, and in such industries as may be established and maintained in connection therewith by the board of control. The board of control may detail prisoners, classed as trusties, from the state penitentiary or reformatory to perform services for the conservation commission within the state parks. The conservation commission shall provide proper supervision, housing and maintenance for said prisoners but the surveillance of said prisoners shall remain under employees of the board of control. All such employment, including but not limited to that provided in this section, shall have as its primary purpose, and shall provide for, inculcation or the reactivation of attitudes, skills, and habit patterns which will be conducive to prisoner rehabilitation."

It is assumed that prison labor employed in the Yellow River Forest is employed under the authority of the foregoing statute.

Iowa Code Section 246.21 (1962) provides:

> "246.21 Price lists to public officials. The board of control shall, from time to time, prepare classified and itemized price lists of articles and things manufactured at the state institutions controlled by it, and furnish such lists to all boards of supervisors, boards of school directors, city and town councils and commissions, township trustees, and all other departments and officials of the state, county, cities, and towns empowered to make purchase of supplies for public purposes."

Iowa Code Section 246.24 (1962) provides:

> "246.24 Selling price. Such supplies, material, and articles manufactured by convict labor within the state shall be furnished by the board of control to the state, its institutions and political subdivisions, at a price not greater than that obtaining for similar products in the open market."

We believe the foregoing statutes must be construed together - that is, in pari materia. Section 246.18 provides for the use of prison labor in the service of the Conservation Commission within the state parks to the end that prisoners' trade skills will be

sharpened and their rehabilitation engendered. This section makes no provision for the sale of what is produced or manufactured by prisoners while detailed to the Conservation Commission, but it is reasonable to conclude that any product of their labor not meant to serve a Conservation Commission purpose must be disposed of in accordance with the provisions of other applicable statutes.

Section 246.21 provides for the furnishing of price lists by the Board of Control to other state departments on goods manufactured at institutions controlled by the Board of Control. These institutions include the prisons. (Iowa Code Section 218.1 (1962)). And Section 246.18 provides that employees of the Board of Control retain responsibility for the surveillance of prisoners detached to the Conservation Commission. The prisoners remain wards of the Board of Control, and what the prisoners manufacture must be made available to other state departments only in accordance with statutory provisions. Section 246.24 governs the fixing of prices on products made by convict labor for disposition to governmental units. It makes no provision for giving away the products, and we are unable to find any statutory authority to permit it.

This opinion is to be distinguished from one dated April 20, 1962 directed by this office to the Board of Control, advising that board that although the prison industries could contract with the State Highway Commission to furnish road signs for interstate highways, they could not act as a prime contractor to furnish goods and subcontract labor, and that prison labor could not be used to install said signs. No question of a gift - either of things manufactured by convict labor or of the labor itself - was raised or answered in that opinion.

It is the opinion of this office, therefore, that the Conservation Commission may not transfer by gift to the Highway Commission picnic tables manufactured by convict labor.

Very truly yours,

ROBERT B. SCISM
Assistant Attorney General

RBS:ms

TAXATION: Moneys and Credits -- Section 429.4, Code, 1962. Mortgages which do not bear interest are exempt from moneys and credits tax.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

LAWRENCE F. SCALISE
ATTORNEY GENERAL

February 26,1965

Mr. Curtis G. Riehm
Hancock County Attorney
338 State Street
Garner, Iowa 50438

Dear Mr. Riehm:

This will acknowledge your letter of February 19, 1965, wherein you ask the following question:

> "If a purchase money mortgage on a farm does not provide for interest to be paid on the amount of the mortgage or mortgage note, is the amount of the mortgage includable for moneys and credits for the mortgagee?"

Please be advised that the Iowa State Tax Commission's policy is to treat mortgages which do not bear interest as being exempt from moneys and credits tax. In this connection we call your attention to the second paragraph of Section 429.4, Code of Iowa, 1962:

65-2-21

"All noninterest-bearing moneys and credits and accounts receivable shall be tax exempt, but the five thousand dollar exemption as set out in this section shall not apply in the event such noninterest-bearing moneys and credits and accounts receivable exempted herein shall exceed five thousand dollars and if less than five thousand dollars then only so much thereof as shall amount to five thousand dollars when added to such noninterest-bearing moneys and credits and accounts receivable."

Very truly yours,

Thomas W. McKay
Special Assistant Attorney General

TWM/f

COUNTY AND COUNTY OFFICERS - Township Trustees: Sections 359.37 and 113.1 of the 1962 Code of Iowa. Township Trustees have power under Section 359.37 to fence in a township cemetery. Township land used as a cemetery would be under Section 113.1 as the township can be under that statute as a "respective owner of adjoining tract of land."

February 23, 1965

Mr. Keith A. McKinley
Mitchell County Attorney
Mitchell County Court House
Osage, Iowa

Dear Mr. McKinley:

You have submitted the following question:

> "The Township Trustees of Jenkins Township in this County maintain and operate a cemetery which adjoins five parcels of property each of which is owned by a different person. One of the five sections of fence is in a state of disrepair to the extent that the cattle of the adjoining landowner have, on occasion, gotten into the cemetery. The question arises as to whether or not the expense of the repair of this fence must be shared by the Township as well as the adjoining landowner. Therefore, I would ask your opinion as to the meaning of the words "to inclose" as contained in Section 359.37 of the Code of Iowa, 1962."

Section 359.37 of the 1962 Code of Iowa reads as follows:

> "The trustees, board of directors, or other officers having the custody and control of any cemetery in this state, shall have power, subject to the bylaws and regulations of such cemetery, to inclose, improve, and adorn the ground of such cemetery; to construct avenues in the same; to erect proper buildings for the use of said cemetery; to prescribe rules for the improving or adorning the lots therein, or for the erection of monuments or other memorials of the

> dead upon such lots; and to prohibit any use, division, improvement or adornment of a lot which they may deem improper.
>
> "The trustees, after such land has been advertised for sealed bids by the trustees, shall have authority to sell and dispose of any lands or parcels of lands heretofore dedicated for cemetery purposes and which are no longer necessary for such purposes, for the reason that no burials are being made in such cemetery, provided that any portion of said cemetery in which burials have been made shall be kept and maintained by said trustees. The proceeds from such sales shall be deposited in the tax fund established in accordance with section 359.30, to be used for the purpose of that fund."

Our opinion in regard to the meaning of the words "to inclose" as contained in the above statutory section is that the township trustees are empowered to fence their cemetery. Since there are no Attorney General's opinions or cases on point, the rules of statutory construction must be indulged in to determine the meaning of the statute as that is the issue. The first rule is to construe words of the statutes according to their plain meaning. This appears to be possible in this case.

The following case citation bears out the fact that the plain meaning of the word in the statute grants the authority to fence the cemetery. This plain meaning is the legal meaning as well as the dictionary definition.

> "In order that land shall be 'inclosed,' within the meaning of V.S. 4626, it must be surrounded by visible objects, natural or artificial, and an imaginary boundary is not enough. It is not sufficient that the locus in quo and an adjoining parcel of land, taken together as one tract, are inclosed." Payne v. Gould, 52 A. 421, 74 Vt. 208.
>
> "In order to constitute inclosed lands it is not necessary that such land should be confined within an actual and sufficient

> fence, but if the same is in any manner inclosed, sufficient to protect the land from depredation, by artificial or natural means, it would be sufficient." Haynie v. State, Tex., 75 S.W. 24, 25, 45, Tex. Cr. R. 204.
>
> "'Inclosed,' when applied to lands, as defined by Webster, is 'separated from common grounds by a fence.' Worcester defines it as 'parted off or shut in by a fence; set off, as private property.' Inclosed lands, therefore, are lands surrounded by a fence." Kimball v. Carter, 27 S.E. 823, 925, 95 Va. 77, 38 L.R.A. 570.

Now if the meaning of the words "to inclose" gives the township trustees authority to fence in the cemetery, the question we are then posed is whether the township trustees can be asked to share in the expense of the repair or maintenance of a partition fence under Chapter 113 of 1962 Code of Iowa. Section 113.1 and Section 113.3 read as follows:

> "113.1 Partition fences. The respective owners of adjoining tracts of land shall upon written request of either owner be compelled to erect and maintain partition fences, or contribute thereto, and keep the same in good repair throughout the year."
>
> "113.3 Powers of fence viewers. The fence viewers shall have power to determine any controversy arising under this chapter, upon giving five days' notice in writing to the opposite party or parties, prescribing the time and place of meeting to hear and determine the matter named in said notice. Upon request of any landowner, the fence viewers shall give such notice to all adjoining landowners liable for the erection, maintenance, rebuilding, trimming, or cutting back, or repairing of a partition fence, or to pay for an existing hedge or fence."

Before Section 113.1 was amended by the 38th General Assembly of the State of Iowa, it read as follows:

> "The respective owners of adjoining tracts

> of land, except timber land not used otherwise than for the timer thereon, from which each derives any revenue or benefit, shall be compelled to erect and maintain partition fences, or contribute thereto, and keep the same in good repair throughout the year, and if said fence be hedge, the owner thereof shall trim or cut it back once in two years to within five feet from the ground, unless such owners otherwise agree in a writing to be filed with and recorded by the township clerk."

The case of Sinott v. District Court, 201 Iowa 292, reads as follows at page 296:

> "Under the prior statute, the duty to build and repair a partition fence was absolute where each owner derived a benefit or revenue from his land, and was nonexistent in other cases. By the amendment, the right was secured to one adjoining owner to compel the other to contribute to a partition fence on written request, without regard to the use to which either put his land."

The common law rule was that ownership of land carried with it no common law duties to enclose the land with fences. The ownership of land carried with it the right to erect a division fence on common boundaries of adjoining lands. Rights and obligations under partition or division fences originate by statute. 36A C.J.S. Fences, Section 5, Page 263.

At page 267 at Section 8B in Volume 36A of C.J.S. the following language is found:

> "Partitioned fence statutes confer no rights or duties, except between the owners or occupiers of adjoining lands and those who hold under them. These statutes vary in different jurisdictions, some conferring rights and opposing duties only on the occupier of adjoining lands, while others are construed to render the remedies provided available either to the owner or occupier of one tract of land against either the owner or occupier of the adjoining tract."

Thus far in our discussion of this problem, it appears from the statutory history that the law was purposely broadened to include all respective owners of adjoining tracts of land, irregardless of the type of land involved.

Volume 53 American Jurisprudence at page 475 under the topic Towns and Townships at Section 3, states as follows in regard to townships:

> "So far as they may own and manage property, make contracts, or sue or be sued, they are corporations."

It is to be noted that townships are creatures of the state and are subject to state regulation. Additionally, township functions which are proprietary rather than governmental, are generally subject to regulation by other municipal corporations. A review of Section 359.37 indicates that the function of the cemetery is not used for burying of paupers so as to constitute a relief function of the township or county. Cemeteries of the nature contemplated by Chapter 397 are generally considered to be of a propietary nature. Mt. Hope Cemetery vs. City of Boston (1893) 158 Mass. 509, 33 N.E. Rep. 695. Proprietary functions of governmental subdivisions can be regulated by state statutes. 38 Am. Jur., Municipal Corporations, Section 575.

An area where the government instrumentality will regulate government instrumentality is zoning. 68 Am. Jur. under the topic Zoning at page 1009, Section 120, contains the following language:

> "Municipalities are sometimes regarded as subject to the prohibitions or restrictions of their own zoning ordinances, insofar as the property is being used in the performance of a proprietary or corporate function, as distinguished from a governmental function."

The other consideration in this matter is the meaning of Section 113.1 and whether any construction but the plain meaning should be considered. It is a well settled rule of law in Iowa that where the language of the statute is plain and unambiguous and meaning thereof is clear, courts are not permitted to search for meaning beyond express terms of the statute.

Therefore, it is my opinion from the statutory history, from the function being employed by the township, and from the plain meaning of the statute, plus the fact that the township governments are entirely governed by state law, that a township cemetery can be a respective owner of an adjoining tract

of land under Section 113.1 and if the adjoining property owner takes the steps provided under Chapter 113, this matter would be subject to determination by the fence viewers who are designated by Section 359.17 to be the township trustees.

It is to be further noted that the Iowa Legislature has in the past specifically required school districts to fence wherever they adjoin cultivated or improved ground. This is at Section 297.13. This is a further indication that the Legislature does not wish to exclude townships from being considered to be an "owner of adjoining tracts of land" under Section 113.1.

Respectfully submitted,

/S/ Timothy McCarthy
TIMOTHY McCARTHY
Solicitor General

TMcC:ew

SOLDIER'S RELIEF: Legal Residence - The removal of the soldier and his family to a county with the good faith intention of making that his home is all that is necessary to entitle the soldier to relief. Section 250.1, 1962 Code of Iowa.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

March 3, 1965

Mr. Don E. Guest
Cherokee County Auditor
Cherokee, Iowa

Dear Mr. Guest:

This is to acknowledge receipt of your letter of February 2, 1965 as follows:

> "Our Soldier's Relief Commission would like an opinion on the term of residency in connection with their relief work. There seems to be some difference in their interpretation of the law, Code of Iowa, 1962, Chapter 250."

In reply thereto, I advise that there has been no specific term of residency requirements set out in Section 250.1, 1962 Code of Iowa. The term "legal residence" has been defined several times in the opinions of the Attorney General of Iowa as such:

> "The only residence required is that the one receiving relief have a domicile within the county, and that by domicile we meant that the soldier, his widow, or orphan have a residence in said county with the intention of making that his home. In other words, the removal of the soldier and his family to a county with the good faith intention of making that his home is all that is necessary to entitle the soldier to relief."

Therefore, it appears that the commission's only criterion for determining a parties "Legal Residence" is whether that party

has a good faith intention of making his home in that county, rather than the length of time that party has been within the county.

For further authority dealing with problems which arise concerning the term "Legal Residence", I refer you to the following opinions of the Attorney General. 1930 OAG 47, 1936 OAG 311, 1940 OAG 49, 1948 OAG 12, 1954 OAG 164.

Very truly yours,

/s/ Nolden Gentry

NOLDEN GENTRY
Assistant Attorney General

NG:ms

COUNTIES AND COUNTY OFFICERS - County Hospitals--Employee Benefits: Unliquidated Claims; Sections 331.21, 347.13, 347.14(9)-(10), Code 1962. These statutes permit trustees of county hospitals to compensate their employees with accident and health retirement annuity, and death benefit insurance policies. County hospital boards of trustees are not required to require verified affidavits of unliquidated claims because Sec. 331.21 applies only to claims processed by the board of supervisors or the county auditor, whose participation is not required in the payment of hospital claims provided in Sec. 347.12 as amended by the 58th General Assembly.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

March 8, 1965

Mr. Keith A. McKinley
Mitchell County Attorney
Osage, Iowa

Dear Mr. McKinley:

You requested an opinion as to whether county hospitals have authority to provide:

> "certain 'fringe benefits' for their employees as a part of the personnel policy and the prudent management of the hospital generally. Specifically, the problem is whether county hospitals may provide and pay for Blue Shield - Blue Cross, or private insurance policies, covering hospitalization, accident and health benefits, retirement annuity and death benefits, so-called loss of time or wage protection policies or any other types of insurance benefits. Does Sub-Sections 9 and 10 of Section 347.14, Code of Iowa 1962, or any other applicable section of the law, authorize county hospitals to participate in group insurance plans providing all or any part of the above stated coverage?"

Your attention is directed to Section 347.13, paragraph 4 of the Code, 1962, which gives the hospital board of trustees power to fix the "compensation" of an administrator, assistants and employees:

> "4. Employ an administrator, and necessary assistants and employees, and fix their compensation."

The field of employer-employee relations has expanded far beyond the time when money wages alone were the sole consideration for a work agreement. The types of benefits

set forth in your letter are often deciding factors in an employment contract and certainly constitute a part of the compensation for which one may work.

Other jurisdictions have defined "compensation" broadly enough to include them. Vorhees v. City of Miami (Florida 1940), 199 So. 313, Salz v. State House Commission 18 N.J. 106, 112 A2d 716. We concur in that definition.

Our decision is strengthened by Section 347.14, Code 1962, granting the trustees optional power to:

> "(9) Procure and pay premiums on any and all insurance policies required for the prudent management of the hospital, including but not limited to public liability, professional malpractice liability, workmen's compensation and vehicle liability. Said insurance may include as additional insureds the board of trustees and employees of the hospital. * * *"

and:

> "(10) Do all things necessary for the management, control and government of said hospital and exercise all the rights and duties pertaining to hospital trustees generally, unless such rights of hospital trustees generally are specfically denied by this chapter, or unless such duties are expressly charged by this chapter."

The second question is whether county hospitals must be presented with affidavits verifying unliquidated claims as required in Section 331.21, Code 1962. The answer to this question is found in the historical development of Sections 331.21 and 347.12. The Ninth General Assembly in "an Act relating to suits against counties" provided that no action against a county on an unliquidated claim could be commenced until the claim had been presented and a demand for payment made to the board of supervisors. Acts 1862 (9G.A.) Ch. 93. The Code of 1873 under the heading "Manner of Commencing Actions" required service of such claims be made upon the auditor or chairman of the board of supervisors, again with presentation and demand a condition precedent to the initiation of a judicial proceeding. Code 1873, Section 2610. It was at this point

that the verification requirement was added. This act was applicable to fees or compensation, not fixed salaries; and required a verified affidavit be filed in the auditor's office to support the claim. Code 1873, Section 3843. This section would seem to have been applicable to all claims against counties processed by the board of supervisors and the auditor.

The two sections were united by an Act of the Extraordinary Session of the Fortieth General Assembly into what is now Section 331.21 of the Code, 1962.

Chapter 347 of the Code dealing with county hospitals clearly made this procedure and history applicable to claims under that chapter by Section 347.12 which, when originally enacted, required the participation of auditors and supervisors in the payment of claims as a result of county hospital activities. But in 1959 the Fifty-eighth General Assembly amended this procedure to exclude the auditor and supervisors and provide for warrants counter-signed by the chairman of the board of trustees, and claims to be certified correct by that board. The result of this amendment would seem to be a break with the history of Section 331.21 nullifying as to county hospitals the requirement of verification, Section 347.12, Code 1962, with the interest being to eliminate an unmanageable procedural requirement.

Respectfully submitted,

/s/ Dan L. Johnston

DAN L. JOHNSTON
Assistant Attorney General

DLJ:ew

Executive Council: Administrative body of specific powers and has no authority to hold administrative hearing on the question of approval of sale by the Highway Commission. Statutory authority for such hearing is lacking. Section 306.16, Code of Iowa.

March 3, 1965

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

Dear Mr. Wellman:

Reference is herein made to yours of the 19th ult., with a request from the Highway Commission relative to the issuance of a patent for the City of Sioux City for parts of thirteen lots in Woodbury County for the sum of $10,800. Accompanying your letter is a letter to the Council from William A. Shuminsky, an attorney of Sioux City, reciting a matter which he claims would have an effect upon your power to approve this purchase.

However, I advise you that the Executive Council is an administrative body of specific powers, among which is the power to approve a sale of land by the Highway Commission. See Section 306.16, Code of 1962. However, your power does not include the power to adjudicate a claim of a third party adverse to this approval. Adjudication of such claim in connection

65-3-4

with the described power of approval is only effective at an administrative hearing. There is no statutory authority in the Executive Council for entertaining such claim nor for an administrative hearing thereon.

Granting of the request from the Highway Commission is within the power of the Council and may be approved.

Respectfully submitted,

OSCAR STRAUSS
First Assistant Attorney General

OS:ew

CONSERVATION: Management agreements with municipalities. §§19.23, 111.27, Code of Iowa, 1962, as amended by Acts of the 60th G.A. The State Conservation Commission in the context of an agreement under which a county, city or town undertakes to maintain lands over which the commission has jurisdiction, may transfer picnic tables, etc., to the participating municipality in accordance with the strictures noted herein.

March 8, 1965

Mr. E. B. Speaker, Director
State Conservation Commission
E. 7th and Court
L O C A L

Dear Mr. Speaker:

In a recent letter, you requested an opinion from this office on the following matter:

> Under Section 111.27, Code of Iowa, 1962, as amended by Chapter 105, Acts of the 60th G.A., the State Conservation Commission may enter into agreements with a county, city or town under which one of the latter undertakes to maintain lands belonging to the State. The areas involved in such agreements are small recreational areas whose value is primarily local. In effecting such agreements, the commission leaves all permanent fixtures in place. Considering that it often costs more to remove picnic tables, picnic fireplaces, and garbage cans than they are worth, may the commission also transfer these items to the governmental subdivision which agrees to maintain the area? Such items appear on the commission's inventory.

Pertinent sections of the code of Iowa, 1962, are:

> "Section 111.27. Management by municipalities. The commission may, subject to the approval of the executive council, enter into an agreement or arrangement with the board of supervisors of any county or the council of any city or town whereby such county, city, or town shall undertake the care and maintenance of any lands under the jurisdiction of the commission. Counties, cities, and towns are authorized to maintain such lands and to pay the expense thereof from the general fund of such county, city or town as the case may be." (As amended by Chapter 105, Acts of the 60th G.A.).

> "Section 19.23. Disposal of state property. Said council may dispose of any personal property when the same shall, for any reason, become unnecessary or unfit for further use by the state."

The "council" referred to in Section 19.23 is the executive council of the state.

Section 111.27 authorizes the Conservation Commission to enter into an "agreement or arrangement" with a county, city, or town under which one of the latter undertakes the "care and maintenance" of lands over which the Commission has jurisdiction. Approval of the executive council is required. Authority is given to the governmental subdivision to maintain the lands in promulgation of the agreement and to expend money from its general fund for that purpose. There are no dictates as to the form or substance of the agreement, but the statute does not contemplate the transfer of title to real property: That remains in the state.

It is the Executive Council which must approve management agreements and it is the Executive Council which also possesses the authority to dispose of State-owned personal property. Section 19.23, Code of Iowa, 1962. It may "dispose" of such property when it becomes "unnecessary or unfit for further use" by the State.

But no question of disposition of state personal property arises if what the commission wishes to do is "leave" it in state parks or on other lands which are to be maintained by a county, city or town. The commission's records can reflect its continued ownership of the personal property; its agreement with the county, city or town can reflect the latter's commitment to maintain and account for it. Statutory authority for this view is present in Section 4.2, which imposes an obligation to construe the provisions of the Code liberally "to promote its objects and assist the parties in obtaining justice."

If what the commission seeks to do is give away or sell personal property - that is, transfer title to it -- a different question arises. It can do so only by acting through and with the executive council's approval. If in the context of a management agreement effected under Section 111.27 it wishes to transfer title to personal property, then the agreement should so signify. In considering whether to approve the agreement, the executive council can at the same time consider whether it is disposing of state-owned personal property within its statutory authority to do so.

It is my opinion, therefore, that within the inhibitions of the foregoing, the conservation commission may transfer personal property -- possession of it, or title to it, or both -- to a county, city or town which agrees to maintain a park or other lands over which the conservation commission exercises jurisdiction.

Respectfully submitted,

/S/ Robert B. Scism

ROBERT B. SCISM
Assistant Attorney General

RBS:ms

TAXATION: Property exemption and taxable: Section 427.1 (17), Code, 1962. It is not necessary that a person make his livelihood solely by farming in order to be granted the exemption provided by the statute.

LAWRENCE F. SCALISE
ATTORNEY GENERAL

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

March 9, 1965

Mr. Albert F. Goeldner
Keokuk County Attorney
122 South Main Street
Sigourney, Iowa 52591

Dear Mr. Goeldner:

Under date of February 25, 1965, you requested an opinion concerning the following:

> "An individual has been leasing farm groung and operating the farm during the past years. He owns a line of farm machinery used in the farming of the rented farm ground. In addition to his farming, he works a job for wages. His farming operation is not a hobby, but provides two-thirds of his income.
>
> "In making assessments for personal property tax, the County Assessor has refused to allow this individual a personal property tax exemption in the amount of $300.00 of taxable value for farming equipment as provided in Iowa Code Section 427.1 (17) on the grounds that this individual was not solely engaged in farming.
>
> "Will you please give me a letter which can be used as a guide to our County Assessor in assessing the hundreds of farmer-job workers in the assessment of personal property tax on farm equipment."

65-3-2

Section 427.1, Code, 1962, provides as follows:

> "427.1 Exemptions. The following classes of property shall not be taxed:
>
> "***
>
> "17. Farm equipment - drays - tools. The farming utensils of any person who makes his livelihood by farming, the team, wagon, and harness of the teamster or drayman who makes his living by their use in hauling for others, and the tools of any mechanic, not in any case to exceed three hundred dollars in taxable value."

The statute does not require that a person who claims an exemption under this provision of statute make his livelihood solely by farming. Therefore, it is our opinion that the exemption is available to any person who makes part of his livelihood by farming.

Very truly yours,

/s/Thomas W. McKay
Thomas W. McKay
Special Assistant Attorney General

LFS:TWN:f

TOWNSHIPS: Town Halls - Chapter 360 of the 1962 Code of Iowa. A township cannot enter into an arrangement to improve, equip and maintain an existing town hall without having an ownership interest:

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

March 17, 1965

Mr. Charles H. Barlow
Palo Alto County Attorney
2121½ Main Street
Emmetsburg, Iowa 50536

Dear Mr. Barlow:

You have submitted the following question:

> "My question is, can a township enter into such an arrangement to improve, equip and maintain an already existing town hall when Section 360.4 seems to contemplate that the joint authorities be limited to 'building' a public hall?"

A review of Chapter 359 of the 1962 Code of Iowa and the annotations indicates that a township is an instrumentality of a state and only has such powers as are given to it by the state. The only powers given to townships in regard to township halls is under Chapter 360 of the Code. Section 1 deals with the voting on the erection of a public hall. Section 2 deals with raising of a tax to pay for such building. Section 3 is not applicable. Section 4 is very pertinent and reads as follows:

> "Any public hall built under the provisions of this chapter shall be located by the township trustees so as to accommodate the greatest number of the resident taxpayers, and for such purpose the trustees may purchase land not to exceed in value five hundred dollars. They shall also have the power to join with the city or town authorities of any city or town within their borders and build and equip said building as a public hall under such terms and conditions as may be mutually agreed upon."

Section 5 is also pertinent and reads as follows:

"The township trustees or in the case of joint ownership, in conjunction with the city or town authorities shall have charge of the building of such hall, shall receive bids, and shall let the building of the same to the lowest responsible bidder, and the township clerk shall pay out of the funds collected, only on the order of the trustees of said township for the township's share of the cost thereof."

Section 360.6 is entitled Custodian but it has some sections in regard to joint ownership and should be noted and it reads as follows:

"The township clerk, under the direction of the trustees, shall be the custodian of the building, and the use thereof may be permitted by the township trustees to citizens of the township for any lawful purpose; and, for the purposes of this chapter, the township clerk is hereby clothed with all the powers and duties of a constable of the township, to maintain order within and about the premises, protect the property, and enforce orders of the township trustees with respect thereto. In case of joint ownership by the township and town, the duties herein enumerated shall devolve jointly upon the township trustees and the town authorities or they may purchase a building already built with the same limitations as in said section 360.4. A copy of this section shall be at all times kept posted in a conspicuous place in said hall."

Thus, from the above sections, it only appears that the Code provided for: (1) the levy of a tax to build a township hall and, (2) under Section 360.4 the power to build and equip a public hall with a city or town. Section 360.5 only contemplates joint ownership. The same is true under Section 360.6 which contemplates a joint purchase of an existing building.

Therefore, the answer to your first question would have to be that Section 360.4 does not contemplate a township entering into an arrangement to improve, equip, and maintain an already existing town hall.

You have asked a second question if the answer to your first question was no, and the second question is as follows:

> "If such an arrangement would be held not to be within the contemplation of the chapter, could the township pay a fixed amount monthly or yearly from the funds levied pursuant to Section 360.1 and 360.2 to defray a reasonable portion of maintenance, the same to be in lieu of rent?"

Sections 360.1 and 360.2 read as follows:

> "360.1 Election. The trustees, on a petition of a majority of the resident freeholders of any civil township, shall submit the question of building or acquiring by purchase, a public hall to the electors thereof, by posting notices of such election in four conspicuous places in the township, thirty days before election, and the form of the proposition shall be: 'Shall the proposition to levy a tax of .... mills on the dollar for the erection of a public hall be adopted?'"

> "360.2 Tax. If a majority of the votes cast are in favor of the tax, the trustees shall certify such fact to the board of supervisors, and they shall thereupon levy a tax not to exceed the rate voted and not to exceed three-fourths mill on the dollar each year for a period not exceeding five years on the taxable property of the township; and when such tax is collected by the treasurer, it shall be paid to the township clerk; but said clerk shall not receive to exceed one percent for handling said money."

Section 360.8 also applies and reads as follows:

> "360.8 Tax for repairs. The trustees of any township where such building has been erected or acquired by purchase or by gift are hereby authorized to certify to the board of supervisors that a tax

> of not exceeding in any one year, one-half mill on the dollar, on the taxable property of the township, should be levied, to be used in keeping such building in repair, to furnish same with necessary furniture, and provide for the care thereof. Provided, that in counties with a population of seventeen thousand to seventeen thousand two hundred fifty census 1960, where such buildings are of brick construction with at least one hundred thousand cubic feet of space, such tax may be one mill on the dollar. When such certificate is filed in the auditor's office, the board of supervisors shall levy such tax."

It is apparent from Chapter 360 that trustees have authority to erect, acquire by purchase or gift, a township hall and provide for the care thereof.

Chapter 360 does not contemplate any such arrangement that you suggest in your question No. 2 where the township trustees could pay rent for some building. Chapter 360 only provides for ownership and maintenance of an ownership interest.

Respectfully submitted,

/s/ Timothy McCarthy

TIMOTHY McCARTHY
Solicitor General

TMcC:ew

STATE AND STATE OFFICERS: Department of Agriculture. Feed law. Acts of the 60th G.A., Chapter 137. Feed distributors do not have to register as manufacturers, nor does a manufacturer have to have a manufacturer's license after he discontinues manufacturing a feed. Labeling requirements of the feed law only require the name and address of the distributor, and do not require the manufacturer's name if the manufacturer is not the distributor.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

March 17, 1965

Honorable Kenneth E. Owen
Secretary of Agriculture
State House
L O C A L

ATTN: Everett Saylor, Administrative Assistant

Dear Mr. Owen:

You have submitted the following questions in regard to the Acts of the Sixtieth General Assembly, Chapter 137:

1. Are veterinarians, who distribute a product manufactured by a registered manufacturer under a label not showing the manufacturer's identity, required to have a license under Section 4 of the above quoted statute?

2. A manufacturer has gone out of business and his product is still being distributed by others. Are these distributors required to have a license?

3. Does the feed law require a manufacturer's license to be held by each company who appears as responsible party upon the label?

In regard to your question No. 1, we must note Section 4 of Chapter 137 of the Acts of the Sixtieth General Assembly which replaces Chapter 198 of the 1962 Code of Iowa, which said Section 4 reads as follows:

"1. Any person who manufactures, mixes or mixes to customer order any commercial feeds, or customer-formula feeds, or

stock tonic, offered for sale, sold or distributed in the state of Iowa must first obtain a license from the secretary, said license to expire on December 31 of each year and be renewed annually.

2. The application for license shall be submitted on forms furnished by the secretary providing current name and address of applicant.

3. Each license application shall be accompanied by the annual license fee of two dollars per license. License fees so collected shall become a part of the fund stipulated in section seven (7), subsection three (3) of this Act."

You will note that the key words are "any person who manufactures, mixes or mixes to customer order". These words control who must obtain a manufacturer's license in the State of Iowa. It is obvious the distributors do not have to obtain a manufacturer's license.

So, therefore, the answer to your first question must be that the veterinarians who distribute a product labeled under their own name are not required to register under Section 4 as a manufacturer, when they do no mixing to customer's order or do no manufacturing. You will note that Section 5 requires that "each commercial feed and stock tonic shall be registered before being distributed in this state ..." This appears to put a restriction upon distributors.

In regard to your question No. 2, the plain meaning of Section 4 as quoted above does not place any requirement that a manufacturer continue his registration once he ceases to manufacture. It would appear that the only process that is occurring after the manufacturer ceases manufacturing is distribution, and that is not restricted in any way by Section 4.

In regard to question No. 3 as to disparity of the actual manufacturer, Section 5 and Section 6, subsection 1(b) appear to apply. They read as follows:

"Sec.5.

1. Each commercial feed and stock tonic shall be registered before being distri-

buted in this state; provided, however, that customer-formula feeds are exempt from registration. The application for registration shall be submitted on forms furnished by the secretary and, if the secretary so requests, shall also be accompanied by a label or other printed matter describing the product. Upon approval by the secretary a duplicate copy of the registration shall be furnished to the applicant. All registrations shall expire on December 31 of each year. Registrations to be renewed with no changes in label guarantee may be reregistered by forwarding a list showing product name and brand name and department of agriculture registration number to the secretary. For any commercial feed on which the label guarantee has been changed or altered or for a new commercial feed, a new registration application must be filed. The application shall include the information required by paragraphs 'b', 'c', 'd' and 'e' of subsection one (1) of section six (6). The secretary may by regulation permit on the registration the alternative listing of ingredients of comparable feeding value, provided that the label for each package shall state the specific ingredients which are in such package.

2. A distributor shall not be required to register any brand of commercial feed which is already registered under this Act by another person.

3. The secretary is empowered to refuse registration of any application not in compliance with the provisions of this Act, and to cancel any registration subsequently found not to be in compliance with any provisions of this Act; provided, however, that no registration shall be refused or canceled until the registrant shall have been given the opportunity to be heard before the secretary, and to amend his application in order to comply with the requirements of this Act.

4. All articles subject to the registration requirements of this Act shall be exempt

> from any provisions of chapter two hundred three (203) of the Code."
>
> "Sec. 6.
>
> 1. Any commercial feed distributed in this state shall be accompanied by a legible label bearing the following information:
>
> (b) The product name and brand name, <u>if any</u>, under which the commercial feed is distributed." (Emphasis supplied)

Section 6, subsection 1(e) also applies. It reads as follows:

> "The name and principal address of the person responsible for distributing the commercial feed."

You will note subsection 2 of Section 5 states that a "distributor shall not be required to register any brand of commercial feed which is already registered under this Act by any other person." Section 3, subsections 8 and 9, also apply and read as follows:

> "8. The term 'brand name' means any word, name, symbol or device or any combination thereof, identifying the commercial feed or a distributor and distinguishing it from that of others."
>
> "9. The term 'product name' means the name of the commercial feed which identifies it as to kind, class or specific use."

Therefore, what is required is a "product name" and a "brand name, if any". There does not appear to be any requirement as to labeling that the manufacturer's name appear on the label. The definition of brand name at Section 3, subsection 8, requires that when a "brand name" is used, the distributor's name appear on the label.

The labeling law does not require the use of a "brand name". The only definite requirement under Section 6 in regard to labeling is that under subsection 1(e) the name and address of the person responsible for distributing the feed appear on the label.

It is my conclusion that the feed law does not require a manufacturer's license to be held by the party whose name appears on the label. The law only requires the name and address of the party responsible for distributing the feed. Section 6, subsection 3(a) requires that customer-formula feed shall have the name of the mixer on it.

Respectfully submitted,

/s/ Timothy McCarthy

TIMOTHY McCARTHY
Solicitor General

TMcC:ew

TAXES: Personal Property Taxes; Lien of personal taxes: Sec. 445.29, Code of Iowa, 1962. The purchaser at an execution sale takes the personal property free of liability for the unpaid personal property taxes since the lien for personal property taxes created by Section 445.29, Code of Iowa, 1962, is not a prior and superior lien.

State of Iowa

LAWRENCE F. SCALISE
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Des Moines

March 17, 1965

Mr. L. D. Carstensen
Clinton County Attorney
306 Court House
Clinton, Iowa 52732

Dear Mr. Carstensen:

This is in response to your letter of February 26, 1965, wherein you state the following:

> "'S' Reducing Salon located in the City of Clinton, Iowa, has gone out of business and left town leaving unpaid its personal property taxes on business fixtures, for the years 1963, 1964, and 1965.
>
> "Recently, the owner of the real estate, who was a judgment creditor, levied a lien on said fixtures and purchased the same at Execution sale.
>
> "To this point, the county has taken no steps to perfect this lien to collect the taxes.
>
> "I would appreciate very much your Opinion as to whether or not these taxes remain a lien on the personal property now in the hands of the purchaser on the Execution sale."

Section 445.29, Code of Iowa, 1962, provides in part:

> "Personal property taxes, together with any interest, penalty, or costs, shall be a lien in favor of the county upon all the taxable personal property and rights to property belonging to the taxpayer, such lien to relate back to and exist from the first day of January of the year in which such personal property is assessed."

As a general rule of law, the only Iowa tax statutes which create "first liens" are those in which the legislature has either expressly or by implication manifested an intent that the liens be paramount. Linn County vs. Steele, 223 Iowa 864, 867, 273 N.W. 920, 921 (1937). Personal property taxes do not ordinarily give rise to first liens except in two situations which are expressly mentioned in the Iowa Code and which have been interpreted as superior liens by the Courts. One concerns the lien for personal property taxes on specified classes of property used in certain commercial enterprises, Section 445.31, Code of Iowa, 1962, and the other concerns the lien on buildings which are assessed as personal property. Section 445.32, Code of Iowa, 1962.

However, Section 445.29 does not create a first or prior lien upon personal property. 1956 Ops. Atty. Gen. 106. This opinion quotes the test set down by the Supreme Court in Bibbins vs. Clark 90 Iowa 230, 57 N.W. 884 (1894), "The statute does not say so,

the legislature has not so declared, nor can any such result be reached by applying to this provision of the statute the same rule of construction applied to like language used elsewhere in the Code."

Thus, the County Treasurer should have taken steps to protect the County. Section 445.8, Code of Iowa, 1962, provides in subsection three that:

> "The treasurer shall, within ten days following the final publication of such notice, issue a distress warrant in the form as prescribed in section 445.7. The publication of delinquent personal property tax lists shall include a notice, that, unless such delinquent personal property taxes are paid within ten days of the date of final publication of the notice, a distress warrant will be issued for the collection thereof."

The County Treasurer also has the opportunity under Section 445.6, Code of Iowa, 1962, to protect the county by filing a notice of lien on the taxpayer's personal property and proceeding immediately to collect such taxes by distress and sale before the taxes become delinquent when he believes that the taxpayer is about to remove himself from the county. 1960 Ops. Attorney Gen. 254, 257.

In the instant case, the county has taken none of the steps mentioned to protect itself. Thus, when the judgment creditor perfected his lien and sold the property at execution sale, this had the effect of displacing the inchoate tax lien of the county on the personal property in question. The rule, in the absence of

statutory provision to the contrary, is that liens take precedence in the order of time; the first in point of time is superior. Des Moines Brick Mfg. Co. vs. Smith, 108 Iowa 307, 309, 79 N.W. 77, 78 (1899). The county's lien was not superior by the statute, and the county did nothing to protect itself; thus, the personal property taxes are not a lien on the personal property now in the hands of the purchaser from the execution sale.

'S' Reducing Salon is not relieved from liability for the tax levy against the personal property even though it may be sold at a sheriff's sale to satisfy the claims of the creditors. 1919 Ops. Atty. Gen. 391, 393.

Very truly yours,

Thomas W. McKay
Special Assistant Attorney General

TWM:JRS:dj

TAXATION: Sales and Use Tax; Exclusions - Sec. 422.42(3), Code, 1962, as amended by Acts 1963 (60 G.A.) Ch. 260, Sec. 1, effective July 4, 1963, and Section 423.1(1), Code, 1962, as amended by Acts 1963, 60 G.A., Ch. 260, Sec. 2, effective July 4, 1963. "Dry ice" is a chemical, and when consumed or dissipated in processing meat intended to be sold ultimately at retail, is excluded from the imposition of sales and use tax.

LAWRENCE F. SCALISE
ATTORNEY GENERAL

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

March 18, 1965

Mr. S. A. Vogl
Chief Auditor
Sales & Use Tax Division
State Tax Commission
L O C A L

Dear Mr. Vogl:

In reference to your request of March 1, 1965, for an opinion on the dry ice usage of a packing company, you state that said company uses the dry ice by mixing it with other ingredients in the preparation of sausage. The dry ice helps give the ingredients the necessary moisture, and when the product is finally completed, the dry ice physically changes from a solid to a gas. Upon completion of the manufacturing process, the dry ice is no longer in the product.

The amendments (underlined below) to Sections 422.42 and 423.1, respectively, as set forth in Sections 1 and 2 of Chapter 260, Laws of the 60th G.A. (1963) are as follows:

> "422.42. The following words, terms, and phrases, when used in this division, have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

***

'3. "Retail sale" or "Sale at retail" means the sale to a consumer or to any person for any purpose, other than for processing or for resale of tangible personal property and the sale of gas, electricity, water, and communication service to retail consumers or users, but does not include . . . or such property is a chemical, solvent, sorbent, or reagent, which is directly used and is consumed, dissipated, or depleted, in processing personal property which is intended to be sold ultimately at retail, and which may not become a component or integral part of the finished product.'"

"423.1. The following words, terms and phrases when used in this chapter shall have the meanings ascribed to them in this section:

"1. 'Use' means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include processing, or the sale of that property used in "processing" within the meaning of this subsection shall mean and include . . . or (d) chemicals, solvents, sorbents, or reagents, which are directly used and are consumed, dissipated, or depleted in processing personal property, which is intended to be sold ultimately at retail, and which may not become a component or integral part of the finished product."

Although the Iowa Supreme Court has not ruled upon the point, other Courts have held that "dry ice" is solid carbon dioxide or CO_2. At ordinary temperatures, CO_2 is in gaseous

state, but, by applying pressure, it may be liquified and in turn solidified. At normal temperatures, dry ice changes from solid to gas. In transition from solid to gas, its volume increases 500 times. New York Eskimo Pie Corporation vs. Rataj, C.C.A. Pa., 73 F. 2, 184 (1934); Carbo-Frest vs. Pure Carbonic, C.C.A. Mo., 103 F. 2, 210 (1939). A chemical is defined as a substance produced by a chemical process or used for producing a chemical effect. Stuart vs. Robertson, 45 Ariz. 143, 40 P. 2d 979 (1935); Shreveport Gas, Electric Light and Power vs. Assessor of Caddo Parish, 47 La. Anno. 65, 16 So. 650 (1895).

From the above discussion, it is determined that dry ice is a chemical. Prior to July 4, 1963, such a chemical was not excluded from sales and use tax. It is our opinion that such a chemical which is used and is consumed or dissipated in processing of personal property that is to be sold at retail is excluded from sales and use tax.

Very truly yours,

/s/ Thomas W. McKay

Thomas W. McKay
Special Assistant Attorney General

TWM:JRS:dj

CITIES AND TOWNS: Civil Service Commission: §§365.11, 365.8, 365.9, 29.28. Persons on the certified eligible list for promotion in Civil Service who are questioning the promotion of another on said list through the appeal procedure provided, are required to take an additional promotional examination to maintain their eligibility under §365.11.

March 19, 1965

Hon. Jake B. Mincks
State Senator, Wapello County
Senate Chamber
L O C A L

Dear Senator Mincks:

You have requested an opinion of this office based on the following set of facts:

> "Recently it had been called to my attention by people who are eligible for promotion, who are questioning through the appeal procedure of Chapter 365, the right of another person to receive the promotion and also the denial of the affected people from receiving said promotion even though they are eligible by reason of having passed a promotional examination at least twice in the past several years. However, it has been almost two years since these people have taken and passed the examination, making them eligible for promotion.
>
> "My question to you, specifically, is, 'Are these people required to take an additional promotional examination to maintain their eligibility for promotion under Chapter 365.11, even though their appeal from action of the Civil Service Commission is, at the present time, under litigation through the appeal procedure, or would they maintain their eligibility because of the litigation through the appeal procedure in said Chapter?'".

Before entering into the specific problem that you raise in your letter, I would like to point out a case annotated under Chapter 365, specifically Sec. 365.11 which might be analogized to your situation, but I feel is clearly distinguishable:

65-3-14

> "A member of city police department who had been certified as eligible for promotion to chief of detectives before he entered military service and was prevented by such service from taking next promotional examinations was entitled under §29.25 (Code 1946 now 29.28 Code 1962) to the same status of eligibility until next promotional examination after his return from service and hence, following return from service, he was eligible for promotion to chief of detectives prior to next promotional examination." Gibbons v. Sioux City, 1951, 242 Iowa 160, 45 N.W.2d 842. (Underline and parenthesis added)

Code Section 29.28 (§29.25 as construed in Gibbons case) states:

> "29.28 Leave of absence of civil employees. All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when ordered by proper authority to active state or federal service, be entitled to a leave of absence from such civil employment for the period of such active state or federal service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence. The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence." (Underline added)

From your facts as you set out, it is apparent that these people do not fall within this exception, nor are they "prevented" from taking the promotional examination as "prevented" is contemplated in the Gibbons case.

Sections 365.8 and 365.9 set forth the provisions dealing with "Original entrance examination-appointments." and "Promotional examination-promotions." Section 365.9, specifically covering your situation states:

> "365.9 Promotional examinations - promotions. The commission shall, during the month of April of each second year, and at such other times as shall be found necessary, under such rules as shall be prescribed and published in advance by the commission, and posted in the city hall, hold competitive promotional examinations shall be practical in character, and shall relate to such matters as will fairly test the ability of the applicant to discharge the duties of the position to which he seeks promotion.
>
> "Hereafter, all vacancies in the civil service grades above the lowest in each department shall be filled by promotion of subordinates when such subordinates qualify as eligible, and when so promoted, they shall hold such position with full civil service rights therein."

It has been the opinion of this office that the duties imposed by these sections (365.8, 365.9) upon the Civil Service Commission are mandatory:

> "The duties imposed upon the Civil Service Commission by §§365.8 and 365.9 are mandatory, and the Commission would have no power to delegate to a city manager its functions in respect to the preparation of examinations, administration of examinations and determination of qualifications of applicants for employment." (Underline added) OAG, May 25, 1959.

The purpose of the Civil Service law is to free those public offices that are covered, from political partisanship and to establish a merit system of fitness and efficiency as the basis for appointment and promotion. It was said by the Court in Herman v. Sturgeon, 228 Iowa 829, 838 (1940); "Efficiency departs when laxity in the enforcement of civil service legislation is permitted to prevail."

Section 365.11 in part provides:

> "Names certified - temporary appointment. The commission shall, within ninety days after the beginning of each competitive examination for original appointment or for promotion, certify to the city council

> a list of the names of the ten persons who qualify with the highest standing as a result of each examination for the position they seek to fill, or such number as may have qualified if less than ten, in the order of their standing, and all newly created offices or other vacancies in positions under civil service which shall occur before the beginning of the next examination for such positions shall be filled from said lists, or from the preferred list existing as provided for in case of diminution of employees, within thirty days. Preference for temporary service in civil service positions shall be given those on such lists." (Underline added)

From this it would appear that the people you refer to presently questioning the right of another to promotion might avoid taking the next promotional examination and still be eligible. It would have to be construed that the questioning of the appointment through the appeal procedure of the party who received it creates a "vacancy." Clearly this is not the case.

Vacancy has been defined in C.J.S. thusly:

> "The word 'vacancy' has no technical meaning; an office is vacant whenever it is unoccupied by a legally qualified incumbent who has a lawful right to continue therein until the happening of some future event." 67 C.J.S. - Officers, §50.

This then would appear to bring the situation under the language in §365.11 which you cited in your letter:

> "Except where such preferred list exists, persons on the certified eligible list for promotion shall hold preference for promotion until the beginning of a new examination, but in no case shall such preference continue longer than two years following the date of certification, after which said lists shall be canceled and no promotion to such grade shall be made until a new list has been certified eligible for promotion." (Underline added)

I am of the opinion that the use of the word "shall" is mandatory in keeping with the purpose of the Civil Service and these people would be required to take an additional promotional examination to maintain their eligibility for promotion under Chapter 365.11.

Respectfully submitted,

/s/ Michael S. McCauley

MICHAEL S. McCAULEY
Assistant Attorney General

MSMcC:ms

TAXATION: Personal Property Tax; Tax Exemption of Property Stored in a Public Warehouse: Section 427.1(29), Code of Iowa, 1962. Cartons stored in a public warehouse are exempt from personal property taxation if they become the property of the manufacturer-user prior to the time said property was placed in the warehouse. However, if the cartons are sold to the manufacturer-user from the warehouse, the cartons are subject to personal property taxation.

LAWRENCE F. SCALISE
ATTORNEY GENERAL

STATE OF IOWA
DEPARTMENT OF JUSTICE
DES MOINES, IOWA

March 22, 1965

Mr. Frank M. Krohn
Jasper County Attorney
301 Court House
Newton, Iowa

Dear Mr. Krohn:

This is in response to your letter of October 26, 1964, in which you state in part as follows:

> "'Z' Corporation of St. Louis, Missouri, produces cartons that are sold to The 'M' Company in Newton, Iowa, for the purpose of protection and shipment of the 'M' washing machines and dryers. 'N' Warehouse in Newton is classified as a public warehouse and acts as a place for storage of the cartons, and are delivered to The 'M' Company as needed for packaging their product.
>
> "The cartons stored in the'N' Warehouse in Newton are purchased by The 'M' Company for the purpose of packaging their product and not for resale by The 'M' Company.
>
> "Are the cartons in storage in the 'N' Warehouse subject to personal property tax under the sections in Chapter 428 of the Iowa Code, or do they come under the exemption provided in Section 427.1, subparagraph 29 of the Iowa Code?"

The answer to your question depends upon a determination of the facts in your case. It must be pointed out that Section 427.1, Code of Iowa, 1962, is an exempting statute and as such

must be strictly construed. If there is any doubt upon the questions, it must be resolved against the exemption and in favor of the taxation. National Bank of Burlington vs. Huneke, 250 Iowa 1030, 1035, 98 N.W. 2d 7 (1959), Trinity Luthern Church of Des Moines vs. V. L. Browner, _____Iowa_____, 121 N.W. 2d 131 (1963).

Section 427.1, Code of Iowa, 1962, provides:

* * *

> "The following classes of property shall not be taxed:
>
> "(29) Goods stored by warehouseman. All personal property intended for ultimate sale or resale, with or without additional processing, manufacturing, fabricating, compounding or servicing, stored in a warehouse of any person, co-partnership or corporation engaged in the business of storing goods for profit as defined in section five hundred forty-two point fifty-eight (542.58), Code 1958, provided such personal property is not offered for sale or sold by the owner at retail directly from the public warehouse."

Thus, if "M" Company owns the cartons at or prior to the time that the cartons enter the "N" Warehouse, there would be no question that said cartons would be exempt from taxation. 1960 Ops. Atty. Gen. 252, 253.

However, if the cartons belong to the "Z" Corporation when they enter the "N" Warehouse, said cartons would be subject to taxation, for the statute states in part "...provided such personal property is not offered for sale or sold by the owner at retail directly from the public warehouse." If the "Z" Cor-

poration owned the cartons at the time they went into storage in the public warehouse, then such personal property (the cartons) would be offered for sale or sold by the owner at retail directly from the public warehouse to "M" Company. Such a sale would be considered a retail sale for the word "retail" has been construed to mean a "sale to the consumer or ultimate user." 1960 Op. Atty. Gen. 252, 253. In other words, we construe the sale by "Z" Corporation to "M" Company from the warehouse to be a retail sale for personal property tax purposes.

As manufacturers, "M" Company does not pay sales tax on containers and cartons which hold the products they manufacture. Retail Sales and Use Tax Rule No. 52 (1962 I.D.R. 565). The definitions and constructions found in the Iowa Retail Sales Tax Act (Sec. 422.42 et seq., Iowa Code, 1962) are not applicable to this situation, because the Section 422.42 definitions apply only to "words, terms, and phrases, when used in this division (Division IV, Chapter 422)."

Very truly yours,

/s/ Thomas W. McKay
Thomas W. McKay
Special Assistant Attorney General

TWM:JRS:dj

TAXATION - Personal Property Tax: Section 428.17 of the 1962 Code of Iowa. Article I, Section 6, Article III, Section 30, Article VII, Section 7, and Article VIII, Section 2, Iowa Constitution. The taxation of merchants and farmers inventories is constitutional.

LAWRENCE F. SCALISE
ATTORNEY GENERAL

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

March 23, 1965

Honorable William J. Reichardt
State Representative, Polk County
House of Representatives
L O C A L

Dear Sir:

In your letter of February 26, 1965, you state in part:

> "The tax on inventories of merchants and farmers discriminates against a person's opportunity to make a living. Only through the sale of their products can merchants and farmers make a living. These people are being retarded because of the punishment of an inventory tax. This tax attacks only one segment of business, if retained, the professional occupation should be equally penalized for the knowledge that makes them productive. This tax is preventative, discriminatory, and totally dishonest, and it's collection allows blackmail by law.
>
> "I feel this tax violates the constitutional rights of the individual, and I request an opinion from your office."

In addition you state:

> "There are also discriminatory policies in determining inventory size. Some merchants can turn their inventory 40 times a year and other can only turn it one to two times a year, thus severely penalizing the slow-turnover merchants."

As a general rule of law, it may be stated that except as restrained by the authority of the Federal Constitution, the taxing power of the states extends to and embraces all persons, property, and things within its jurisdiction. Lucas vs. Purdy, 142 Iowa 359, 362, 120 NW 1063 (1909). The legislature has inherent power subject to the controlling provisions of the state organic law and the applicable provisions of the Federal Constitution to determine the subjects of taxation and to determine the persons, property, and privileges to be taxed. Carmichael vs. Southern Coal and Coke Co., 301 US 495, 508, 509, 81 L. Ed. 1245, 1252, 1253, 57 S. Ct. 868 (1936). Freedom to select subjects of taxation is inherent in the exercise of the power to tax. Long vs. St. John 126 Fla. 1, 170 So. 317 (1936).

Thus, where there are no constitutional restrictions, the legislature has the right to use its discretion as to the persons, property, or occupations to be taxed. It may tax all property or only certain kinds of property. Savings & Loan Society vs. Multnomah County, 169 US 421, 42 L. Ed. 803, 18 S. Ct. 392 (1898). The Legislature may tax or license any business it so desires. It may tax all occupations or only certain occupations. Everything to which the legislative power extends may be the

subject of taxation. Whether it be person or property, franchise or privilege, or occupation or right. In summary, nothing but the constitutional limitation upon legislative authority can exclude anything from the grasp of the taxing power, if the legislature in its discretion shall select it for revenue purposes. 4 Cooley, Taxation, 177-178. From this discussion, it is our opinion that the tax on inventories of farmers and merchants is a proper subject for taxation.

The power of taxation is exercised subject to certain constitutional requirements and restrictions in the Iowa Constitution. There are four provisions of the Iowa Constitution which impose restriction on the legislative power to tax. The first is the general requirement that all laws of a general nature have a uniform operation. I.C.A. Const. Art. I, Sec. 6. The second provision is the injunction that the general assembly shall not pass local or special laws for the assessment and collection of taxes for state, county, or road purposes, coupled with a reiteration of the requirement that in all cases where a general law can be made applicable, it shall be employed and made of uniform operation throughout the state. I.C.A. Const. Art. III, Sec. 30. Third, every law which imposes a tax must distinctly state the tax and its object. I.C.A. Const. Art. VII,

Sec. 7. A fourth requirement is that the property of corporations for pecuniary profit shall be subject to taxation the same as an individual. I.C.A. Const. Art. VIII, Sec. 2.

As your letter pointed out, the tax through the assessment procedure appears to be discriminatory. It has been frequently recognized by the courts that absolute or perfect equality and uniformity in taxation is impossible. Accordingly, all the courts ask is substantial compliance with the requirements of equality and uniformity in taxation as laid down by the Federal and State Constitutions. Maxwell vs. Bugbee, 250 U.S. 525, 63 L. ed. 1124, 1132, 40 S. Ct. 2 (1919). It is our opinion that even though some merchants can turn on inventory faster than others and even though the tax applies to only a small segment of our population, it substantially complies with the equality and uniformity requirement.

Very truly yours,

/s/ Thomas W. McKay
Thomas W. McKay
Special Assistant Attorney General

TWM:JRS:dj

CITIES AND TOWNS: Civil Service - "leave of absence" to run for public office. §365.12, 365.29, 365.2, 1962 Code. There is no statutory authority for allowing policemen under civil service a "leave of absence" to run for public office.

March 29, 1965

Hon. James D. Resnick
State Representative
L O C A L

Dear Mr. Resnick:

I am in receipt of your letter of March 12 to the Attorney General in which you solicit an opinion in regard to the following:

> "Can a policeman serving under civil service take a leave of absence and run for a public office? If he should lose the election can he then go back on the police force and still retain his seniority."

In order to answer your question I must refer to Section 365, Code of Iowa, 1962, which contains the governing provisions relating to the rights and privileges of persons employed under civil service. A search of this chapter discloses no express authority for granting any civil service employee a "leave of absence" for any reason. It might be argued that Sec. 365.12, because of the following language,

> "365.12 Seniority. For the purpose of determining the seniority rights of civil service employees, seniority shall be computed, begining with the date of appointment to or employment in any positions for which they were certified or otherwise qualified and established as provided in this chapter, but shall not include any period of time exceeding sixty days in any one year during which they were absent from the service except for disability . . .",

contemplates an allowable absence from the service for a period of time not exceeding 60 days in any one year, however, other provisions in Chapter 365 clearly show that the legislature did not intend to allow persons working under civil service a "leave of absence" for any period of time to run for public office. The Iowa Supreme Court in Gibbons v. Sioux City, 242 Iowa 165, 45 N.W. 2d 842, defines "leave of absence" thusly:

> "A leave of absence connotes a permission to be away from a certain place for a stated time with the supposition of returning thereto."

I think that it is an inescapable conclusion that a person absent from the service by virtue of a "leave of absence" is still technically a member of civil service or under civil service, because he can return to his job upon the expiration of his authorized leave without the loss of seniority rights.

The legislature has unequivocally expressed its feelings regarding persons under civil service actively participating in any political campaign in Section 365.29 by use of the following language:

> "365.29 Campaign contributions. No officer or employee under civil service shall, directly or indirectly, contribute any money or anything of value, to any candidate for nomination of election to any office, or to any campaign or political committee, or take any active part in any political campaign except to cast his vote and to express his personal opinion privately, nor shall any such candidate or com-

mittee solicit such contribution or active political support from any such officer or employee. Any person violating any provision of this section shall pay a fine of not less than twenty-five dollars or more than one hundred dollars, or be imprisoned in the county jail not to exceed thirty days." (Underscoring added)

It is also interesting to note that Section 365.2 which contains the following language:

"Commissioners must be citizens of Iowa and residents of the city for more than five years next preceding their appointment, and shall serve without compensation. No person while on said commission, shall hold or be a candidate for any office of public trust." (Underscoring added)

forbids any civil service commissioner from holding a public office or being a candidate for any office of public trust. Apparently, the legislature felt that it would be incompatible for any person connected with the civil service system to actively be in politics.

Based on the foregoing it is my opinion that there is no authority for granting a policeman serving under civil service a leave of absence in order for him to run for public office. Further, it is my opinion that a policeman under civil service must resign from the service before running for public office, and in doing so loses all of his seniority rights accumulated to the date of his resignation.

Respectfully submitted,

/s/ Joseph S. Brick

JOSEPH S. BRICK
Assistant Attorney General

JSB:ms

TAXATION: Sales Tax--Application of sales tax to communication services: Sec. 422.43, Code of Iowa, 1962. State Tax Commission rules consider commercial telephone exchanges to be "communication services" taxable under Sec. 422.43 while newspapers are considered to be a "service," and, as such, exempt from tax.

LAWRENCE F. SCALISE
ATTORNEY GENERAL

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

April 21, 1965

Honorable Harold O. Fischer
House of Representatives
L O C A L

Dear Sir:

In your letter of April 15, 1965, you state as follows:

> "For a considerable period of time there has been a 2% tax on telephone services. To me, this appears to be a pure service tax. In view of this situation, I would like to have your opinion and the basis of that opinion for the exemption from sales or use tax of the equipment and materials used by newspapers in the service which they reportedly perform. As long as communications are set out and taxed, there is no commodity involved and newspapers do communicate."

Section 422.43, Code of Iowa, 1962, provides in part as follows:

> "422.43. Tax Imposed. There is hereby imposed, beginning the first day of April, 1937, a tax of two per cent upon the gross receipts from all sales of tangible personal property, consist-

> ing of goods, wares, or merchandise, except as otherwise provided in this division, sold at retail in the state to consumers or users; a like rate of tax upon the gross receipts from the sales, furnishing or service of gas, electricity, water, heat, and communication service . . ." (Emphasis supplied.)

At the outset, it must be pointed out that the legislature has provided the Iowa State Tax Commission the authority to make rules and regulations with which to effectuate the tax laws. Sections 421.14 and 422.61(1), Code of Iowa, 1962.

In State vs. Manning, 220 Iowa 525, 532, 259 N.W. 213, (1935), the Iowa Supreme Court stated:

> "That the lawmaking body, to wit, the legislature, cannot delegate legislative power, is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by our State Constitution, but the authority to make administrative rules is not a delegation of legislative power."

To require that the legislature enact tax laws that specifically provide for every situation or circumstance that may arise would be to require an impossibility. It is for this reason that administrative bodies exist and are provided with authority to carry out the intention of the legislature. Peoples Gas and Elec. Co. vs. State Tax Comm., 238 Iowa 1369, 1376, 28 N.W. 2d 799 (1947).

Thus, we look to the rules set out by the State Tax Commission. Rule 77, Sales and Use Tax, 1962 I.D.R. 572 states as follows:

> "Rule No. 77. Newspapers, magazines, trade journals, etc. Publishers of newspapers are deemed to be rendering a service to their subscribers and the gross receipts from the sale of newspapers to the public are therefore not taxable. The sales of magazines, trade journals, and other periodicals when sold to consumers or users are sales at retail and the gross receipts from such sales are taxable."

Rule 120, Sales and Use Tax, 1962 I.D.R. 582 states as follows:

> "Rule No. 120. Applies to sales tax only. Commercial telephone exchanges. All telephone exchanges operating switch boards must hold retail sales tax permits and must collect and remit the retail sales tax upon their entire gross receipts from or in connection with the operation of such exchanges.
>
> "The tax shall apply to receipts from the transmission of messages and conversation wholly within the state, for which the exchange collects the charge. In the case of a pay station, the exchange must pay the tax on the total receipts therefrom. Where a minimum amount is guaranteed to the exchange from any pay station, the tax shall be computed on the full amount collected."

A careful reading of these rules points out that the State Tax Commission considers commercial telephone exchanges to be "communication services" taxable under Section 422.43,

Code of Iowa, 1962. Newspapers are considered to be a service and the gross receipts from this sale to the public are not taxable.

Next we look to Rule 121 and Rule 191. Rule 121, Sales and Use Tax, 1962 I.D.R. 583 states as follows:

> "Rule No. 121. Applies to sales tax only. Sales to telephone and telegraph companies. Receipts from sales of tangible personal property to telephone and telegraph companies are taxable under the provisions of the retail sales tax law."

We have found no rule comparable to Rule 121 to apply to sales to newspaper companies. However, Rule 114.2, Sales and Use Tax, 1962 I.D.R. 581 states as follows:

> "Rule No. 114.2. Sales of photographs to newspaper or magazine publishers for reproduction. The sales of photographs by a person engaged in the business of making and selling photographs to newspaper or magazine publishers for reproduction is taxable..." .

Nevertheless, it has been the policy of the State Tax Commission to apply Section 423.1(1)(c), Code of Iowa, 1962, (exclusion for equipment and materials not readily obtainable in Iowa) to newspapers. No doubt there is an inconsistency when the newspaper has been called a "service" for sales tax purposes and "tangible personal property" for use tax purposes.

The only reason we can see for such an inconsistency is an administrative interpretation of a statute that has been of long standing. As a general rule of law, where administrative interpretation of a statute is of long standing, it will not lightly be discarded. N.W. State Portland Cement Company vs. Board, 244 Iowa 720, 58 N.W. 2d 15 (1953). Therefore, any change in taxable status must come from the legislature.

Very truly yours,

/s/ Jerome R. Smith
Jerome R. Smith
Assistant Attorney General

JRS:dj

GENERAL ASSEMBLY - LEGISLATION BY REFERENCE: Legislation by reference is an approved form thereof but such legislation includes other statutes only. House Files 606 and 607 are both legislation by adopting by reference compilations which have no official status.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

May 3, 1965

Hon. Harold O. Fischer
House of Representatives
L O C A L

Dear Harold:

Reference is herein made to yours of the 15th ult., in which reference is made by you with respect to House Files 606 and 607 of the following:

> "It is requested that a legal opinion on the constitutionality of the above indicated bills be furnished to me as soon as possible.
>
> "I question the legality of these two bills because I do not believe it is proper to put into law a publication which is not included in the Code and is only used as a reference. In the event that you have any questions concerning this request please let me know."

The proposed bills are legislation by reference. House File 606 adopts by reference:

> "The state of Iowa hereby ratifies and adopts by reference the interstate vehicle equipment safety compact consisting of ten (10) articles approved by the committee of state officials on suggested state legislation of the council of state governments published in the program of suggested state legislation, 1963."

and House File 607 adopts by reference:

> "The state of Iowa hereby ratifies and adopts by reference the interstate driver license

> compact consisting of nine (9) articles approved by the committee of state officials on suggested state legislation of the council of state governments published in the program of suggested state legislation, 1963."

It is true that legislation by reference is an approved form thereof, but that legislation, as far as diligent research discloses embraces only reference to other statutes and by reference incorporate them into proposed statutes. 50 Am. Jur. titled Statutes, Section 36, states:

> "'Statutes which refer to other statutes and make them applicable to the subject of the new legislation, are called 'reference statutes'. The purpose of such practice is to incorporate into the new act the provisions of other statutes by reference and adoption, and thereby to avoid encumbering the statute books by unnecessary repetition. In the absence of constitutional restrictions, reference statutes are frequently recognized as an approved method of legislation. It is, however, reasonable to suppose that when the legislature undertakes to legislate specifically on a subject it does so fully, and it cannot be deemed to have incorporated into the law parts of a former law unless the language employed is such as to indicate with a reasonable degree of certainty that that was the legislative intention.'"

I find no authority to adopt by reference compilations of the character described in House Files 606 and 607, neither appearing to have official status. These compilations are rules duly adopted by committee, which no doubt are meritorious, but it will be seen by the explanations attached to the bills that they deal with matters of law and become the law of Iowa not by reference but by legislative enactment. See Bergeson vs. Pesch, Commissioner of Public Safety of Iowa,

254 Iowa 223, 117 N.W. 2d 431. The violations of the provisions of these compilations may become the basis of criminal liability and more certainty of the legality of their enactment would be in the public interest.

It would appear that the contents of the compilations referred to are either laws or rules. In either situation there are constitutional and statutory provisions for their adoption. For your information it appears that the method of legislation by reference exhibited in House Files 606 and 607 has precedent in Iowa legislation. Section 231.14 provides the governor with authority to enter into the interstate compact on juveniles as approved by the council of state governments on January 21, 1955. Section 247.10, 1962 Code of Iowa, provides that the governor is authorized to enter into compacts and agreements with other states in reference to reciprocal supervision of persons on parole or probation and for the reciprocal return of such persons to the contracting states for violation of the terms of their parole or probation. Chapter 143, 60th General Assembly, Section 1 thereof, states:

> "The state of Iowa hereby ratifies and adopts by reference the interstate compact on mental health consisting of fourteen articles approved by the committee of state officials on suggested state legislation of the council of state governments published in Suggested State Legislation, Program for 1958."

On information I understand that Alaska is the only other state

which legislates by reference in the form proposed in House Files 606 and 607.

Very truly,

/s/ Oscar Strauss

OSCAR STRAUSS
First Assistant Attorney General

OS:jtm

TAXATION: Real Property. § 428.4, Ch. 441, Code of Iowa, 1962. Statutes regarding quadrennial reassessment of real estate take precedence over 1962 district court decree purporting to set assessed and taxable valuation of certain real estate for a period of ten years.

LAWRENCE F. SCALISE State of Iowa
ATTORNEY GENERAL DEPARTMENT OF JUSTICE
Des Moines, Iowa

May 6, 1965

Mr. Earl E. Hoover
Clay County Attorney
Spencer, Iowa

Dear Mr. Hoover:

In your request for an opinion dated April 21, 1965, you state as follows:

> "In 1962, the District Court in Clay County, Iowa, entered a judgment and decree sustaining an assessment on property owned by the Spencer Shopping Center, Inc., approving a gradual increase of assessment valuation over a ten year period until said assessment equals approximately $180,000.00, and found said assessment to be binding upon the Assessor's Office and Board of Review of Clay County. I enclose a copy of the judgment and decree with this letter for your consideration.
>
> "All property in Clay County has been reappraised as per order of the Iowa State Tax Commission, and the reappraised value of the Spencer Shopping Center is comparable to the appraised values of other property in Spencer and Clay County. However, the taxable value of the Spencer Shopping Center, when assessed at the same 27% ratio, as other property, would be in excess of the taxable value as ordered by the Court decree above referred to. Therefore, the question arises, would the laws of the State of Iowa regarding the quadrennial assessment of real estate take precedence over the Decree of the District Court?"

With reference to your question, it is our opinion that the 1961 assessed valuation of the Spencer Shopping Center, Inc., which was decreed by the Clay County District Court in 1961, was effective only for the years 1961, 1962, 1963, and 1964.

Section 428.4, Code of Iowa, 1962, provides in part as follows:

> "Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. Real estate shall be listed and valued in 1933 and every four years thereafter. . .".

Article XII, Sec. 1(1) Constitution of Iowa states:

> "Supreme Law of the state-laws to carry Constitution into effect
>
> > "Section 1. The Constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void. The General Assembly shall pass all laws necessary to carry the Constitution into effect."

In order to provide for a system of real estate property taxation in Iowa, the General Assembly enacted Sec. 428.4, Code of Iowa, 1962, and Chapter 441, Code of Iowa, 1962. As a general rule of law, courts interfere with acts of the legislature only when the act is in violation of some constitutional prohibition. Youngerman vs. Murphy, 107 Iowa 686, 76 N.W. 648

(1898). A statute will not be declared unconstitutional unless in plain violation of some provision of the constitution. The courts will presume in favor of the constitutionality of a law until the contrary clearly appears. Dickinson vs. Porter, 240 Iowa 393, 35 N.W. 2d 66, (1949).

In the instant case, the Iowa Supreme Court has not declared the applicable law, Sec. 428.4 and Chapter 441, Code of Iowa, 1962, to be unconstitutional. Therefore, these statutes are still effective laws and are considered as laws "necessary to carry the constitution into effect."

Mr. Justice Story in the famous case of Swift vs. Tyson, 41 U.S. (16 Pet.) 1, 10 L. Ed. 865, 871 (1842) stated, "The decisions of the highest court of a state are not the laws of that jurisdiction. In the ordinary use of language, it will hardly be contended that the decisions of the courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws." The Iowa court in Swanson vs. City of Ottumwa, 131 Iowa 540, 550, 106 N.W. 9, 13 (1906) agreed with Justice Story and stated, "A judicial decision is not a 'law.' It is merely evidence of what the law is. . .".

Sec. 428.4, Code of Iowa, 1962, sets up the requirements for real estate to be listed and valued in 1933 and every four years thereafter. Chapter 441, Code of Iowa, 1962, sets up the procedure whereby assessments are made and reviewed under an administrative process. The district court has the power to review virtually all phases of the assessment process, and to raise, lower, or affirm assessments. Sec. 441.38 and 441.43, Code of Iowa, 1962. However, the court has no assessing authority in its own right. Frost vs. Board of Review of Oskaloosa, 114 Iowa 103, 86 N.W. 213 (1901).

It must be pointed out that the Clay County Court attempted by declaratory judgment to bind the Clay County Board of Review, the members of which were not parties to the action. It is a basic doctrine of the law that a party to be affected by a personal judgment must have his "day in court" and his chance to be heard. The judgment of a court without hearing the party or giving him an opportunity to be heard is not a judicial determination of his rights. Earle vs. McVeigh, 91 U.S. 503, 23 L. Ed. 398 (1876), Smith vs. Woolfolk, 115 U.S. 143, 29 L. Ed. 357, 5 S. Ct. 1177 (1884). Thus, all the persons necessary to the full and final determination of the interests

involved should be made parties to a suit in equity. The rights and liabilities of such as are not made parties cannot be adjudicated. Spurgin vs. Adamsen, 62 Iowa 661, 18 N.W. 293 (1883). In the instant case, the court could not bind the board of review. It is our opinion that the board of review must, in any event, carry out its duties as prescribed by Sec. 441.33 and 441.35, Code of Iowa, 1962, as well as Memorandum #138 of the Iowa State Tax Commission (sitting as the State Board of Review) dated July 23, 1963. This memorandum sets statewide standards for valuation and assessments for the statutory real estate assessment year 1965.

Thus, the State of Iowa has effective laws in the Code. The decision of the district court cannot be considered to be the law of the state. Such a decision is merely evidence of what the law is. The decision binds the parties involved for the period of the 1961 assessment. The assessor is bound by the law of the state, Sec. 441.17 and 441.18, Code of Iowa, 1962, to assess the property in question. The board of review can then exercise the powers granted to it by the law.

Sec. 441.35, Code of Iowa, 1962. The decision of the district court cannot incapacitate the law for a decade.

Very truly yours,

/s/ Thomas W. McKay

Thomas W. McKay
Special Assistant Attorney General

TWM:dj

CRIMINAL LAW: Trespass by fisherman. §714.25, 1962 Code of Iowa. The owner of inclosed lands may cause the prosecution of trespassing fishermen even though the owner has stocked his ponds with fish provided by the State Conservation Commission.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

May 10, 1965

Mr. Glen M. McGee
Mills County Attorney
Glenwood, Iowa

Dear Sir:

This is in response to your request for an opinion on the following:

> "The owner of a private pond is contemplating stocking his private pond with fish furnished by the State Conservation Commission. Does this transaction prevent a criminal prosecution under provisions of Section 714.25?"

Sec. 714.25, Iowa Code of 1962, as amended by Chapters 328 and 329 of the Acts of the 60th G.A., is as follows:

> "714.25 Hunting or fishing upon cultivated or inclosed land and waters. Any person who shall hunt with dog, bow and arrow, or gun upon the cultivated or inclosed lands of another, or who shall fish upon the inclosed or cultivated lands containing or encompassing an artificially constructed pond or ponds of another which have been privately stocked with fish, without first obtaining permission from the owner or occupant thereof, or his agent, shall for each offense be fined not more than one hundred dollars and costs of prosecution, and shall stand committed until such fine and costs are paid."

If there is language here which would proscribe prosecution of trespassers, it is the words "privately stocked." The Conservation Commission makes available fish for stocking artificially-constructed ponds. Its customary procedure is to provide the fish to landowners or their agents at certain places: The burden

is on owners or agents to ask for and to come get them. They are required to sign an agreement with the Commission to permit a reasonable amount of fishing in their ponds. They are not required to agree, nor do they agree to permit indiscriminate fishing by trespassers, and the agreement cannot be so construed.

We do not consider the words "privately stocked" to mean the fish must have come from a private source. To do so would mean that anyone who accepts fish from a public source must be considered to have waived his common law rights to the exclusive use and enjoyment of his land, that he must have consented to trespasses, that in effect he must have granted a license to the public at large to come on his land. He has not done so unless he has done so expressly.

It is my opinion that "privately stocked" means only that the landowner himself caused his ponds to be stocked, and that where he obtained the fish to stock his ponds is irrelevant. It does not mean his private pond has now become a public pond, nor does it mean that he cannot invoke Sec. 714.25 to cause prosecution of those who come onto his land without permission.

Nor does this language in the agreement - "owner agrees that ownership of all fish stocked in said pond by the State Conservation Commission, and all progeny of such fish, shall remain in the State of Iowa for law enforcement purposes" - controvert what has just been said. This means merely that the owner agrees not to permit violations of the Commission's rules and regulations in respect to fishing seasons, netting, etc.

Respectfully submitted,

/S/ Robert B. Scism

ROBERT B. SCISM
Assistant Attorney General

RBS:ms

POLICE POWER: Iowa Public Employee's Retirement System -- §97B.9(2) and ¶97B.9(3), 1962 Code of Iowa as amended. A political subdivision may not levy a tax to establish a separate fund from which to pay employer's contribution to the Iowa Public Employee's Retirement System.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

May 11, 1965

Mr. Lee J. Farnsworth
Crawford County Attorney
Crawford County
Denison, Iowa

Dear Mr. Farnsworth:

I am in receipt of your letter of March 22, 1965, to the Attorney General in which you pose the following query:

> "May a tax be levied to establish a separate fund from which to pay the employer's contribution to the Iowa Public Employees Retirement system?"

To aid in answering your question, I shall set out Section 97B.9, 1962 Code of Iowa, as amended, which contains the governing provisions in regard to employer's contribution to the Iowa Public Employees Retirement system, to-wit:

> "97B.9 Taxes - payment and interest. Taxes unpaid on the date on which they are due and payable as prescribed by the commission, shall bear interest at the rate of one-half of one per centum per month from and after such date until payment plus accrued interest is received by the commission, provided that the commission may prescribe fair and reasonable regulations pursuant to which such interest shall not accrue with respect to taxes required. Interest collected pursuant to this section shall be paid into the Iowa public employees' retirement fund.
>
> * * *
>
> "2. The employer shall pay its tax or contribution from funds available and

> is directed to pay same from tax money or from any other income of the political subdivision; provided, however, the tax shall be paid from the same fund as the employee salary.
>
> "3. Every political subdivision is hereby authorized and directed to levy a tax sufficient to meet its obligations under the provisions of this chapter if any tax is needed." (Underline indicates amendment by Acts of the 60th G.A.)

Your question must be answered in the negative not only because the quoted statutory provisions are void of any authority for the establishment of such a fund but also because Chapter 344 of the 1962 Code of Iowa, which, contains the governing provisions in regard to county budgets, is also absent authorization for setting up such a fund.

In addition to a lack of authority, the amendment to Sec. 97B.9(2) and 97B.9(3), added by the Acts of the 60th G.A., Chapter 97, Sec. 10, specifically forbids payment of the employer's tax or contribution from any fund except the employee salary fund.

This amendment was obviously an afterthought and compromise and I believe its purpose is, as you pointed out in your letter, to insure that each department within a political subdivision shows the tax or contribution as an operational cost in its budget.

If the employee salary fund does not possess adequate resources to meet its obligations, the political subdivision may transfer its "tax money or other income" (per Subsection 2) to the salary fund to pay this tax. The subdivision may also levy a tax to supplement the salary fund if existing available funds are exhausted. Regardless then from what source the money is derived, it must be paid out of and shown as an expense of the employee salary fund. Very simply, what the legislature has done is to provide an accounting procedure for departments within a political subdivision, the soundness of which is not in issue.

Based on the foregoing, it is my opinion that a political subdivision may not levy a tax to establish a separate fund from which to pay the employer's contribution to the Iowa Public Employee's Retirement system.

Respectfully submitted,

/s/Joseph S. Brick

JOSEPH S. BRICK
Assistant Attorney General

JSB:ms

TAXATION: Real Property--Taxation of Railway Companies: §§434.1 et seq., Code of Iowa, 1962. Railway companies are responsible to the State Tax Commission to file the required statement for the portion of the year the railroad property was "owned, operated, or leased by" the railway company. The taxing counties are the third party beneficiaries of any agreement made between the lessor and the leasee of the railroad property as to which party will actually pay the taxes.

State of Iowa
LAWRENCE F. SCALISE DEPARTMENT OF JUSTICE
ATTORNEY GENERAL Des Moines, Iowa

May 13, 1965

Mr. Ballard B. Tipton, Director
Property Tax Division
Iowa State Tax Commission
L O C A L

Dear Mr. Tipton:

This is in reply to your letter of March 10, 1965, in which you state as follows:

> "Railroad companies have been merging or are contemplating merging in an increasing number of cases. Such mergers are involving some railroad companies operating in the state of Iowa, and which have been or now are subject to an assessment on their operating property by the Iowa State Tax Commission. The Property Tax Division respectfully requests that an official legal opinion be obtained that would take into account facts and questions set out herein. It would appear desirable for the Commission to have such opinion before the second Monday in July 1965, when under Sections 434.1 and 434.15, Code 1962, it proceeds to assess railway companies for taxation.
>
> "Factual Matter:
>
> "At 12:01 A.M. E.S.T. October 16, 1964, the properties of the Wabash Railroad Company were leased to and have been operated by the Norfolk and Western Railway Company. It appears

that The Wabash Railroad Company still exists as a non-operating shell corporation. It further appears that some former Wabash R.R. Co. locomotives operating in the state of Iowa subsequent to October 16, 1964, have been re-stenciled with N. & W. Ry. Co. insignia. For several years last past The Wabash R.R. Co. has reported annually to the Iowa State Tax Commission in accordance with Section 434.1, Code of Iowa, 1962, and its operating property in this state has each year been assessed by said Commission. Its 1964 Report to the Commission showed that it was in the year 1963 operating over 191 main track miles in the state of Iowa. On the basis of its 1963 operations reported for its 1964 assessment, said Company had a 3-factor formulaic value to this state in the amount of $3,505,000. On August 11, 1964, the Commission found the 1964 actual value of the Company's property to be $2,336,677. and the 1964 assessed value was determined by the Commission to be $1,402,006. The Norfolk and Western Railroad Company did not have any operations or property in the state of Iowa prior to October 16, 1964, and was not being assessed by the Iowa State Tax Commission. The Wabash Railroad Company operated its trains into the State of Iowa day to day during the period January 1, 1964 to and including October 15, 1964. It had operating properties in several counties in the state of Iowa during that 9½ months period. It had gross earnings for that period of time arising from railroad operations of the Company in this state. The annual assessment by the Iowa State Tax Commission on the operating properties of The Wabash Railroad Company has ranged from about $2 million in 1954 down to $1.5 million in 1964.

"Question 1.

"Is it required under the laws of the state of Iowa that the operating property of The Wabash Railroad Company that was within the state of Iowa all or some part of the period January 1, 1964, to and including October 15th, 1964, along with other data, such as gross earnings and related matters, be reported to the Iowa State Tax Commission for purpose of assessment under Chapter 434, Code of Iowa? (Referring to a report to be filed in 1965).

"Question 2.

"If the answer given to Question 1 is 'Yes', then is such report of operating property, gross earnings, and other data and figures to be filed with the Iowa State Tax Commission by the Norfolk & Western Railroad Company? If not, then by whom?

"Question 3.

"If the answer given to Question 2 is 'Yes', then shall such report be made and filed separate and apart from the report that The Norfolk & Western Railroad Company is required to make under Chapter 434, Code of Iowa, 1962, as to its operations in the state of Iowa, October 16, 1964, to December 31, 1964, inclusive?

"Question 4.

"If the operations in Iowa of The Wabash Railroad Company for the period January 1, 1964, to October 15, 1964, inclusive, are reported to the Iowa State

Tax Commission in the year 1965, then shall the Commission's assessment thereon be made against The Wabash Railroad Company and certified under that name to the County Auditors involved or shall such assessment be made against The Norfolk and Western Railroad Company and certified under that name to the respective counties?

"Question 5.

"Assuming that report is properly filed with the Iowa State Tax Commission and assessment is made by the Commission on the operating property of The Wabash Railroad Company for the period January 1, 1964, to October 15, 1964, inclusive, and such assessment is certified to the counties involved, would The Norfolk and Western Railroad Company have liability for payment of the 1965 taxes collectible in 1966, based on such assessment?"

1. In answer to your first question, it must be pointed out that within limitations set forth by various state statutes and the charter of the individual corporations, a corporation may lease its property to another corporation. While such lease is not strictly either a consolidation, merger, or sale of assets, it may, when the term is long enough, amount to practically the same thing. Fletcher, Cyclopedia of Private Corporations, Section 7047 (perm. ed. rev. repl. 1961) Kaufman vs. Pittsburgh & C.S.R. Co., 217 Pa. 599, 66 A 1108 (1907). In a strictly legal sense, the mere sale or lease of all its property by a corporation and the distribution of its assets do

not work a dissolution of the corporation. Beidenkopf vs. Des Moines L. Ins. Co., 160 Iowa 629, 142 N.W. 434 (1913). The Wabash RR Co. is, in effect, a corporation with obligations.

With respect to this question, the following sections of the Iowa Code are applicable:

> "Section 434.1. When assessed -- statement required. On the second Monday in July of each year, the state tax commission shall assess all the property of each railway corporation in the state, excepting the lands, lots, and other real estate belonging thereto not used in the operation of any railway, and excepting railway bridges across the Mississippi and Missouri rivers, and excepting grain elevators; and for the purpose of making such assessment its president, vice-president, general manager, general superintendent, receiver, or such other officer as the state commission may designate, shall, on or before the first day of April in each year, furnish it a verified statement showing in detail for the year ended December 31 next preceding:
>
> > "1. The whole number of miles of railway owned, operated, or leased by such corporation or company within and without the state.
> >
> > "2. The whole number of miles of railway owned, operated, or leased within the state, including double tracks and sidetracks, the mileage of the main line and branch lines to be stated separately, and showing the number of miles of track in each county.

* * *

"8. Any and all other moveable property owned by said railway within the state, classified and scheduled in such manner as may be required by said state commission.

"9. The gross earnings of the entire road, and the gross earnings in this state.

"10. The operating expenses of the entire road, and the operating expenses within this state.

"11. The net earnings of the entire road, and the net earnings within this state."

The statute must be construed according to the provisions of Section 4.1(2), Code of Iowa, 1962, which directs that "words and phrases shall be construed according to the context and approved usage of the language. . ." It is our opinion that the statute requires that the detailed, verified, statement be filed by the Wabash Railroad Company for the year 1964, for Section 434.1(1) specifically states that the report show "the whole number of miles of railway <u>owned</u>, <u>operated</u>, or <u>leased</u> by such corporation or company within and without the state." The word "leased" may properly be used in two senses, first in describing the act

of the lessor in giving the lease, and again in describing the act of the lessee in taking the lease. Stone vs. City of Los Angeles, 114 Cal. App. 192, 299 P. 838 (1931).

The Wabash Railroad Company owned, operated, or leased property within the State of Iowa during the year 1964. On January 1, 1965, the Wabash owned and leased property within and without the state of Iowa. Therefore, a report is required.

2. In regard to your second question, it is our opinion that the Wabash Railroad Company is a corporation with the obligation to make a report for the entire year of 1964, even though it ceased to operate the railroad property at 12:01 am EST, Oct. 16, 1964. Our reasons are stated in the answer to question 1, supra.

The Norfolk and Western also must furnish the verified statement required by Section 434.1 for it operated and leased a railroad in Iowa. As pointed out before, the statute requires that the report show "the whole number of miles of railway owned, operated, or leased by such corporation. Since the Norfolk and Western Railroad operated and leased a railroad in 1964 that operated within the state of Iowa, it too must file the report.

3. With regard to your third question, it is our opinion that the most equitable solution would be as follows: The Wabash Railroad Company must furnish the required statement for the period of January 1, 1964, to October 16, 1964, as the operator of the railroad. The Norfolk and Western must furnish the required statement for the period of October 16, to December 31, 1964, as operator of the railroad in Iowa. The Property Tax Division of the Iowa State Tax Commission would consolidate the figures presented by both statements and assess the property as a unit. However, the Wabash Railroad Company as a lessor, will remain responsible at all times to produce a statement for the period of October 16, 1964, to December 31, 1964, if so deemed necessary by the Property Tax Division of the Iowa State Tax Commission.

4. With the answer to question three in mind, we turn to question four. Since the Property Tax Division of the Iowa State Tax Commission will consolidate the figures presented by the statements of both the Wabash and Norfolk and Western Railroad. It is our opinion that for the sake of uniformity and to be consistent with the Lease Agreement, the assessment should be made against the Norfolk and Western Railroad Company and certified under that name to the respective counties. In support of this position, we quote Section 4(j)

of the Amendment to the Lease Agreement between the two railroads dated October 1, 1964, which states as follows:

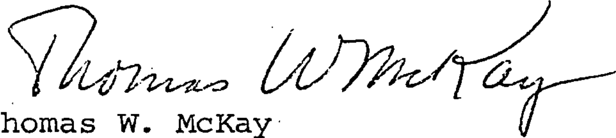
> "(j) All taxes, assessments and government charges, ordinary and extraordinary, regardless of whether relating to or accrued or payable in respect of a period prior to the effective date of this Lease, which are lawfully imposed upon Lessor or the demised property or its income or earnings or upon any amount payable to any security holder of Lessor which Lessor has agreed to pay or discharge, except for any federal income taxes of Lessor upon the rent paid pursuant to subdivisions (e) and (f) of this Section 4, and except for any taxes arising after commencement of the term of this Lease in respect of non-demised property or the income therefrom. The foregoing sums shall be paid or discharged by Lessee as and when they become due and payable."

Under the law of the State of Iowa, Section 434.1 et seq., Code of Iowa, 1962, the Wabash Railroad would not be relieved of its responsibility for the assessment because it suspended operation in the state of Iowa.

5. The answer to your last question must be in the affirmative. It is our opinion that the N. & W. R.R. Co. would, as a result of its agreement, have liability for payment of the 1965 taxes. The taxing counties are third party creditor beneficiaries of the agreement under which the N. & W. R.R. Co. agrees to pay all taxes due on behalf of the Wabash R.R.

Co. and itself. Thus, the taxing counties could enforce the promise made for its benefit even though it is a stranger both to the contract and to the consideration. In Re Disinterment of Tow, 243 Iowa 695, 698, 53 N.W. 2d 283 (1952).

Very truly yours,



Thomas W. McKay
Special Assistant Attorney General

TWM:JRS:dj

TAXATION: Moneys and Credits--§§428.1, 428.8, Code of Iowa, 1962. Portions of joint bank accounts located in banks outside of Iowa and allocable to residents of Iowa are subject to moneys and credits tax.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

LAWRENCE F. SCALISE
ATTORNEY GENERAL

May 14, 1965

Richard G. Davidson, Esq.
Page County Attorney
Clarinda, Iowa

Dear Mr. Davidson:

In your letter of May 7, 1965, you state as follows:

> "We have been asked for a clarification of your opinion No. 21-10, 62 O.A.G., Page 461. In the printed opinion you are dealing with the taxability of moneys and credits under Section 429.4, 1958 Code of Iowa, of an Iowa resident who owned bank accounts in New York. On the theory of the Iowa Supreme Court in Crane vs. Des Moines, 208 Iowa 167, it was held that personal property being mobile in character followed the domicil of the owner. The holding of the opinion is that such New York bank account is subject to Iowa moneys and credit taxes because the Owner was an Iowa resident. A somewhat similar area in reflected in 60 O.A.G., Page 264, No. 21.43.
>
> "We have the problem of bank accounts owned by A, B, C, and D as joint tenants with rights of survivorship, the accounts being located in Ohio and Nebraska, with A and B living in Ohio and C and the Estate of D residents of Iowa. Are such accounts subject to moneys and credits tax?

65-5-10

> "We are tempted to raise the question whose money created the bank account, and which of the four tenants enjoyed income, but feel the basis of the 1962 OAG or '61 Opinion denies any standard of Ownership excepting Iowa residency.
>
> "What of the impact of Section 428.1 and 428.8 on this problem?"

Section 428.1, Code of Iowa, 1962, provides in part as follows:

> "428.1. Listing - by whom. Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed:
>
> * * *
>
> "4. The personal property of a decedent, by the executor or administrator, or if there is none, by any person interested therein.

Section 428.8, Code of Iowa, 1962, is also pertinent and states in part:

> "428.8. Place of listing. Moneys and credits, notes, bills, bonds, and corporate shares or stocks not otherwise assessed, shall be listed and assessed where the owner lives, except as otherwise provided. . . ".

It is our opinion that the allocable portions of the bank accounts owned by C and the Estate of D, who are residents of Iowa, are subject to moneys and credit tax.

As a general rule, it must be pointed out that the situs of intangible personal property for the purposes of taxation is the domicile of the owner. In Crane Company vs. City Council of Des Moines, 208 Iowa 164, 166, 225 N.W. 344 (1929), the Iowa Supreme Court stated:

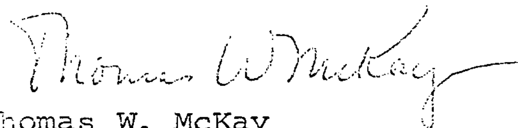
> "Intangible personalty includes open accounts, credits, (whether or not evidenced by writing), promissory notes, mortgages, bonds, shares of stock, deposits in bank, judgments, etc., where the debt or obligation is the real thing which is sought to be taxed. The general rule is that the situs of intangible personal property for the purposes of taxation is the domicile of the owner."

The Iowa Supreme Court held in Hunter vs. The Board of Supervisors, et al, 33 Iowa 376, 11 AR 132 (1871) that where a resident of Iowa had deposited some promissory notes in Illinois for safe keeping, said notes were subject to taxation even though they had never been brought into Iowa. The Court stated as follows: "The right to the 'money due' being in the appellant

(Iowan), the property in the right must, of necessity, be at the place where he resides, irrespective of the situs of the evidence." Supra at 379.

Section 428.6, Code of Iowa, 1962, quoted supra, reiterates this proposition. Both C and the Estate of D must act according to Chapter 428.1, Code of Iowa, 1962, quoted supra. The allocable portions of the bank accounts owned by C and the Estate of D are subject to moneys and credit tax.

Very truly yours,



Thomas W. McKay
Special Assistant Attorney General

TWM:JRS:dj

TAXATION: Exemptions -- §97A.12, Code of Iowa, 1962. All pensions, annuities, retirement allowance and other rights mentioned in §97A.12, as well as the amount contributed by the employee are exempt from any tax of this state.

State of Iowa
LAWRENCE F. SCALISE DEPARTMENT OF JUSTICE
ATTORNEY GENERAL Des Moines, Iowa

May 18, 1965

Mr. Gene L. Needles, Director
Law Enforcement Division
Iowa Liquor Control Commission
East 7th and Court Avenue
Des Moines, Iowa 50308

Dear Sir:

We are in receipt of your letter of May 11, 1965, in which you state as follows:

> "Several of our agents are interested in the interpretation given to Section 97A.12. This section of the Code has to do with the exemption from taxation the pension or annuity received by retired police officers, highway patrol officers, and etc.
>
> "One reading of this section would lead one to conclude that the entire pension or annuity is exempt from State Income Tax. Another reading of it would lead you to believe that the exemption only applies to the amount contributed by the employee.
>
> "Please give us the interpretation to this section."

Section 97A.12, Code of Iowa, 1962, states as follows:

65-5-11

> "97A.12 Exemption from taxation and execution. The right of any person to a pension, annuity, or retirement allowance, to the return of contributions, the pension, annuity, or retirement allowance itself, any optional benefit or death benefit, any other right accrued or accruing to any person under the provisions of this chapter, and the moneys in the various funds created under this chapter, are hereby exempt from any tax of the state and shall not be subject to execution, garnishment, attachment, or any other process whatsoever, and shall be unassignable except as in this chapter specifically provided."

Section 4.1(2), Code of Iowa, 1962, points out that words and phrases shall be construed according to the context and approved usage of the language. . .". It is a fundamental principal of statutory construction "that words of a statute are to be given their accepted meaning in law, and that courts will not give a statute construction contrary to plain, unambiguous language. . .". Sears vs. City of Maquoketa, 183 Iowa 1104, 166 N.W. 700 (1918), Scott vs. Wamsley, 218 Iowa 670, 253 N.W. 524 (1934).

It is our opinion that all pensions, annuities, retirement allowances and other rights mentioned in Sec. 97A.12,

supra, as well as the amount contributed by the employee, are exempt from any tax of this state.

Very truly yours,

/s/ Thomas W. McKay
Thomas W. McKay
Special Assistant Attorney General

TWM:f

TAXATION: Use Tax - §§423.1, 423.2 and 423.7, Code of Iowa, 1962. Use tax cannot be imposed and collected upon a vehicle which had been previously registered in the State of Iowa, and upon which use tax has been collected once.

LAWRENCE F. SCALISE
ATTORNEY GENERAL

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

May 18, 1965

Ira Skinner, Esq.
County Attorney, Buena Vista County
Fritcher Building
Storm Lake, Iowa

Dear Sir:

We are in receipt of your letter dated April 26, 1965, in which you state as follows:

> "A question arises concerning the collection of the use tax provided for in Sections 423.2 and 423.7 of the 1962 Code of Iowa on a used motor vehicle. The factual situation concerning this is as follows:
>
> "A. A resident of Buena Vista County purchased a new motor vehicle in the State of Nebraska and brought the vehicle into Buena Vista County where he registered said vehicle and paid the use tax provided for in Sections 423.2 and 423.7, which tax was collected by the County Treasurer of Buena Vista County.
>
> "B. Subsequent thereto the owner took the vehicle back into the State of Nebraska and traded it off on another vehicle.

"C. Another resident of the State of Iowa went into Nebraska and purchased said vehicle and brought it back into Buena Vista County for the purpose of using it here in Buena Vista County. The County Treasurer has refused to register and license said vehicle unless and until the tax provided for in Sections 423.2 and 423.7 of the 1962 Code of Iowa has been paid.

"Because this vehicle is not a new vehicle within the purvue of Section 423.7, it would appear that the use tax to be imposed would have to be imposed by virtue of Section 423.2. The question arises as to whether or not a use tax would apply to this vehicle in view of the fact that it has previously been registered in and licensed in Buena Vista County, State of Iowa, and a use tax paid. The vehicle in question carries Iowa license plates at the present time.

"Under Rule #200 of the RULES AND REGULATIONS RELATING TO RETAIL SALES AND USE TAX, it is stated 'by virtue of the authority granted in the above sub-section, (referring to 422.64) the Commission does hereby authorize and direct the County Treasurer to collect use tax upon each used motor vehicle and used trailer registered in Iowa <u>for the first time</u> unless such vehicle comes within the exemptions mentioned herein.'

"The question for determination is whether or not the Treasurer of Buena Vista County can refuse to register and license said used motor vehicle because of the refusal of the purchaser to pay the use tax in view of the fact that the vehicle in question was registered as a new motor vehicle in Iowa and a use tax paid under the provisions of Section 423.7 of the 1962 Code of Iowa.

"In other words, can the use tax provided for in Section 423 be imposed and collected more than once on any one motor vehicle?

"Section 423.2 provides that the tax is imposed 'until such tax has been paid directly to the County Treasurer, to the retailer, or to the Commission as hereinafter provided'. In this case the tax was paid to the County Treasurer of Buena Vista County at the time the vehicle was a new vehicle."

Section 423.1, Code of Iowa, 1962, states as follows:

"Section 423.1 Definitions

* * *

"7. 'Motor vehicle' shall mean every motor vehicle, as is now or may hereafter be so defined by the motor vehicle law of this state, which is required to be registered under such motor vehicle law.

"'New motor vehicle' shall mean any motor vehicle of a type subject to registration under the laws of this state <u>which has not been previously registered in this or any other state</u>.

"'Used motor vehicle' shall mean any other motor vehicle.'"

Section 423.2 and 423.7, Code of Iowa, 1962, provide for the imposition of use tax on motor vehicles. These statutes provide as follows:

"Section 423.2 Imposition of Tax.

"An excise tax is hereby imposed on the use in this state of tangible personal property purchased on or after April 16, 1937, for use in this state, at the rate of two percent of the purchase price of such property. Said tax is hereby imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the commission as hereinafter provided."

Section 423.7 Motor Vehicles.

"The tax hereby imposed upon the use of new motor vehicles and new trailers shall be paid by the owner thereof to the county treasurer from whom the original certificate of registration for such motor vehicle or trailer is obtained. No original certificate of registration for any new motor vehicle or new trailer shall be issued until said tax has been so paid. The county treasurer shall require every applicant for an original certificate of registration for any new motor vehicle or new trailer to supply such information as he or the commission may deem necessary as to the time of purchase, the purchase price, and other information relative to the purchase of said motor vehicle or trailer... ."

At the outset, it must be pointed out that the legislature has provided the Iowa State Tax Commission the authority to make rules and regulations with which to effecuate the tax laws. Sections 421.14 and 422.61(1), Code of Iowa, 1962.

In State vs. Manning, 220 Iowa 525, 532, 259 N.W. 213, (1935), the Iowa Supreme Court stated:

> "That the lawmaking body, to wit, the legislature, cannot delegate legislative power, is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by our State Constitution, but the authority to make administrative rules is not a delegation of legislative power."

To require that the legislature enact tax laws that specifically provide for every situation or circumstance that may arise would be to require an impossibility. It is for this reason that administrative bodies exist and are provided with authority to carry out the intention of the legislature. Peoples Gas and Elec. Co. vs. State Tax Comm., 238 Iowa 1369, 1376, 28 N.W. 2d 799 (1947).

Thus, we look to the rules of the State Tax Commission. Rule 200, Sales and Use Tax, 1962, I.D.R. 604, states as follows:

> "Rule 200. Used vehicles. Code section 423.7 refers to new motor vehicles and new trailers. Authority for the collection of use tax on used motor vehicles and trailers by the county treasurer is found in this rule and subsection five of section 422.64.

"By virtue of the authority granted in the above subsection, the commission does hereby authorize and direct county treasurers to collect use tax upon each used motor vehicle and used trailer registered in Iowa for the first time unless such vehicles come within exemptions mentioned herein.

"Section 422.64 is made a part of the use tax law by reference thereto in section 423.23."

Rule 201, Sales and Use Tax, 1962, I.D.R. 605, states in part as follows:

"Rule No. 201 * * *

"Each motor vehicle and trailer, whether new or used, which is registered for the first time in Iowa, and each motor vehicle and each trailer registered or purchased in a state other than Iowa the year preceding its registration in this state, is taxable, provided such a motor vehicle or trailer was purchased by the applicant on or after the sixteenth day of April, 1937. * * *"

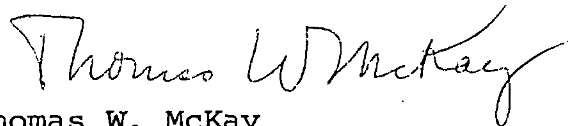
It is our opinion that the use tax provided for under Chapter 423, Code of Iowa, 1962, cannot be imposed and collected on the vehicle in question. Rule 200, Sales and Use Tax, quoted in full supra, states that "the Commission does hereby authorize and direct county treasurers to collect use tax upon each used motor vehicle . . . registered in Iowa for the first time. . . " . Rule 201, Sales and Use Tax, quoted

in full supra, reiterates that the county treasurer should collect use tax on "each motor vehicle. . . whether new or used, which is registered for the first time in Iowa. . .".

The facts clearly point out that the vehicle in question carries Iowa license plates at the present time. Thus, said vehicle has been registered at least once before in Iowa and should not be taxed under either Rule 200 or Rule 201.

The vehicle itself does not come within the purview of the definition of a new vehicle in Section 423.1(7), quoted supra; therefore, Section 423.7 supra is inapplicable. The authority to tax the used vehicle is found in Rule 200, Sales and Use Tax, supra. Since we have already stated that the use tax cannot be imposed under Rule 200, Sales and Use Tax, supra, there can be no tax on this vehicle.

Very truly yours,



Thomas W. McKay
Special Assistant Attorney General

TWM/f

COUNTY BOARD OF SUPERVISORS: Highways; Accumulation of funds for bridge-building; §§ 309.3, 310.20, 310.27, 1962 Code of Iowa. County Board of Supervisors may accumulate road funds for bridge construction.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

May 21, 1965

Mr. Max R. Werling
Cedar County Attorney
122 West Fifth Street
Tipton, Iowa

Dear Mr. Werling:

This is in response to your request for an opinion dated February 5, 1965, addressed to the Attorney General of the State of Iowa.

Your request for an opinion pertains to the Cedar County Board of Supervisors and their Resolution to lay away $50,000.00 a year to accumulate a fund to be expended in the building of three (3) bridges at a total cost of $500,000.00 each. You have stated that this program is to extend over ten years. Your request is whether or not the Board of Supervisors may accumulate these funds over this period of time.

Section 309.3, 1962 Code of Iowa, defines the type of bridge system referred to in your query.

> "Secondary Bridge System. The secondary bridge system of a county shall embrace all bridges and culverts on all public highways within the county except on primary roads and on highways within cities which control their own bridge levies, except that culverts which are thirty-six inches or less in diameter shall be constructed and maintained by the city or town in which they are located." (Emphasis supplied)

Your specific questions pertaining to the legality of such accumulation will be answered separately and individually, wherever possible.

I.

> "Par 1, May a county accumulate local tax funds for a future expenditure and if so is there a time or amount limitation?"

It is our opinion that "county local road tax funds" may be accumulated for future expenditure and this accumulation is not limited as to time or amount. This opinion is based on the fact that we find no statutory prohibition which would limit or restrict such accumulation.

II.

"Par 2. May a county accumulate funds in the farm to market road fund earmarked for the purpose of bridge building subject, of course, to the three a year limitation statute?"

Funds in a county farm-to-market road fund may be accumulated and "ear-marked" for the purpose of bridge building, subject to the three-year limitation statute. This authority is clearly expressed in Section 310.27, 1962 Code of Iowa:

"Period of allocation--reversion. The farm-to-market road fund allotted to any county as provided in this chapter <u>shall remain available for expenditure in said county for three years after the close of the calendar year during which said sums respectively were allocated</u>. Any sum remaining unexpended at the end of the period during which it is available for expenditure, shall be reapportioned among all the counties as provided in section 312.5 for original allocations.

"For the purposes of this section, any sums of the farm-to-market road fund allotted to any county <u>shall be presumed to have been 'expended' when a contract shall have been let by the state highway commission obligating said sums</u>." (Emphasis supplied)

III.

"Par 3. If local funds may not be accumulated separately may they be transferred into the farm to market road fund for accumulation?"

This question is partially answered in our answer to your paragraph 1 and to complete the answer to this question, we would advise that local funds (we assume you mean local road tax funds) may be transferred into the farm-to-market road fund for accumulation. With reference to Section 310.20, 1962 Code of Iowa, this should be sufficient authority for the transferring of local road tax funds into the farm-to-market road fund.

> "Supervisors resolution to state treasurer. Any county may, in any year, by resolution of its board of supervisors, make available for improvement or construction of farm-to-market roads within the county any portion of its allotment of road use tax funds. Upon certification of such a resolution, the state treasurer shall place in the county's allotment of the farm-to-market road fund the amount authorized by such resolution." (Emphasis supplied)

Once local road tax funds have been transferred to a county farm-to-market road fund they become part of the farm-to-market road fund and lose their identity as local road tax funds. This means that they, as all other farm-to-market road funds, become subject to Section 310.27, 1962 Code of Iowa, as stated above.

IV.

> "Par 4. If local funds are mingled with farm to market funds for the purpose of building a bridge what limitations, if any, prevail regarding letting of contracts and maximum amount of funds expendable without voter approval?"

The answer to this inquiry is also contained in Section 310.27, 1962 Code of Iowa, inasmuch as you have assumed (correctly) that local road tax funds may be mingled with farm-to-market road funds and, as such, are restricted by any and all restrictions applicable to farm-to-market road funds.

V.

> "Par 5. Is it still the opinion of the Attorney General's Office that County Boards of Supervisors may spend from the farm to market fund for road and bridge construction without submitting the question to the electors?"

Your paragraph five was probably predicated on 1954 OAG 157. It is still the opinion of the Attorney General of the State of Iowa that County Boards of Supervisors may spend farm-to-market road funds for road and bridge construction without submitting their resolution to the voters.

You should note in Section 310.27, 1962 Code of Iowa, that farm-to-market road funds must be expended within a period of three years from date of availability or they will be reapportioned as provided by Section 312.5, 1962 Code of Iowa.

"Period of allocation--reversion. The farm-to-market road fund allotted to any county as provided in this chapter shall remain available for expenditure in said county for three years after the close of the calendar year during which said sums respectively were allocated. Any sum remaining unexpended at the end of the period during which it is available for expenditure, shall be reapportioned among all the counties as provided in section 312.5 for original allocations.

"For the purposes of this section, any sums of the farm-to-market road fund allotted to any county shall be presumed to have been '<u>expended</u>' when a contract shall have been let by the state highway commission obligating said sums."
(Emphasis supplied)

Respectfully submitted,

/s/ Robert L. Martin

ROBERT L. MARTIN
Assistant Attorney General

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TAXATION: Taxing District Defined. A taxing district is the area throughout which a particular tax or assessment is ratably apportioned and levied upon the inhabitants.

LAWRENCE F. SCALISE
ATTORNEY GENERAL

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

May 26, 1965

Charles E. Vandebur, Esq.
County Attorney
Story County
537 Main Street
Ames, Iowa

Dear Sir:

We beg to acknowledge receipt of your letter dated May 17, 1965, requesting an opinion from this office. Your letter asks "What is a taxing district?"

It is our opinion that a workable definition of a taxing district is the area throughout which a particular tax or assessment is ratably apportioned and levied upon the inhabitants.

As a general rule of law, the creation and determination of the taxing districts within the state are within the discretion of the legislature. In the absence of fraud or gross abuse of discretion, such districts as set up by the legislature will not be disturbed by the courts. Mitchell vs. Charles City W. Ry., 169 Iowa 237, 148 N.W. 975 (1915). However, the legislature may delegate this power to other bodies or persons. Mitchell vs. Charles City W. Ry., supra, at 247.

It must be pointed out that under the Constitution of the State of Iowa, Article III, Section 1, the power of taxation is vested in the legislature. However, the legislature may for proper and legitimate purposes confer the taxing power upon *municipalities*, but such power cannot be delegated without the consent of the people of the *municipality*, to any body or person not elected by . . . and responsible to the people. State vs. Mayor, Etc., of Des Moines,

103 Iowa 76, 72 N.W. 639 (1897). Munn vs. Board of Supervisors of Greene County, 161 Iowa 26, 141 N.W. 711 (1913).

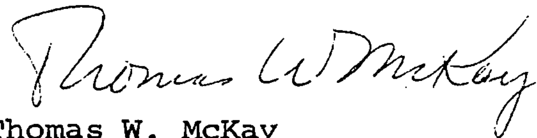
To define the word "municipality," we look to the Local Budget Law, Chapter 24, Code of Iowa, 1962. Section 24.2, Code of Iowa, 1962, states as follows:

> "Section 24.2 Definition of terms.
>
> "As used in this chapter and unless otherwise required by the context:
>
> "1. The word 'municipality' shall mean the county, city, town, school district, and all other public bodies or corporations that have power to levy or certify a tax or sum of money to be collected by taxation, but shall not include any drainage district, township, or road district."

Thus, state, county, city, town, school districts and all other public bodies or corporations that have the power to levy or certify a tax can be considered taxing districts. Sections 455.57 and 455.59, Code of Iowa, 1962, provide for a levy by a levee and drainage district. This would also be considered a taxing district. Finally, the legislature has the power to create a special taxing district for the purpose of making local improvements, and its boundaries need not coincide with the boundaries of counties or other municipalities. 4 Cooley, Taxation, 210.

A complete discussion of the term "taxing district" can be found in Volume 1 of 4 Cooley, Taxation.

Very truly yours,



Thomas W. McKay
Special Assistant Attorney General

TWM/JRS/f

INTERSTATE HIGHWAY SYSTEM: Certified checks: 23 U.S.C. 112(a): §541.188, 1962 Code of Iowa: Policy and Procedure Memorandum No. 21-6.3, §5. It is an unreasonable restriction on behalf of the Iowa State Highway Commission to require bidders to submit a certified check drawn on a solvent Iowa Bank with their bid proposals.

May 27, 1965

Mr. L.M. Clauson
Chief Engineer
Iowa State Highway Commission
Ames, Iowa

Dear Mr. Clauson:

In responding to your request for our opinion as to the validity of the Iowa State Highway Commission's requirement that certified checks accompanying bid proposals be drawn on solvent Iowa banks, we would refer you to 23 U.S.C. 112(a):

> "In all cases where the construction is to be performed by the State highway department or under its supervision, a request for submission of bids shall be made by advertisement unless some other method is approved by the Secretary. The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition."

The last sentence of this federal regulation is pertinent to the existing conflict between the Iowa State Highway Commission and the Federal Bureau of Public Roads. By way of further support of the position being taken by the Bureau of Public Roads, they cite Policy and Procedure Memorandum No. 21-6.3, §5c:

> "Bidding procedures on a nondiscriminatory basis shall be afforded to all qualified bidders regardless of State boundaries. If any provisions of such State laws, specifications, regulations, or policies, in any manner contrary to Federal requirements, may operate to prevent submission of a bid, or prohibit consideration of a bid submitted by any responsible contractor appropriately qualified by evaluation of his experience, equipment, financial resources and performance record, such provisions shall not be applicable to Federal-aid projects. Where such nonapplicable provisions exist, the division engineer shall not approve any Federal-aid project unless notices of advertising, specifications, special provisions or other governing documents include a

> positive statement to advise clearly those provisions that are not applicable."

The Bureau of Public Roads contends that the requirement that bidders procure their certified checks from solvent Iowa banks is an unreasonable restriction, particularly on foreign contractors. The key word in the determination of this requirement's validity is "reasonable".

In appropriately defining the word "reasonable", we find very little concrete support in Words and Phrases and it would appear that the most concise and logical definition of the term "reasonable" is that anything not unreasonable is reasonable.

Applying this definition to the application of the term "reasonable" as used by the implication in Policy and Procedure Memorandum No. 21-6.3, §5c, the requirement of certified checks drawn on solvent Iowa banks is discriminatory in that foreign bidders are inconvenienced by this requirement, whereas domestic bidders are not so necessarily inconvenienced. This requirement further burdens the foreign bidder, whose normal banking procedures are not conducted in Iowa, in that he must establish credit in Iowa, at least to the satisfaction of the solvent Iowa bank from whom your present proposal form requires him to purchase the certified check. Any requirement which places a higher burden, regardless of degree, on one bidder as opposed to another, can only be considered as discriminatory.

If the Iowa State Highway Commission's bid proposal form deleted the word "Iowa" from the proposal form, itself, and conformed to §1102.05 of your Standard Specifications for Construction on Primary, Farm-to-Market and Secondary Roads and Maintenance Work on the Primary Road System, published by the Iowa State Highway Commission, 1964 publication, there would be no discrimination as between domestic and foreign bidders in that this section does not require a certified check to be drawn on a solvent Iowa bank, but merely a solvent bank. The adoption of this section of your Standard Specifications publication and incorporation thereof in the bid proposal form No. 823 and form No. 381D would permit foreign contractors to purchase their proposal guaranty certified checks from solvent banks, regardless of their location.

Very truly yours,

/s/ Raymond T. Walton

RAYMOND T. WALTON
Special Assistant Attorney General

RTW/RLM/se

DRAINAGE DISTRICT: § 455.201, 1962 Code of Iowa. The Board of Supervisors has the duty to employ an engineer; however, the Agricultural Soil Conservation Commission is ineligible for such appointment.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

June 1, 1965

Mr. Dewayne A. Knoshaug
Wright County Attorney
Clarion, Iowa

Dear Mr. Knoshaug:

Reference is herein made to yours of the 24th ult., in which you stated:

> "The undersigned desires a ruling from your office on the question of the status of an engineer where a drainage district is established under the provisions of Section 455.201 et following of the Iowa Code.
>
> "A petition was filed with the Board of Supervisors for such a district. The A S C recommended establishment of the district and filed plans for the proposed improvement. The Board of Supervisors appointed an engineer who filed bond. He approved the report made by the A S C. After hearing on notice the Board of Supervisors today established the district and approved the plan.
>
> "Does the District need an engineer (appointed by the Board) from here on out or does the A S C act as the engineer?
>
> "As bearing on the question, I think Sections 455.204 and 455.214 are important.
>
> "The A S C people take the position that another engineer is not needed from here on out and that when the engineer appointed by the Board approved the plan, he completed the functions for which he was created."

65-6-2

In reply thereto, I would advise that the Agricultural Soil Conservation Service is a federal agency and their services in this project are merely advisory. The statutory duty of establishing the districts is in the Board of Supervisors. Under Section 455.201, there is a duty upon the Board to appoint an engineer. The duty of the engineer to examine the federal plan (Section 455.202) makes the ASC ineligible for such appointment.

Very truly,

/s/ Oscar Strauss

OSCAR STRAUSS
First Assistant Attorney General

jtm

TAXATION: Real Property Tax; Section 427.1(2) and 427.1(9), Code of Iowa, 1962. Renting a building of the Wright County Junior Fairgrounds for garaging a school bus is only incidental to public use and does not affect tax exempt status of that property.

LAWRENCE F. SCALISE
ATTORNEY GENERAL

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

June 7, 1965

Dewayne A. Knoshaug, Esq.
Wright County Attorney
Clarion, Iowa

Dear Sir:

This will acknowledge your letter dated May 19, 1965, in which you state as follows:

> "The Wright County District Junior Fair is a non-profit corporation owning real estate in Wright County. This organization, which is made up of the County and certain non-profit agricultural organizations, is supported by taxes upon the property in Wright County, Iowa, except for proceeds from admission to the grandstand and fees for concessions which are used to pay for the platform entertainment and other fair expenses.
>
> The corporation owns a building which they use for fair purposes during approximately one week of each year and during the remainder of the year they receive rental for the building from the Eagle Grove Public Schools which uses the building as a bus storage.
>
> The question now is whether this building is exempt from real estate taxation under the provisions of Iowa Code Chapter 427. More specifically the question is whether the building is being used regularly for commercial purposes with special reference to 427.1(24).
>
> The argument on the behalf of the corporation is that the building is not being used for commercial purposes because the tenant, being a public institution and supported by taxes, should not be regarded as a commercial tenant and the end result probably would be that if property tax were assessed,

> the result would be an increase in the levy for the Wright County District Junior Fair. It is further urged that neither the Fair or the School District are institutions conducted for profit, and that the use of the building is therefore not for 'A profit to any party or individual', as is provided in Section 427.1, Paragraph 9 and 24 of the Code."

It must be pointed out that Section 427.1, Code of Iowa, 1962, is an exempting statute and as such must be strictly construed. If there is any doubt upon the question, it must be resolved against the exemption and in favor of the taxation. National Bank of Burlington vs. Huneke, 250 Iowa 1030, 98 N.W. 2d 7 (1959), Trinity Lutheran Church of Des Moines vs. V. L. Browner, 255 Iowa 197, 121 N.W. 2d 131 (1963).

Sections 427.1(2) and 427.1(9) provide as follows:

"427.1 Exemptions. The following classes of property shall not be taxed:

* * *

"2. Municipal and military property. The property of a county, township, city, town, school district or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit."

* * *

"9. Property of religious, literary, and charitable societies. All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment."

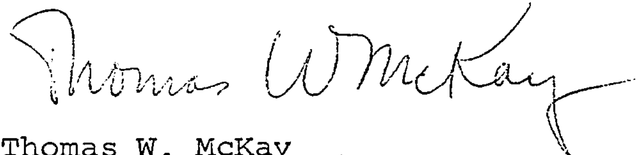
Subsections 9 and 24 must be read together for subsection 24 is a procedural section rather than an exemption section. The purpose of the statement of the objects and uses of the organization which files the statement with the assessor is to establish whether all or part of the property is used for purposes that can be considered tax exempt. 1956 OAG 176, 177. As set out in subsection 9 and subsection 24, the property cannot be leased, rented, or otherwise used with a view toward a pecuniary profit. Thus, the test for the exemption is the use made of the property by the organization within its provisions. Lutheran Mutual Aid Society vs. Murphy, 223 Iowa 1151, 274 N.W. 907 (1936). The use can be shown in the statements submitted to the assessor as set out in subsection 24. The burden of proof is on the taxpayer because tax exemption statutes are strictly construed, and those claiming exemptions must show themselves to be entitled thereto. Theta Xi Building Association of Iowa vs. Board of Review, Iowa City, 217 Iowa 1181, 251 N.W. 76 (1933).

The case at bar is not unlike that considered by the Attorney General in 1926 OAG 349. A part of the county fairgrounds that were rented as pasture for a portion of the year was assessed. The Attorney General stated in his opinion that even if part of the county fairgrounds were rented for a part of the year and rent was collected therefor, the grounds were not taxable.

In the instant case, a non-profit organization, the Wright County Junior Fair Corporation, which is composed of the county itself and certain non-profit agricultural organizations, own the real estate and the building from which the income is derived. As a general rule of law, it can be said that where the primary and principal use to which the property is put is public, the mere fact that an income is incidentally derived from it does not affect its character as property devoted to public use. This principle was expounded in the case City of Osceola vs. Board of Equalization, 188 Iowa 278, 176 N.W. 284 (1920). In that case the court held that where a charge is made for the use of property, which charge is consistent with and incidental to the public use, it does not change the exempt character of the property.

Thus, it is our opinion that the rental of the building to the school board for a bus garage would be incidental to and consistent with the public use of the fairgrounds. The principles stated in the City of Osceola case are applicable, and the income which the Wright County Junior Fair Corporation receives should not deprive the corporation of the tax exemption under Section 427.1(2) and 427.1(9).

Very truly yours,



Thomas W. McKay
Special Assistant Attorney General

TWM/JRS/f

TOWNS: Township Dumps. §§ 332.31, 332.32, 332.33, 332.34 and 359.29. The only statutory authority for the operation, maintenance, tax levy and funding of a township dump is with the county boards of supervisors.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

June 11, 1965

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

RE: Authority of townships to operate township dumps

Dear Mr. Saur:

I have your letter where you request an opinion from this office as to whether township trustees may operate a township dump.

You point out that the only possible authority is under Section 359.29 which states that gifts and donations may be taken "for the purpose of establishing and maintaining libraries, township halls, cemeteries, or for any other public purpose."

It should be noted that all the other provisions in that section of the Code pertain to the power to condemn, tax, and control for the use of parks and cemeteries. These powers should be compared with Sections 332.31 through 332.34 which give county boards of supervisors the powers to establish county dumps. The county boards of supervisors are given power to determine the need, levy the tax for acquiring and <u>maintaining</u> such disposal grounds, and to establish rules and regulations for them and enter into contractual arrangements. It is to be noted that the tax levy provision states as follows:

> "332.32 Tax levy. Said boards may within their respective jurisdictions make a determination of which townships of the county will be best served by such disposal ground and levy a tax of not to exceed one-fourth mill on all the property in said townships outside the incorporated limits of any city or town for the purpose of acquiring and maintaining such disposal grounds. Such funds shall be placed in a <u>township dump</u> fund." (Emphasis supplied)

The rule section is as follows:

> "332.33 Rules. The board of supervisors may make such rules and regulations for the use of such disposal grounds as it shall deem necessary, and may adopt and enter into contractual agreements with cities and towns for the use of such disposal grounds. Any funds derived from such agreements shall be placed in the township dump fund established for that purpose and none other." (Emphasis supplied)

Townships only have such powers as are separately given to them by statute. The only power a township has is to accept a gift. It does not have the power to maintain a disposal ground. The necessary powers to run and maintain a disposal ground are those as set out in Sections 332.31 through 332.34. These provisions also contemplate that the board of supervisors will determine which township should have dumps or disposal grounds, and the boards of supervisors have the exclusive power to determine the tax levy and to place the funds in a township dump fund.

Therefore, it is my opinion that the only authority for the operation of a township dump is with the county board of supervisors.

Respectfully submitted,

/s/ Timothy McCarthy

TIMOTHY McCARTHY
Solicitor General

ew

PUBLIC OFFICERS: County Boards of Supervisors - Direct or indirect interest in contracts. § 314.2, 1962 Code of Iowa. When a contract for materials to be used in the improvement or maintenance of a county road is entered into by the county board of supervisors and the lessee of one of the supervisors, said lessee being a charitable corporation and said lease actually being a gift to said group, if the contracting supervisor could deduct the moneys paid by the county to the charitable corporation as a Federal and Iowa income tax deduction, said contract involves a direct or indirect interest to the contracting supervisor as contemplated by Section 314.2 of the 1962 Code of Iowa.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

June 22, 1965

Mr. Stanley R. Simpson
Boone County Attorney
Lippert Building
Boone, Iowa

Dear Mr. Simpson:

You have submitted the following fact situation and the legal questions arising therefrom:

> "In recent years, Boone County, Iowa, has contracted to purchase gravel. As of January 2, 1965, the owner of the gravel pit commenced his official term as a member of the Boone County Board of Supervisors. On the 6th day of April, 1965, this man and his wife entered into an 'Agreement of Lease' with a church in consideration of $1.00 to lease said gravel pit from the 6th day of April 1965 to the 31st day of December 1965, and allowing said church to remove not more than 25,000 tons of pit-run gravel material from certain areas of the pit. A copy of said lease agreement is attached hereto setting out the terms and conditions in more detail. As you will note in said lease agreement, the church is not restricted as to who it may sell gravel to, nor are the first parties restrained from selling gravel to any other persons, firms or corporations. Furthermore, it is my understanding that the supervisor is not a member of this church, but his wife is and that they both attend the same.
>
> "The legal questions now being raised are as follows:
>
> "1. Would a contract to purchase gravel between

#65-6-5

> Boone County, Iowa, and the church create such an 'indirect interest' as to come within the prohibition of Section 314.2 of the Code of Iowa?
>
> "2. The fact that the contracting supervisor might receive a tax deduction for this as a charitable contribution be such an 'indirect benefit' as to prevent the county from purchasing gravel from the church under this state?"

We are basically dealing with Section 314.2 of the 1962 Code of Iowa which reads as follows:

> "No state or county official or employee, elective or appointive shall be directly or indirectly interested in any contract for the construction, reconstruction, improvement or maintenance of any highway, bridge or culvert, or the furnishing of materials therefor. The letting of a contract in violation of the foregoing provisions shall invalidate the contract and such violation shall be a complete defense to any action to recover any consideration due or earned under the contract at the time of its termination."

The general rules have been set out in the Iowa case of Bay v. Davidson, 133 Iowa 688, 111 N.W. 25 (1907). The court quotes Judge Dillon in his work on Municipal Corporations, section 444, as follows:

> "'It is a well-established and salutary rule in equity that he who is intrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself. This rule does not depend upon reason technical in character, and is not local in its application. It is based upon principles of reason, of morality and of public policy. It has its foundation in the very constitution of our nature, for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails. One who has power, owing to the frailty of human nature will be too readily seized with the inclination to use the opportunity for securing his own interest at the expense of that for which he is intrusted . . . . The law will in no case permit persons who have

> undertaken a character or a charge to change or invert that character by leaving it and acting for themselves in a business in which their character binds them to act for others.'"

At pages 691 and 692, the court states from the case of <u>Smith v. City</u>, 61 N.Y. 444, as follows:

> "'The council of the city were the agents of the city, and, while holding their relation to it, each member of that body was under such an obligation of absolute loyalty to the interests of the city, as prohibited him from entering into any arrangement with his associates by which his individual interests could come in conflict with the interests of his constituents, who are entitled exclusively to such an exercise of his caution and judgment in their behalf as an ordinarily prudent man would exercise in his own business.'"

The leading Iowa case is <u>Nelson v. Harrison County</u>, 126 Iowa 436, 102 N.W. 197 (1905). In a case involving a county supervisor contracting with the county, under the existing statutes, the court stated at page 445 as follows:

> "Now, the provision of the statute is that 'members of the board * * * shall not buy from, sell to, or in any manner become parties, directly or indirectly, to any contract to furnish supplies, material, or labor to the county,' etc. Surely the language here used is not subject to misunderstanding. A supervisor may not sell material or labor to the county; he may not in any manner become a party to any contract (and this includes implied as well as express contracts) to furnish labor or material to the county. We may agree with counsel for appellants that the enforcement of this law may at times work inconvenience, but with that we have nothing to do."

The type of action you are particularly concerned with is discussed at 56 OAG 57 at page 60, and I quote:

> "The question of the propriety of selling by contract to another who in turn will contract with the Iowa Highway Commission and the effect of such an arrangement as it relates to the prohibitions set out in

similar statutes was considered in the case of Wayman vs. City of Cherokee, 204 Iowa 675, 215 N.W. 655 (1927), where the Court said:

"'The agreement between J.D. Wayman and appellant for the rental of the cement mixers, tools and other equipment is not a part of the contract to do the work of the city. If the agreement had been entered into for the purpose of securing contracts with the city and for the division of profits, on contracts made therewith in pursuance thereof, the situation would be different.'

"The particular question as to whether a contract or agreement is indirect within the prohibition of the statute must, of necessity, depend on the facts in each particular case. The element of 'prior agreement' referred to above would seem to cause an otherwise simple business transaction to come within the prohibition of the statute."

If the purpose of the lease arrangement allows all of the benefits of the lease to go to the church, with no benefit to the contracting supervisor, there would not appear to be any direct or indirect interest. This would be our answer to your first question

A much more difficult situation is presented by your second question if the contracting supervisor receives a tax deduction in the amount of all of the payments that are made to the church. He could possibly receive considerable relief on his Federal and Iowa tax returns. This could possibly amount to a substantial amount. Under these conditions, it would appear that a direct or indirect benefit could be obtained by sales to the county. This would certainly be construed to be an interest in the contract as contemplated by Section 314.2 of the 1962 Code of Iowa.

Please note that this opinion is predicated upon the fact assumption that what the county will contract for has to do with the improvement or maintenance of a highway or the furnishing of materials therefor.

To summarize, it is my opinion that the answer to your first question would be that there is no direct or indirect interest

to the supervisor. However, your second question presents a situation where there could be a substantial financial benefit to the contracting supervisor. If there is, in fact, a substantial tax savings whereby the supervisor could deduct from his Iowa and Federal returns the money that is paid to the church as a charitable deduction, it is my opinion that there would be a direct or indirect interest as contemplated by Section 314.2 of the 1962 Code of Iowa.

Respectfully submitted,

/s/ Timothy McCarthy

TIMOTHY McCARTHY
Solicitor General

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INTERSTATE HIGHWAY SYSTEM: Utilities; Title 23 U.S.C., §101(a); Title 23 U.S.C., §103(d); 23 U.S.C. §123; §306A.10, 1962 Code of Iowa; Chapter 471, 1962 Code of Iowa; §306A.13, 1962 Code of Iowa; Policy and Procedure Memorandum No. 30-4, §3a(3); Policy and Procedure Memorandum No. 30-4, §2(a). The Iowa State Highway Commission is obligated to reimburse a utility for removal and/or relocation costs on a non-betterment basis from private property or private right of way, if such removal and/or relocation is necessitated for construction of the Interstate Highway System, as defined in 23 U.S.C., §101.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

June 25, 1965

Mr. L. M. Clauson
Chief Engineer
Iowa State Highway Commission
Ames, Iowa

Dear Mr. Clauson:

Herewith is opinion requested in yours of April 19, 1965, regarding the Iowa State Highway Commission's obligation to utilities when their removal and/or relocation is required pursuant to §306A.10, 1962 Code of Iowa, as part of the construction and maintenance program of the Interstate Highway System. The Iowa Legislature, in the Acts of the 58th G.A., adopted what is now §306A.10, 1962 Code of Iowa:

> "Notice to relocate--costs paid by state. Whenever the Iowa state highway commission shall determine that relocation or removal of any utility facility now located in, over, along, or under any highway or street, is necessitated by the construction of a project on routes of the national system of interstate and defense highways including extensions within cities and towns, the utility owning or operating such facility shall relocate or remove the same in accordance with statutory notice. The costs of relocation or removal, including the costs of installation in a new location, shall be ascertained by the Iowa state highway commission or as determined in condemnation proceedings for such purposes and paid by the state out of the primary road fund as part of the cost of such federally-aided project."

This statutory provision was designed to reimburse utilities for non-betterment costs associated with relocation of their facilities

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when necessitated by the Interstate Highway System as defined in 23 U.S.C., §101(a).

> "Definitions and declaration of policy . . . .
> The term 'Interstate System' means the National System of Interstate and Defense Highways described in subsection (d) of section 103 of this title."

23 U.S.C., §103(d) states:

> "The Interstate System shall be designated within the United States, including the District of Columbia, and it shall not exceed forty-one thousand miles in total extent. It shall be so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities and industrial centers, to serve the national defense and, to the greatest extent possible, to connect at suitable border points with routes of continental importance in the Dominion of Canada and the Republic of Mexico. The routes of this system, to the greatest extent possible, shall be selected by joint action of the State highway departments of each State and the adjoining States, subject to the approval by the Secretary as provided in subsection (e) of this section. All highways or routes included in the Interstate System as finally approved, if not already coincident with the primary system, shall be added to said system without regard to the mileage limitation set forth in subsection (b) of this section. This system may be located both in rural and urban areas."

It was specifically designed to promote compatibility between the Federal Aid Highway Act and the authority of the Iowa State Highway Commission which did not clearly exist previously. The supplement to 23 U.S.C., §123, Policy and Procedure Memorandum No. 30-4, §3a(1), clearly provides that federal funds may participate in the costs of utility relocations, where the utility has right of occupancy in its existing location, by reason of holding the fee, easement or other property interest.

> "Federal funds may participate, at the pro rata share applicable, in an amount actually paid by a state or a political subdivision thereof for the costs of utility relocations made under one or more of the following conditions:
>
> "(1) Where the utility has right of occupancy in its existing location by reason of holding the fee, an easement or other property interest."

There is no question, but what the State of Iowa, acting through the Iowa State Highway Commission, has the authority to require a utility to remove or relocate its facilities under authority of §306A.10, 1962 Code of Iowa.

Authority is extended to the Iowa State Highway Commission for their requiring any utility facility to move its facilities if the present location obstructs the projected routes of the National System of Interstate and Defense Highways. This section must be correlated with §306A.11, 1962 Code of Iowa, which defines the cost of relocation or removal of such utilities:

> "What costs included. Cost of relocation or removal shall include the entire amount paid by such utility properly attributable to such relocation or removal except the cost of land or any rights or interest in land, after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility."

Policy and Procedure Memorandum No. 30-4, §2(a) reads:

> "'Utility' shall mean and include all privately, publicly or cooperatively owned communication lines and facilities, any systems, lines and facilities for the distribution and transmission of electrical energy, oil, gas and water, including sewer, steam and other pipe lines. Dependent upon the meaning intended in the context, 'utility' shall also mean the utility company, inclusive of any wholly owned subsidiary."

The Iowa Code makes no distinction as to a utility located on public property as opposed to a utility located on private property. The Federal Bureau of Public Roads does make a distinction between the two in that Policy and Procedure Memorandum No. 30-4, §3a(3), pertains only to utilities located on publicly owned land or public right of way.

> "Federal funds may participate, at the pro rata share applicable, in an amount actually paid by a state or a political subdivision thereof for the costs of utility relocations made under one or more of the following conditions:
>
> "(3) Where the utility which occupies publicly owned lands or public right-of-way is owned by an agency or political subdivision of a State and said agency or political subdivision is not required by law or agreement to relocate its facilities at its own expense."

This does not pose a conflict in that the Bureau of Public Roads has issued Policy and Procedure Memorandum No. 30-4, §3a(1), which makes provision for those utilities and reimbursements for the costs of their relocation where their occupancy is by reason of holding the fee, easement or other property interest.

It is the opinion of this office that the Iowa State Highway Commission is obligated to reimburse a utility for removal and/or relocation from private property or private right of way and they are similarly obligated to reimburse a utility for removal and/or relocation from public property or public right of way. The Iowa Law does not distinguish the type of utility involved nor does it distinguish as to the type of property upon which the utility might be located and from which its removal or relocation may be required under §306A.10, 1962 Code of Iowa.

Respectfully submitted,

/s/ Raymond T. Walton

RAYMOND T. WALTON
Special Assistant Attorney General

RTW:RLM:se

TAXATION: Property Tax - §441.29, Code of Iowa, 1962. The Assessor must rely upon the Auditor's Plat Book for there is nothing in the Iowa Code that will allow him to take an independent survey to determine the exact number of acres held by the taxpayer.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

June 25, 1965

J. G. Johnson, Esq.
Fayette County Attorney
22 East Charles
Oelwein, Iowa

Dear Mr. Johnson:

We acknowledge receipt of your letter dated May 12, 1965, in which you request an opinion from this office. Your letter states as follows:

> "At the request of our County Assessor, we are asking for an opinion in regard to the powers and duties of the Assessor's office.
>
> "The facts are as follows: The Northeast Quarter of Section 18-92-8 in Fayette County has been deeded from party to party for many years. Some time ago, however, a fence along this property was straightened and the net result of this straightening was to cut off from the farm normally described as the Northeast Quarter of Section 18 a piece of land containing approximately 8.3 acres. This piece of land is now being used by the neighbor to this property, and because this fence line has been established for more than ten years, it is presumed that this neighbor could claim title to this property under the statutory provisions therefor. The present title holder knew of this fact at the time he took title to this farm, and he had a survey made, and this survey revealed that this particular farm contained 151.97 acres. Accordingly, the deed by which the current title holder took title to the property reads as follows: The Northeast Quarter of Section 18,

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92, 8 containing 160 acres more or less: also described as (here is set out the metes and bounds description) ... containing 151.97 acres.

"The problem is this: There is no dispute at the present time that the current title holder owns only 151.97 acres. The question is whether or not the remaining 8.3 acres can be assessed to the neighbor who is using this property or whether it might be assessed to the current title holder. The Auditor's Plat has not been changed, and therefore it indicates that the current title holder owns a full 160 acres.

"The questions are these:

"1. Does the County Assessor have authority to undertake an independent survey to determine the exact amount of acres held by this title holder or any other title holder?

"2. Or must the Assessor rely upon the Auditor's Plat and make the assessment to the title holders in the amount of 160 acres regardless of an independent survey or recitation in the deed?

"3. Or must the Assessor accept the recitation in the deed in regard to the number of acres contained in a particular piece of property?

"4. If the original title holder is to be assessed for only 151.97 acres, to whom are the 8.5 acres assessed? Can they be assessed to the neighbor who is using this property and who might claim title to it even though this title has not been established yet? Or must these acres be assessed to "owner unknown" under Section 428.5?

"Aside from the particular problem involved in this case, this seems to be a

recurring issue for the County Assessor. There are many instances in which a deed may recite that a certain amount of land is included, when the actual amount may be greater or smaller. If the Assessor has the authority to undertake an independent survey when necessary to determine the exact amount of land, it would greatly facilitate the equitable distribution of assessment. For this reason we are requesting the opinion concerning the Assessor's authority in this area, and we appreciate your attention to this request."

Section 441.29, Code of Iowa, 1962, provides as follows:

> "441.29 Plat book. The county auditor shall furnish to each assessor a plat book on which shall be platted the lands and lots in his assessment district, showing on each subdivision or part thereof, written in ink or pencil, the name of the owner, the number of acres, or the boundary lines and distances in each, and showing as to each tract the number of acres to be deducted for railway right of way and for roads and for rights of way for public levees and open public drainage improvements."

With regard to your first question, it is our opinion that the county assessor does not have authority to undertake an independent survey to determine the exact number of acres held by a landowner. Section 441.29 specifically states that "the county auditor shall furnish to each assessor a plat book on which shall be platted the lands and lots in his district...". We find no statutory authority for the assessor to make an independent survey.

In order to answer your next two questions, the following sections of the Iowa Code are pertinent.

> "Section 558.59 Final record. Every such instrument shall be recorded, as soon as practicable, in a suitable book to be kept by the recorder for that purpose; after which he shall complete the entries aforesaid

> so as to show the book and page where the record is to be found."
>
> "Section 558.60 Transfer and index books. The County auditor shall keep in his office books for the transfer of real estate, which shall consist of a transfer book, index book and plat book."
>
> "Section 558.63 Book of plats - how kept. The auditor shall keep the book of plats so as to show the number of lot and block, or township and range, divided into sections and subdivisions as occasion may require, and shall designate thereon each piece of real estate and mark in pencil the name of the owner thereon, in a legible manner; which plats shall be lettered or numbered so that they may be conveniently referred to by the memoranda of the transfer book, and shall be drawn on the scale of not less than four inches to the mile."

From these sections quoted supra, we determine that the county auditor must keep the book of plats, and in order to do so, he must get from the county recorder a copy of the deed after the county recorder has completed recording said deed. The auditor, who has the responsibility to keep the book of plats, must take cognizance of the recitation in the deed and designate the property in question as such on his plat book. Section 558.63, Code of Iowa, 1962.

The Iowa Code is rather unclear as to the method to be used by the auditor in correcting the book of plats. Unless directed by the board of supervisors, the county auditor does not direct a resurvey to correct his book of plats. Chapter 333, Code of Iowa, 1962. As a practical matter, the land owner retains a private land surveyor to physically survey the land using the "rules prescribed by the acts of congress, and instructions of the secretary of the interior...". Section 355.4, Code of Iowa, 1962. The registered land surveyor, in his certificate, must certify that this survey was done in accordance with these rules and instructions.

The plat is then recorded in the Recorder's office. Section 558.41, Code of Iowa, 1962. After the plat has been photostated and the original made available for return to the owner or surveyor, the original plat should be filed in the auditor's office. Sections 448.59 and 558.63, supra.

Pursuant to Section 355.5, Code of Iowa, 1962, the plat becomes presumptive evidence of the correctness of the acreage set out therein.

Thus, the assessor must rely upon the auditor's plat book. See answer to question one, supra. It is our opinion that the auditor's plat should take cognizance of the recitation in the deed and designate the property in question as such in his plat book. In the instant case this was not done and the facts recite that the auditor's plat continues to show the land owner's property to be 160 acres. It must also be pointed out that a private survey was made of the property in question by the land owner. The results of said survey should have been filed in the auditor's office according to the procedure described in preceding paragraphs of this answer.

There is no evidence that anyone has made an attempt to correct the auditor's plat book. Since this was not done, the assessor must rely only upon the plat book as it stands and cannot accept the recitation in the deed as the amount of acres to be assessed.

With the answer to the first three questions in mind, we answer your last question by stating that it is our opinion that the original title holder must be assessed for the entire 160 acres. The assessor can only rely upon the auditor's plat book. Therefore, since there is nothing in the Iowa Code that will allow him to take an independent survey to determine the exact number of acres held by the original title holder, he must assess the entire acreage to the original title holder.

Very truly yours,

/s/ Lawrence F. Scalise

LAWRENCE F. SCALISE
ATTORNEY GENERAL

LFS:TWM:JRS:dj

STATE AND STATE OFFICERS: State Auditor, Assistant Auditor. §§11.7, 11.8, 64.1, 64.2 and 64.6, 1962 Code of Iowa as amended. Assistants to State Auditors are not "public officers" who are required by statute to give bond as a condition of employment.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

June 29, 1965

Honorable Lorne R. Worthington
Auditor of State
State House
LOCAL

ATTN: E. H. Creese, Deputy Auditor

Dear Mr. Worthington:

You have submitted the following question:

> "We have employed some accounting students from various colleges for the summer as temporary help. They will be working out in the field as 'assistant auditors' under the direct supervision of a senior auditor at all times.
>
> "We would like to know, in view of their status as temporary help as assistant auditors, if it is necessary to have them bonded."

The sections of the 1962 Code of Iowa, as amended by Chapter 60, Sections 1 and 2, of the Acts of the 60th General Assembly, are Sections 11.7 and 11.8. They read as follows:

> "11.7 State auditors. The auditor of state shall appoint such number of state auditors as may be necessary to make such examinations. Said auditors shall be of recognized skill and integrity, familiar with the system of accounting in county, school and city offices, and with the laws relating to the county, school and city affairs. Each auditor shall give bond in the sum of two thousand dollars, conditioned as bonds of county officers, which bonds shall be approved and filed as bonds of state officers. Such auditors shall be subject at all times to the direction of said auditor of state."

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> "11.8 Assistants. The auditor of state shall appoint such additional assistants to the auditors as may be necessary, who shall be subject to discharge at any time by the auditor."

It is to be noted that these sections call for bonds from State Auditors, but make no such requirement for the assistants. Your question is in regard to whether these assistants would be required to submit a bond. Section 64.2 of the 1962 Code of Iowa is the basic section in regard to who should furnish a bond. It should be read in connection with Sections 64.1 and 64.6. These sections are as follows:

> "64.1 Bond not required. Bonds shall not be required of the following public officers:
> 1. Governor.
> 2. Lieutenant governor.
> 3. Members of the general assembly.
> 4. Judges of the supreme, district, superior and municipal courts.
> 5. Township trustees.
> 6. Aldermen, councilmen, and commissioners of cities and towns."

> "64.2 Conditions of bond of <u>public officers</u>. All other <u>public officers</u>, except as otherwise specially provided, shall give bond with the conditions, in substance, as follows:
>
> 'That as . . . . . (naming the office), in . . . . . (city, town, township, county, or state of Iowa), he will render a true account of his office and of his doings therein to the proper authority, when required thereby or by law; that he will promptly pay over to the officer or person entitled thereto all moneys which may come into his hands by virtue of his office; that he will promptly account for all balances of money remaining in his hands at the termination of his office; that he will exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers, securities, or other property appertaining to his said office, and deliver them to his successor, or to any other person authorized to receive the same; and that he will faithfully and impartially, without fear, favor, fraud, or oppression, discharge all duties now or hereafter required of his office by law.'
>
> The attachment of a renewal certificate to an existing bond shall not constitute compliance with this section." (Emphasis supplied)

> "64.6 State officers - amount of bonds. State officers shall give bonds in an amount as follows:
>
> 1. Secretary of state, auditor of state, attorney general, clerk of the supreme court, not less than ten thousand dollars.
>
> * * *
>
> 27. All other <u>public officers</u>, in the amount provided by law, or as fixed under section 64.7.
>
> 28. The state shall pay the reasonable cost of the bonds required in subsections 1 to 26, both inclusive, of this section." (Emphasis supplied)

A reading of Sections 64.2 and 64.6 indicates that, in order for bonds to be required of these assistant auditors, they would have to be "public officers." One of the most recent cases setting out the rule in Iowa as to whether a person is a "public officer" or an "employee" is the case of <u>Francis v. Iowa Employment Security Commission</u>, 250 Iowa 1300, 98 N.W.2d 733 (1959). At page 1303 of the Iowa Reports the court stated:

> "1. 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.'"

Applying the rules set forth by the Iowa Supreme Court, it is apparent that the duties of an assistant auditor are not prescribed in the Constitution or statutes, there is no requirement of oath or a fixed term, nor are these the type of positions whereby their nature would be that of an office.

I must, therefore, necessarily conclude that the Assistant Auditors are "employees" rather than "public officers," and as long as they are not public officers, they do not have to be bonded.

Respectfully submitted,

/s/ Timothy McCarthy

TIMOTHY McCARTHY
Solicitor General

cc: E. H. Creese, Deputy Auditor

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CITIES AND TOWNS: Reports of the Fire Chief. §100.3, 1962 Code of Iowa. Without statutory authority the Mayor cannot compel the Fire Chief to report daily on fire calls.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

June 29, 1965

Mr. Henry G. Allbee, Jr.
Muscatine County Attorney
314 Medical Arts Building
Muscatine, Iowa

Dear Mr. Allbee:

This is in response to your letter dated March 8, 1965 wherein you submit the following situation:

> "Section 365.13, 1962 Code of Iowa provides for the appointment of the Chief of the Fire Department by the Mayor in cities under the council form of government.
>
> "Section 365.19 provides that the person having the appointing power as provided in said chapter may pre-emptorily suspend, demote or discharge any subordinate then under his direction for neglect of duty, disobedience of orders, misconduct or failure to properly perform his duties."

Then you ask:

> "(1) Can the Mayor order the Fire Chief to report to the Mayor daily each fire call or ambulance call, and whether or not said call was accepted, and if refused, the reasons for such refusal?
>
> "(2) Upon the failure of the Fire Chief to make such daily reports, can the Mayor then suspend, demote or discharge the Fire Chief for disobedience of orders?"

1. The Code of Iowa, The Rules and Regulations of the State Fire Marshal and the Municipal Ordinances of the City of Muscatine do not contain any provisions providing the Mayor with the power to order the Fire Chief to report daily each fire call or ambulance call, and whether or not the said call was accepted or refused, and if refused, the reasons for refusal. The only provisions on this subject that I can find are as follows:

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Section 100.3, 1962 Code of Iowa:

> "Time of investigation - report. Whenever the investigation of a fire indicates that bodily injury, or property damage to the extent of fifty dollars or more, was caused by such fire, or where arson is suspected, the official required by section 100.2 to make such investigation /Fire Chief/ shall, within one week of the occurrence of the fire, report in writing to the state fire marshal stating all facts relating to the cause and origin of the fire and such other information as may be called for by the report forms provided by the state fire marshal. Furthermore, when the investigating officer believes the fire was by design, or whenever death occurs as the result of a fire such officer shall immediately notify the state fire marshal."

Section 13-14 Municipal Ordinances of the City of Muscatine:

> "Chief to keep records of fires. The Chief of the fire department shall keep a record of all fires and all the facts concerning the same, including statistics as to the extent of such fires and the damage caused thereby, and whether such losses were covered by insurance, and if so, in what amount. Such record shall be made daily from the reports made under the provision of section 14-5 of this Code. All such records shall be public."

The above clearly does not supply the Mayor with the authority that he is now attempting to assume, and I am of the opinion that the Mayor cannot so order the Fire Chief.

2. The civil service system of this state under which the Fire Chief in question holds office is a product of enlightened legislation. The purpose of our state civil service system is to offer the highest degree of protection to both the public to be served and the employees who render that service. 2 Yokley: Mun. Corp. Section 344, p. 176.

Prior to the enactment of civil service or merit system statutes appointments and discharges were usually made on some basis other than a person's fitness to discharge the duties of the office or position held by him. Part of the consideration in enacting the civil service system in this state was to protect capable employees from unjust and unreasonable discharges. This is not to say that once appointed a person obtains a property right in his position for all merit systems provide for dismissal in certain cases, but this is to say that the spirit and purpose of merit system law require good faith in the dismissal of a civil service employee and only on grounds provided by statute. Section 365.19, 1962 Code of

Iowa, Truitt v. City of Philadelphia, 221 Pa. 331, 336; 70 Atl. 757, 758 (1908).

Generally, a civil service employee may be discharged for good faith economy reasons, §365.28(2), 1962 Code of Iowa. Lyon v. Civil Service Commission, 203 Iowa 1203, 212 N.W. 579 (1927); where an office or place is in good faith abolished, §365.28(1), 1962 Code of Iowa, Rounds v. City of Des Moines, 213 Iowa 52, 238 N.W. 428 (1931), Douglas v. City of Des Moines, 206 Iowa 144, 220 N.W. 72, (1928); but such action cannot be taken to cover up the discharge of an employee in controvention of the law. Dickey v. King, 220 Iowa 1322, 263 N.W. 823, (1936).

The answer to your second question must also be answered in the negative due to the absence of power in the Mayor.

Therefore, I am of the opinion that grounds for removal, suspension or demotion must be good faith grounds which relate to the manner in which the public officer performs the required duties of his office. Section 365.19 requires grounds for dismissal be neglect of duty as failure to obey valid orders. These reasons for dismissal do not occur in the situation you have described.

Very truly yours,

/s/ Nolden Gentry

NOLDEN GENTRY
Assistant Attorney General

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STATE AND STATE OFFICERS: Department of Agriculture, Weights and Measures - §§ 215.1, 215.2, 215.4, 215.18, 1962 Code of Iowa. The Department of Agriculture is not required by statute to make a six-month inspection of scales upon request of the owner. The Department has statutory authority to charge fees for inspections made more than once a year. The Department cannot make rules to charge fees to cover total costs of additional tests as the subject matter is already covered by statute.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

June 29, 1965

Mr. J. Clair Boyd, Chief
Weights and Measures Division
Department of Agriculture
State House
LOCAL

Dear Mr. Boyd:

You have submitted the following question:

> "I have a request from Mr. Kenneth E. Owen, Secretary of Agriculture, for an Attorney General's opinion in regard to testing of livestock scales that comes under the Packers and Stockyards Division, Scales and Weighing Memorandum No. 1, page 2, 201.72-1 (A) Definitions-Item #3 A suitable interval between test is a period of approximately six months. Our policy is to check all scales at least once each year. Inasmuch as we have a limited amount of trucks that check livestock scales, we are able to test livestock scales only once a year. We have suggested that company under the P & S Act contact a private bonded scale company for the six month test who is a competent testing agency which employs experienced personnel with sufficient amount of official standard test weights.
>
> "Question #1. Do we have authority to refuse test at the six month test period when we receive a written request from the owners?
>
> "Question #2. (Under Chapter 215.1-2-3-4, 1962 Code of Iowa) Could the department make a rule to charge fees on second test to cover total cost and expense of test?"

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I.

The basic duty of the Department of Agriculture to inspect weights and measures is set out in Section 215.1 of the 1962 Code of Iowa, which reads as follows:

> "The department shall make an inspection of all weights and measures wherever the same are kept for use in connection with the sale of any commodity sold by weight or measurement, or where the price to be paid for producing any commodity is based upon the weight or measurement thereof; and when complaint is made to the department that any false or incorrect weights or measures are being made under said conditions, said department shall have the same inspected."

This section does not provide for when the inspection should be made, except when a complaint is made.

Section 215.2 of the Code provides for an inspection fee and reads as follows:

> "An inspection fee shall be charged the person owning or operating the scale so inspected in accordance with the following schedule:
> Railroad track scales, ten dollars each.
> All hopper and automatic scales, three dollars each.
> Platform scales.
> 500 to 1,000 pounds beam capacity, one dollar each.
> 1,001 to 30,000 pounds capacity, three dollars each.
> 30,001 to 50,000 pounds capacity, five dollars each.
> 50,001 pounds capacity and up, seven dollars each."

It is to be noted that Section 215.2 does not provide for a license for any period of time and does not indicate how often the inspection should be made. Section 215.4 provides for a limitation of inspections as follows:

> "No person shall be required to pay more than two inspection fees for any one scale in any one year unless additional inspections are made at the request of the owner of said scale."

This section does not require any number of inspections.

Under Section 215.18, the Secretary of Agriculture may establish specifications and tolerances of the U.S. Bureau of Standards. This section reads as follows:

> "The secretary of agriculture may after consultation and with the advice of U.S. bureau of standards establish specifications and tolerances for weights and measures and weighing and measuring devices, and said specifications and tolerances shall be legal specifications and tolerances in this state, and shall be observed in all inspections and tests."

There is no mention that the Secretary may adopt the recommendations as to the time of inspections. It is also to be noted that Packers and Stockyards Division Scales and Weighing Memorandum No. 1, put out by the U.S. Department of Agriculture and referred to in your letter, is only instructions. They indicate that a suitable interval between tests is a period of approximately six months. It is the opinion of this writer that this does not constitute a specification or tolerance of the U.S. Bureau of Standards which the Iowa Secretary of Agriculture has adopted.

There is no statutory requirement that the Secretary of Agriculture check scales at any certain period of time. There is no adoption of the Packers and Stockyard Division's Instructions.

The issue presented by your first question is whether the Department of Agriculture is required to make tests at any certain periods of time. There is no statutory language setting out this duty. The next question would be whether the Department, upon request, must make tests. Again, there is no statutory language setting out this duty, except upon complaint. It is the further opinion of this writer that as long as the duty is not set out by statute, or implied from the statute, it is not necessary that an excuse be found in the statute. The statute grants no rights to the scale operators that would place the duty on the Department of Agriculture to make inspections on request, except where complaints are made as contemplated by Section 215.1 of the 1962 Code of Iowa.

II.

The inspection fee, as contemplated by Section 215.2 and as set out above, is on a per inspection basis. The inspection fee is not a matter of a license. The fee, as comtemplated by the statute, is to be charged on a per inspection basis.

Section 215.4 contemplates that, in some cases, two inspection fees may be charged in a year and perhaps more. This section clearly authorizes two inspection fee charges on a scale in one year and any additional inspections may also be charged if they are made at

the request of the owner.

Therefore, our answer to your second question is that your department may charge fees on the second test of any scale within a year, and on any additional test made at the request of the owner of the scale. It is not proper for your department to make a rule to question the total cost and expense of the test, as the statute contemplates several inspection fees within a year and only sets up the fee. The statutory intent obviously was to have the fee cover part of the expense of the test.

Therefore, our answer to your second question is that it is not proper for the Department of Agriculture to make a rule in regard to the charging of fees, the subject matter of which is already covered by Sections 215.2 and 215.4 of the 1962 Code of Iowa.

Respectfully submitted,

/s/ Timothy McCarthy

TIMOTHY McCARTHY
Solicitor General

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STATUTES CONSTRUED: Industrial Loan Companies Act. S.F. 132, 61st G.A. The Auditor may require completion of the license application forms sent out on May 28, 1965. The effective date of a license granted to existing loan companies is May 27, 1965. The act requires that a fifty dollar license fee be submitted by existing loan companies for the period May 27, 1965, to December, 1965.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

July 6, 1965

Mr. Lorne R. Worthington
Auditor of State
L O C A L

Attention: Mr. Richard R. McCormick

Dear Mr. Worthington:

I am in receipt of your letter of June 17, 1965, to the Attorney General in which you solicit the opinion of this office in regard to the following questions which precede each numbered section and are followed by my answer.

I

May the Auditor require completion of the license application forms, sent out on May 28, 1965, to loan corporations whichheld a 1965 Auditor's Certificate issued pursuant to sections 429.11, 429.12 and 429.13 of the 1962 Code of Iowa?

Section 27 of the Iowa Industrial Loan Companies Act effective May 27, 1965, reads as follows:

> "Existing Industrial Loan Companies. A corporation, organized under the laws of the state of Iowa shall be issued a license hereunder by the auditor for each established office in this state which on the date this Act becomes effective was engaged in the business of making loans under the provisions of section four hundred twenty-nine point eleven (429.11) of the Code; provided such corporation has received from the auditor an auditor's certificate as required by section four hundred twenty-nine point thirteen (429.13) of the Code. The license referred to in this section shall be issued for each such established office upon the effective date of this Act, without the notice, investigation, hearing and findings required by sections nine (9), ten (10) and eleven

> (11) of this Act. On or before January 1, 1966, all existing industrial loan companies shall have the capital and surplus required by section eight (8) of this Act to be eligible for subsequent licensing."

Though the statute provides for a waiver of the notice, investigation, hearing and findings required by sections nine, ten, and eleven of the Act, it nevertheless seems to require that the Auditor obtain certain other information before it grants licenses to existing companies. It requires that the Auditor determine that the applicant is a corporation, organized under the laws of the state, which was engaged in the business of making loans under section 429.11 of the Iowa Code. Under section 429.13 of the old law it was possible for a corporation to establish any number of branch offices under its single license; section 4 of the new law requires issuance of the license for each office. It would appear that the Auditor would be required to also obtain information concerning this change, before granting licenses to existing companies.

Section 29 of the Industrial Loan Companies Act gives to the Auditor the authority and power "to make such reasonable and relevant rules and regulations, not inconsistent herewith, as may be necessary for the enforcement of the provisions of this act."

In the absence of statutory provision it has been held that the necessary implications of a statute are as effectual as what is expressed. Lynde v. Winnebago County, 83 U.S. 6, 16 Wall 6, 21 L. Ed. 272 (1872). Where a power or a right is conferred by statute, everything necessary to carry out such power or protect such right and make it effectual and complete will be implied. Daily Record Co. v. Armel, 243 Iowa 913, 54 N.W.2d 503 (1952).

By the terms of Section 27 of the statute and according to the statutory and court made authority allowing rules and regulations for the enforcement of legislation to be made, it appears that the Auditor may require the completion of the license application forms sent out on May 28, 1965.

II

What is the effective date of a license granted to existing loan companies?

Section 27 of the Industrial Loan Companies Act, set out above, states that licenses "shall be issued for each such established office upon the effective date of this Act, without the notice, investigation, hearing and findings required by sections nine, ten and eleven of this act." The effective date of the Act, by section 32, was the publication date, which was May 27, 1965.

The language of Section 27 would seem to indicate that the licenses are to be dated and made effective as of May 27, 1965, irrespective of the date upon which companies return the application forms sent out by the Auditor's office. This interpretation is strongly enforced by the fact that section 30 of the act provides for the repeal of sections 429.11, 429.12 and 429.13 of the Iowa Code upon the effective date of the Act. To say that the license could be dated later than May 27, 1965, would be to say that some companies could operate without a license for the period from May 27, 1965, to any later date upon which a license was granted. Such operation without a license would violate section 28 of the act which provides that:

> "...if any person... shall engage in the business of operating an industrial loan company without obtaining the license required by section three of this Act, he shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than five hundred dollars or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment."

Thus, the licenses are to be dated and made effective as of May 27, 1965, irrespective of the date upon which companies return the application forms sent out by the Auditor's office.

III

Does the act require a fifty dollar license fee from existing Industrial Loan Companies for the period May 27, 1965, to December 31, 1965?

Section 7 of the Act provides that:

> "At the time of making such application the applicant shall pay to the auditor the sum of fifty dollars to cover the cost of the investigation of the applicant. The applicant shall also pay to the auditor the sum of fifty dollars as an annual license fee for the period ending December 31st next following the application; provided that if the license is granted after June 30th in any year, the license fee for the remainder of that year shall be twenty-five dollars and any license fee paid by the applicant in excess of that amount shall be refunded by the auditor."

Thus, the Act provides for both a fifty dollar fee and a fifty dollar license fee. If the license is granted after June 30, in any year, the latter fee is reduced to twenty-five dollars. Because the investigation of the application (Section 9) is waived by Section 27 of the act in the case of existing Industrial Loan Companies, it appears that the Auditor does not have the authority to collect the fifty dollar investigation fee from such companies. Since, as discussed above, the licenses must be dated and made effective as of May 27, 1965, these licenses cannot come within the provisions providing for a fee of twenty-five dollars for licenses granted after June 30th.

Thus, the act does require the fifty dollar license fee from existing Industrial Loan Companies for the period May 27, 1965, to December 31, 1965.

Very truly yours,

/S/ Wade Clarke, Jr.

WADE CLARKE, JR.
Assistant Attorney General

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SCHOOLS: Residence of subdistrict Director of School Board. § 277.29, 1962 Code of Iowa. The office of the subdistrict director becomes vacant whenever the incumbent ceases to be a resident of the subdistrict from which he was elected.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

July 8, 1965

Mr. T. C. Poston
Wayne County Attorney
Corydon, Iowa

Dear Mr. Poston:

This is in response to your request dated March 17, 1965, wherein you presented the following situation:

> The Seymour Community School District is divided into Director Districts. The duly elected director of subdistrict No. 1 has purchased additional land in subdistricts No. 1 and No. 2 and he has subsequently moved into a house in subdistrict No. 2, where he now resides.

You then ask:

1. Can the director serve out his term, must he resign immediately, or does he vacate his office automatically by operation of law?

2. If the director must resign, must he do this on his own motion, or must there be a bonafide complaint registered to the school board?

In reply to your first question, the following Code provision is relevant:

> ". . . the incumbent ceasing to be a resident of the district or subdistrict; . . . shall constitute a vacancy." Section 277.29, 1962 Code of Iowa.

However, before it can be determined that a vacancy has occurred in subdistrict No. 1, the facts should be examined to find whether or not the director in question has, in fact, changed his residence, or if you please, domicile. Dodd v. Lorenz, 210 Iowa 513, 231 N.W. 422 (1930). Temporary removal from subdistrict No. 1

alone is not enough in all cases to constitute a change in domicile. Independent School District v. Miller, 189 Iowa 123, 78 N.W. 323 (1920); Vanderpoel v. O'Hanlon, 53 Iowa 246, 5 N.W. 119 (1880). However, removal to another subdistrict is sufficient to create a vacancy in the public office in question if it is accompanied by a present intention to acquire a new domicile. Independent School District v. Miller, supra; Restatement (First), Conflict of Laws, Sections 16, 20 (1934). The director in question will acquire a new domicile only when he has established sufficient contacts with subdistrict No. 2 to extinguish his former domicile. Story, Conflict of Laws, Section 47 (8th Ed. 1883). Although there is no absolute criterion by which to judge whether a new domicile has been acquired, there are a few of the contacts to be viewed in the light of the particular facts and circumstances of each case.

Domicile is defined in the Restatement of Conflict of Laws as the "place with which a person has a settled connection for certain legal purposes, either because his home is there, or because that place is assigned to him by the law." The Restatement then defines a "home" as "a dwelling place of a person, distinguished from other dwelling places of that person by the intimacy of the relation between the person and the place." In determining which dwelling place is the home, the following contacts are applicable:

1. Physical characteristics of the respective homes;

2. Time spent by the person in the respective homes;

3. The things done in the respective places;

4. Persons and things located in the respective places;

5. The director's mental attitude toward the two places; and

6. His intention when absent to return to one of the places.

Inasmuch as this office does not have access to all of the facts in this case, it will be incumbent on you to make the final determination as to the place of domicile, using the above contacts as guidelines. If the facts indicate that the director is now a domiciliary of subdistrict No. 2, it is my opinion that the directorship of subdistrict No. 1 is vacant via operation of law. Section 277.29, 1962 Code of Iowa. It is then incumbent upon the Board of Directors to fill the vacancy in accord with Section 279.7, 1962 Code of Iowa.

In view of the above answer, it is unnecessary to respond to your second question at this time.

Very truly yours,

/s/ Nolden Gentry

NOLDEN GENTRY
Assistant Attorney General

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TAXATION: Property Tax; Section 441.5, Code of Iowa, 1962, as amended by H.F. 385, 61st G.A., 1965. Any qualified elector of the State of Iowa, including employees of the State Tax Commission, shall be allowed to take the examination for the position of County Assessor, irrespective of the county in which he resides. It is up to the examining board to determine who is an elector, and, if an applicant is not a qualified elector, he will not be allowed to take the examination.

LAWRENCE F. SCALISE
ATTORNEY GENERAL

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

July 12, 1965

Mr. Ballard B. Tipton, Director
Property Tax Division
State Tax Commission
L O C A L

Dear Sir:

This will acknowledge your letter of June 2, 1965, in which you state as follows:

> "In re:-Examination for positions of County Assessor, City Assessor, and Deputy Assessor.
>
> "On or about April 22, 1965, the Governor of the state of Iowa signed House File 385, enacted by the 61st General Assembly, which law will become effective July 4, 1965. It amends Section 441.5, Code of Iowa, 1962, relating to the examination for the positions of county assessor, city assessor, and deputy assessor. Said Section 441.5 as amended will provide that 'Only qualified electors of the state shall be eligible to take this examination.'
>
> "The Property Tax Division respectfully requests that an official legal opinion be obtained on the following questions related to such amended law. It is to be kept in mind that under provisions of said Section 441.5, it is the duty and responsibility of the State Tax Commission to prepare the written examination, and to conduct same and to score the examination papers.
>
> "Question 1.
>
> What are the requirements for a person to be 'a qualified elector of the state'?
>
> "Question 2.
>
> If in answering Question 1 herein reference is made

to Section 1, Article II of the Constitution of the State of Iowa, must applicants to take such examination not only be a resident of the state of Iowa for no less than six months prior to the examination date, but also a resident of the county in which such examination is given for no less than sixty days prior to the examination date?

"Question 3.

Are employees of the Iowa State Tax Commission eligible under such amended law to write the examination and are they also eligible for appointment as assessor or deputy assessor, as the case might be, in the event they attained a grade of seventy percent or more?

"Question 4.

Is it the duty and responsibility of the State Tax Commission to determine whether, before conducting the written examination the applicants are qualified electors of the state?

"Question 5.

If the answer to Question 4 is 'Yes', then does the State Tax Commission have the authority to refuse to let any applicant who does not appear to qualify as an elector of the state take the written examination?"

Section 441.5, Code of Iowa, 1962, states:

"441.5 Examination of applicants. The examining board shall give notice of holding an examination for assessor by posting a written notice in a conspicuous place in the county courthouse in the case of county assessors or in the city hall in the case of city assessors, stating that at a specified date, not more than sixty days nor less than thirty days from the posting of said notice, an examination for the position of assessor will be held at a specified

place. Similar notice shall be given at the same time by mailing one copy of the notice by certified mail to the state tax commission and by one publication of said notice in three newspapers of general circulation in the case of a county assessor, or in case there be no three such newspapers in a county, then in such newspapers as are available, or in one newspaper of general circulation in the city in the case of city assessor.

"A written examination shall be prepared by the state tax commission. This examination shall be conducted by the state tax commission as other similar examinations, including secrecy regarding questions prior to the examination and in accordance with such other rules as may be prescribed by the state tax commission. The examination shall cover the following and related subjects:

"1. Laws pertaining to the assessment of property for taxation.
2. Laws on tax exemption.
3. Assessment of real estate, including fundamental principles and practices of real estate appraisal and valuation.
4. Assessment of personal property and moneys and credits.
5. The duties of the assessor.

"Only qualified electors of the county shall be eligible to take this examination.

"The state tax commission shall grade the examinations taken and certify the results thereof to the examining board within ten days from the date of examination. To be eligible for appointment an applicant shall achieve a grade of not less than seventy percent. Those so qualified by the state tax commission shall remain eligible for appointment for a period of two years from the date of certification by the state tax commission. The examining board shall conduct such further examination either written or oral, necessary to determine the executive ability, experience, general reputation and physical condition of each applicant and make written report thereof and submit such report together with the results certified by the state tax commission to the conference board within fifteen days from the date of the written examination."

House File 385 states as follows:

" AN ACT

> "To amend Section four hundred forty-one point five (441.5), Code 1962, relating to assessments and valuation of property.
>
> "Be it enacted by the Genral Assembly of the State of Iowa:
>
> "Section 1. Section four hundred forty-one point five (441.5), Code 1962, is hereby amended by striking from line thirty-nine (39) the word 'county' and inserting in lieu thereof the word 'state.'"

1. With reference to your first question, the Iowa Constitution has defined the term, "qualified elector of the state," in Article II, Section 1 which provides:

> "Electors. Section 1. Every (male) citizen of the United States, of the age of twenty-one years, who shall have been a resident of this State six months next preceding the election, and of the County in which he claims his vote sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law."

The Attorney General in 1956 O.A.G. 197, 198 further discussed the term and stated:

> "'Residence' as used in Article II, Section 1, Constitution of Iowa, means 'domicile'. Dodd v. Lorenz, 210 Iowa 513, 231 N.W. 422. Domicile is not dependent upon political allegiance and a person may acquire a domicile in a country of which he is not a citizen.' --Goodrich on Conflict of Laws, §29. It follows that the actual residence for a period of three years next preceding the election with intent to remain indefinitely postulated in your letter, would satisfy the 'residence' requirement of the quoted section." (Article II, Section 1, Constitution of Iowa).

Finally, to be a qualified elector of the state, the citizen of any city or township where registration is required must have registered to vote in his precinct at least ten days prior to any election. Sections 47.1, 48.3, and 48.11, Code of Iowa, 1962.

2. To answer your second question, it must be pointed out that Section 441.5, Code of Iowa, 1962, states in part as follows:

> "441.5 Examination of applicants
>
> * * *
>
> Only qualified electors of the <u>County</u> shall be eligible to take this examination."

House File 385, Sixty-first General Assembly, 1965, amended Section 441.5 so that on July 4, 1965, the section will read:

> "441.5 Examination of applicants
>
> * * *
>
> Only qualified electors of the <u>state</u> shall be eligible to take this examination."

It is a fundamental rule of statutory construction that in the absence of previous construction of an enactment, the intent of the legislature must be determined both from the language used and the purpose of the legislation. <u>Dingman v. City of Council Bluffs</u>, 249 Iowa 1121, 90 N.W. 2d 742 (1958). Thus, where the legislature has amended an act so that the word "county" has been replaced by the word "state" it can only mean that the legislature desired to permit <u>any qualified elector of Iowa</u> to make an application for the purpose of taking the examination. The language clearly broadens the class of electors eligible to take the examination. It is our opinion that the only qualification placed upon the applicant by this part of the act is that he be a <u>qualified elector of the state</u>. He need not be a resident of the county in which the examination is given for sixty days prior to the date of examination. So long as he is a qualified elector in any county of the state of Iowa (as defined supra) he has the right to make the application to take the examination. The enactment of Section 441.5, supra, merely shows that the legislature took cognizance of the mobility of our society and the fact that some counties may no longer have an elector interested in the position.

3. To answer your third question, we state that an employee of the Iowa State Tax Commission is eligible to write the examination and to seek appointment as assessor or deputy assessor. We base our opinion on the fact that we can find no statutory prohibition which would prevent the employee from participating.

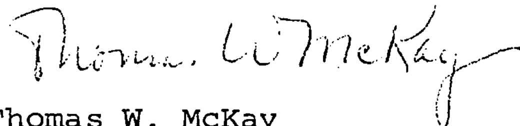
Section 441.5, supra, specifically points out that the State Tax Commission shall prepare the written examination, conduct the examination, grade the papers, and certify the results thereof. At each step of the examination procedure, the State Tax Commission is bound to maintain impartiality toward all examinees.

4. and 5. The last two questions will be considered together. The statute states, "This examination shall be conducted by the state tax commission as other similar examinations. . .and in accordance with such other rules as may be prescribed by the state tax commission." It is our opinion that the statute clearly spells out who is to conduct the examination itself and who is to make the rules concerning the examination.

When the statute states that, "Only qualified electors of the state shall be eligible to take this examination," it is the function of the examining board to determine who is an elector. It is the examining board which has the overall responsibility for the examination. The State Tax Commission conducts the examination for the examining board.

If one cannot qualify as an elector of the State of Iowa at the time the examination is given, he cannot take the examination, and the examining board can refuse to allow him to do so.

Very truly yours,



Thomas W. McKay
Special Assistant Attorney General

TWM/f

CORPORATIONS: Trade Names. Industrial Loan Companies Act. §§ 2, 4 and 25 of S. F. 132 61st G.A., §§ 496A.7, 547.1, 1962 Code of Iowa as amended. The Industrial Loan Companies Act does not prohibit the use of trade names by loan corporations. The auditor may not promulgate a regulation prohibiting use of trade names. A corporation may use a different trade name at each of its various business locations.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

July 7, 1965

Mr. Lorne R. Worthington
Auditor of State
State House
L O C A L

Dear Mr. Worthington:

I am in receipt of your letter of June 17, 1965, to the Attorney General in which you solicit the opinion of this office in regard to the following enumerated questions:

I

Does the Industrial Loan Companies Act prohibit the use of trade names by loan corporations?

A trade name is a name used in trade to designate a particular business of certain individuals considered somewhat as an entity, or the place at which a business is located, but which is not a technical trademark. Black's Law Dictionary. It has been held to be the Iowa law that a trade name which has become of pecuniary value or a business advantage becomes a "property right," and, as such, is entitled to legal protection by the courts. Beneficial Industrial Loan Corp. v. Kline, 132 F.2d 520 (1942); Brown Garage Co. v. Brown Auto & Supply Co., 196 Iowa 823, 195 N.W. 514 (1923); Saperstein v. Grund, 85 F.Supp. 647 (1949).

The provisions of the act which might possibly be relevant to the question at hand are as follows:

> "Sec. 2(a) 'License' shall mean a permit or authorization issued or required under the provisions of this Act to make loans in accordance with this Act at a single location or place of business."

> "Sec. 4. ... Not more than one place of business where loans are made shall be maintained under the same license but the auditor may

> issue more than one license to the same licensee upon compliance, for each additional license, with all the provisions of this Act governing an original issuance of a license."

> "Sec. 25. No licensee shall make any loan under any other name or at any other place of business than that named in the license."

The ultimate object in construction of statutes is to determine the real purpose and meaning of the language. Builders Land Co. v. Martens, 255 Iowa 231, 122 N.W.2d 189 (1963). But in construing statutes, courts search for legislative intent as shown by what the legislature actually said rather than what it should have said or might have said or might have intended to say. Appeal of Board of Directors of Grimes Independent School District, ______ Iowa ______, 131 N.W.2d 802, (1964), State v. Bishop, ______ Iowa ______, 132 N.W.2d 455 (1965).

The provisions of the act make no specific reference to trade names, and no prohibition on the use of such names can be clearly implied from the language of the act. Such a prohibition would have to be very clear to overrule or abolish the statutory and court protection which has been provided for trade names in the past.

Thus it appears that the Industrial Loan Companies Act does not prohibit the use of trade names by loan corporations.

II

May the Auditor promulgate a regulation prohibiting the use of trade names?

Article 4, Section 22 of the Iowa Constitution gives the Auditor of the state authority to perform such duties as may be required by law." The provisions of the Industrial Loan Act make no specific reference to trade names and no prohibition on the use of such names can be implied from the language of the act. The act thus places no duties upon the Auditor as regards trade names. It appears, also, that there are no other statutory provisions which would give the Auditor authority over this matter.

Because there appears to be no such statutory requirement or authority upon which the Auditor might base such a regulation and because, as mentioned above, a trade name is a property right protected by the law, the Auditor has no legal authority to promulgate a regulation prohibiting the use of trade names.

III

Can a corporation use a different trade name at each of its various authorized locations?

Because the Industrial Loan Act makes no specific reference to trade names and because no guidelines regarding the use of such names can be implied from the language of the act, one must turn to other Iowa statutes in answering this question.

Sec. 496A.7 of Iowa's new corporation act, passed by the 58th G.A., in 1959, specifically provided for the adoption by corporations of more than one trade name upon compliance with the provisions of that section. The relevant portions of 496A.7 are as follows:

> "The corporate name:
>
> * * *
>
> "...(4) Shall be the name under which the corporation shall transact business in this state unless the corporation shall also elect to adopt one or more trade names as provided in this chapter.
>
> "(5) A corporation may elect to adopt a trade name that is not the same as or deceptively similar to the corporate name of any other domestic corporation existing under the laws of this state or of any foreign corporation authorized to transact business in this state, or the same as or deceptively similar to any name registered or reserved under the provisions of this chapter ....
>
> "A separate application and annual fee shall be filed and paid for each trade name adopted by the corporation."

When the new corporation act was under consideration in the legislature, however, an amendment was added by which existing domestic corporations can remain permanently under the old law if they wish, and incorporators can continue to organize under the old law without restriction. /496A.142(10), 1962 Code of Iowa/ The old law relating to such use of trade names is not as clear as that in the new act.

Chapter 547 of the 1962 Code of Iowa, providing for the conduct of business under trade names, is the only former statutory law covering this matter.

it provides, in Sec. 547.1 of that chapter as follows:

> "It shall be unlawful for any person or copartnership to engage in or conduct a business under any trade name, or any assumed name of any character other than the true surname of each person or persons owning or having any interest in such business, unless such person or persons shall first file with the county recorder of the county in which the business is to be conducted a verified statement showing the name, post office address, and residence address of each person owning or having any interest in the business, and the address where the business is to be conducted."

Corporations organized under the old law come within the above provisions only if the word "person" in the statute can be interpreted broadly enough to include them. There are no cases interpreting this portion of this statute, though there are two Attorney General's opinions discussing the matter. In 36 OAG 54 it was stated that Chapter 547 was not applicable to corporations. In that opinion one Louisiana case, concerning the validity of a contract entered into by a corporation using an assumed name, was cited concerning the matter, and the question of whether the chapter applied to corporations was finally dismissed as being "not material." In 26 OAG 103 it was stated that the word "person" was broad enough to include a corporation. Two Iowa cases were cited and numerous other authority was mentioned. Similar language has been held by the Iowa Court to include corporations. Simeon v. City of Sioux City, 252 Iowa 779, 108 N.W.2d 506, 510 (1936), and this appears to be the view held by the majority of states.

Even though Section 547.1 may apply to corporations, however, its provisions are unclear as to whether a corporation can use a different trade name at each of its various authorized locations. The statute provides only that if a business is conducted under a trade name, certain recording requirements must be met. As an historical matter the value and protection of trade names was based upon a term of usage in the particular locality in which the party using it was doing business. Sartor v. Schaden, 125 Iowa 696, 101 N.W. 511, (1904). Since the statute does not expressly cover the point and trade name rights were originally based on usage in a particular locality, and in light of the legal protection given to trade names or a "property right" by our courts, it appears that the §547 of the 1962 Code of Iowa does not prevent the use of a different trade name at each of several business locations.

If Section 547.1 does not apply to corporations, the same result is dictated, though more emphatically, by the historical "term of usage in a particular locality" basis for trade names, and by the clear legislative policy as seen in the 1959 Corporation Act.

Thus a corporation can use a different trade name at each of its various authorized locations.

Very truly yours,

/S/ Wade Clarke, Jr.

WADE CLARKE, JR.
Assistant Attorney General

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COUNTY AND COUNTY OFFICERS: County Treasurer: Investment Powers. §§452.10 as amended, 453.1 as amended, 453.5 as amended, 453.9 as amended, 453.10 and 682.45, 1962 Code of Iowa. A County Treasurer may invest (1) in special funds as provided in §§453.5 as amended, 453.9 as amended, and 453.10; (2) in time certificates of deposit or savings accounts in certain banks those certain funds as provided in §453.1; and (3) in certain securities, including those issued and insured by the Federal Housing Administration, those funds eligible for investment as provided in §682.45.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

July 12, 1965

Mr. Paul Franzenburg
Treasurer of State
State House
LOCAL

Dear Mr. Franzenburg:

You have referred to us the following question which was submitted to you by a County Treasurer:

> "During April and October when our treasurer's office collects a great deal of revenue, it occurred to us this money could be put to work for a thirty-day period at least. Since the Code covers making investments from three months to a year however, we questioned the legality of such a short term. Since at these rush periods it is physically impossible to apportion it all out due to the staggering amount of receipts, it does seem a shame to just let it lay idle. We had two million dollars we could have purchased a U.S. Treasury Bill with and made quite a lot of interest even for thirty days. What is your opinion?"

Following is a summary of the powers of county officers in regard to investment of funds. The basic power to deposit money is contained in Section 453.1, 1962 Code of Iowa, as amended by Chapter 278, Section 1, Acts of the 60th G.A. It reads as follows:

> "The treasurer of state, and of each county, city, town, and school corporation, and each township clerk and each county recorder, auditor, sheriff, each clerk and bailiff of the municipal court, and clerk of the district court, and each secretary of a school board shall deposit all funds in their hands in such banks as are first approved by the executive council, board of supervisors, city or town council, board of school directors, or township

> trustees, respectively. However, any county, city, town or school corporation may invest funds not immediately needed for current operating expenses in time certificates of deposit or savings accounts in banks approved as depositories as in this chapter provided. This authority shall be in addition to that granted by sections 453.9 and 453.10. The treasurer of state shall invest or deposit as provided in section 452.10 any of the public funds not currently needed for operating expenses. The list of public depositories and the amounts severally deposited therein shall be a matter of public record. The term 'bank' shall embrace any corporation, firm, or individual engaged in a general banking business." (Emphasis added)

You will note that the underlined portion limits the investment of funds to "certificates of deposit or savings accounts" in certain banks. This does not provide for the investment in government securities or other short time securities. I am reliably informed that certificates of deposit are to be deposited for a minimum of ninety days and, for savings accounts to draw interest, they must be deposited for a minimum of ninety days.

Section 453.1 refers to Sections 453.9 as amended, and 453.10 of the 1962 Code of Iowa, which refer to sinking funds and investment of funds created by elections.

Section 453.1 also refers to Section 452.10, as amended by House File 663, Acts of the 61st General Assembly, which reads as follows:

> "The state treasurer and each county treasurer shall at all times keep all funds coming into their possession as public money, in a vault or safe, to be provided for that purpose, or in some bank legally designated as a depository for such funds. However, the treasurer of state shall invest, unless otherwise provided, any of the public funds not currently needed for operating expenses in bonds or other evidences of indebtedness which are obligations of or are guaranteed by the United States of America; or make time deposits of such funds in banks as provided in chapter 453 and receive time certificates of deposit therefor. With respect to any time deposits that the state treasurer may place with any depository, the state treasurer shall require from such depositories a pledge consisting of bonds or other evidences of indebtedness of the state of Iowa, or of any county, city, town, school, road, drainage, or other district located within

> the state of Iowa, or of any governmental authority or instrumentality of the state of Iowa, or bonds or other evidences of indebtedness which are obligations of or guaranteed by the United States of America, said pledge to be one hundred percent of the amount of said deposit, less $10,000 insurance as provided by the Federal Deposit Insurance Corporation, and said pledge to be evidenced by a safe-keeping receipt of the securities deposited issued by a federal reserve bank or a branch thereof or a correspondent bank, and said safe-keeping receipts to be furnished to the state treasurer."

It is to be noted that the county treasurer is mentioned in the first sentence, but that is only in regard to the keeping of funds in a bank or vault. The remainder of the chapter refers to the investment of only the Treasurer of State.

Section 682.45 of the 1962 Code of Iowa does provide an additional investment power which can be used by the counties. This section reads as follows:

> "Insurance companies and building and loan associations (1) may make such loans and advances of credit and purchases of obligations representing loans and advances of credit as are eligible for insurance pursuant to title 1, section 2, of the National Housing Act (12 USC, §§ 1701-1732), and may obtain such insurance, (2) may make such loans, secured by real property or leasehold, as the federal housing administrator insures or makes a commitment to insure pursuant to title II of the National Housing Act, and may obtain such insurance.
>
> "It shall be lawful for insurance companies, building and loan associations, trustees, guardians, executors, administrators, and other fiduciaries, the state and its political subdivisions, and institutions and agencies thereof, and all other persons, associations, and corporations, subject to the laws of this state, to invest their funds and the moneys in their custody or possession, eligible for investment, in bonds and notes secured by mortgage or trust deed insured by the federal housing administrator, and in the debentures issued by the federal housing administrator pursuant to title II of the National Housing Act, and in securities issued by national mortgage associations, or similar credit institutions now or hereafter organized under title III of the National Housing Act, and in real estate loans which are guaranteed or insured by the administrator of

> veterans' affairs under the provisions of title III of the Servicemen's Readjustment Act of 1944, as amended, otherwise known as the 'G.I. Bill of Rights.'" (Emphasis added)

There are two questions arising out of the interpretation of Section 682.45. In an informal opinion issued by this office on May 11, 1965, in regard to this section, it was interpreted that the Treasurer of State may invest funds not currently needed for operating expenses in the securities mentioned in the above Code section. The other question which arises is whether a county is a political subdivision of the state. It is a fundamental principle held many times by the Iowa Supreme Court that counties are subdivisions of the state. Scott County v. Johnson, 209 Iowa 213, 222 N.W. 378 (1929); Brown v. Davis County, 196 Iowa 1341, 195 N.W. 363 (1923). In our opinion of May 11, we pointed out the legislative history of Section 682.45 and quoted the heading of House File 438 which is recorded as Chapter 120, Acts of the 46th General Assembly. There was legislative intent to promote the objects of the National Housing Act by authorizing "the state of Iowa and its political subdivisions" to invest in said securities.

Our advice to you is that the investment power of the county treasurer in the handling of every-day accounts is limited to investment in certificates of deposit or in savings accounts, except as provided in Section 682.45.

However, there is another exception provided in Section 453.5 of the Code, as amended by Chapter 278, Section 2, of the Acts of the 60th General Assembly. That section reads as follows:

> "If none of the duly approved banks will accept said deposits under the conditions herein prescribed or authorized, said funds may be deposited in any approved bank or banks conveniently located within the state.
>
> "If a governmental unit secures resolutions duly adopted by the board of directors of two or more lawful depository banks to which a bona fide proffer to deposit funds either in a savings account or in a time certificate of deposit, for some period extending from ninety days to one year with the privilege of renewal if mutually desired, and which resolutions are dated within ten days of the proffer and decline such public deposit, then and only then may such governmental unit invest such funds so declined in interest-bearing notes, certificates or bonds of the United States."

The Code of Iowa provides for the investment of specified funds in certain government securities under the provisions of Sections 453.5 as amended, 453.9 as amended, and 453.10. Section 453.1 provides that counties may invest funds not immediately needed for current operating expenses in time certificates of deposit or savings accounts. Additional authority for investing non-specified funds can only be found in Section 682.45 where certain federally insured loans may be invested in, and funds not immediately needed for current operating expenses may be used under this section by the county. It should be noted that Section 682.45 grants the power of investment to the political subdivision, not the treasurer, and further, that the investments under Section 682.45 may be, I am informed, both long term and short term securities.

Respectfully submitted,

/s/ Timothy McCarthy

TIMOTHY McCARTHY
Solicitor General

ew

SCHOOLS: Reorganization. §§ 274.37 and 275.1, 1962 Code of Iowa. Area from a 12 grade system district may not be placed into a district that does not maintain a 12 grade system.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

July 6, 1965

Mr. Glenn M. McGee
Mills County Attorney
Glenwood, Iowa

Dear Mr. McGee:

I am in receipt of your letter of April 9, 1965, to the Attorney General in which you solicit the opinion of this office in regard to the following question:

> Can school district boundaries be legally changed under Iowa Code section 274.37 to put area from a 12 grade system district into a district that does not maintain a 12 grade system when the General Assembly has declared in Iowa Code section 275.1 that it is a policy of the state that all area be within a district maintaining a 12 grade system?

The relevant portions of the statutes in question are as follows:

> "274.37 Boundaries changed by action of boards - contracts for joint construction of buildings
>
> The boundary lines of contiguous school corporations may be changed by the concurrent action of the respective boards of directors at their regular meetings in July, or at special meetings called for that purpose. Such concurrent action shall be subject to the approval of the county board or boards of education involved but such concurrent action shall stand approved if the county board or boards of education do not disapprove such concurrent action within thirty days following receipt of notice thereof. The corporation from which territory is detached shall, after the change, contain not less than four government sections of land."

#65-7-11

"Chapter 275.1 Declaration of policy-surveys

* * *

It is further declared to be the policy of the state that all the area of the state shall be in a district maintaining twelve grades by July 1, 1962. If any area of the state is not in such a district by July 1, 1962, it shall be attached by the county board of education to some such district, provided, however, that such attachment has the approval of the state board of public instruction before becoming effective and the full payment of the agriculture land tax credit as provided for in chapter 426, has been made for at least one year prior to July 1, 1962. Any such district or part thereof attached by the county board of education, with the approval of the state board of public instruction, shall have the right to appeal this attachment to a court of record in the county in which said district or part thereof is located within twenty days after the date of the approval by the state board of public instruction."

It is clear that the creation of school districts and the regulation of the manner of fixing their boundaries is properly within the control of the legislature. Wise v. Palmer, 165 Iowa 731, 147 N.W. 167 (1914). Lincoln Tp. School Dist. of Dallas County v. Redfield Consol. School Dist. of Redfield, 226 Iowa 298, 283 N.W. 881 (1939). One must still determine, however, whether the above two statutory sections are to be given equal weight on the matter in question in light of the fact that the latter provision has been drawn up as a "declaration of public policy," rather than in the usual statutory form.

It appears that a declaration of public policy has as much the force of law as any statute. It has been stated that "We must look to the constitution, statutes, and judicial decisions of the state to determine its public policy." Andrew v. Brenon, 208 Iowa 386, 226 N.W. 7 (1929), 35 Words & Phrases, title Public Policy, p. 480, Section 275.1 is a part of that law adopted by the General Assembly and approved by the governor. It is in form and substance a law of the state of Iowa and by its terms and authority is mandatory. Thus, in it's interpretation of this same section, the Iowa court has treated its language as having equal weight with other statutory law. Peterson v. Board of Education in and for Hamilton County, 251 Iowa 1306, 104 N.W.2d 821 (1960). Robrock v. County Board of Education, 250 Iowa 422, 94 N.W.2d 101 (1959) and has stated that such language is mandatory. Liberty Consol. School Dist. v. Schindler, 246 Iowa 1060, 70 N.W.2d 544 (1955).

The language of section 275.1 places a number of specific limitations upon that of section 274.37. The Iowa court has stated:

> "It is a fundamental rule that where a general statute, if standing alone, would include the same matter as a special statute and thus conflict with it, the special Act will be considered an exception to or a qualification of the general statute and will prevail over it, whether it was passed before or after such general enactment. Yarn v. City of Des Moines, 243 Iowa 991, 998, 54 N.W.2d 439, 443, and citations; Iowa Mutual Tornado Ins. Assn. v. Fisher, 245 Iowa 951, 955, 65 N.W.2d 162, 165; 82 C.J.S., Statutes, Section 369, pages 843, 844. See also State ex rel Michael v. McGill, 267 Wis. 336, 61 N.W.2d 494, 496." Liberty Consol. School Dist. v. Schindler, 246 Iowa 1060, 70 N.W.2d 544 (1955).

In the same case last cited, the court stated:

> "The legislature evidently intended chapter 275 to cover completely the subject of school district reorganization and to provide a comprehensive plan therefor. Obviously it was intended to encourage the reorganization of districts in the interests of economy, efficiency and higher educational standards."

The removal of territory from the Glenwood District which maintains a 12 grade system to the Keg Creek District which does not maintain a 12 grade system would appear to be action contrary to the terms of section 275.1 if it would merely serve to expand the territory in which no 12 grade system is in operation. The substance and intent of the statute appears quite clearly to be the reduction and not the expansion of territory and districts in which there is no existing 12 grade system.

If the 12 grade system presently in operation in the territory which is to be transferred were to be kept intact and in operation in that territory so that the resulting Keg Creek District could perhaps then be termed a 12 grade system, this also would appear to be contrary to the intent and substance of section 275.1. The statute seems to have as its intent the maintenance of a 12 grade system throughout each school district, not in only a part of a district. The statute makes provision for attaching districts without 12 grades to those with 12 grades, but makes none allowing the reverse procedure.

Only one Iowa case has arisen which concerned a factual situation somewhat similar to that here presented. In Peterson v. Board of Education, cited above, the County Board of Hamilton & Boone Counties, acting in 1960 as a single board and upon a duly filed petition, fixed the boundaries of the South Hamilton Community School District and submitted the proposition to the electors. The proposal was adopted and it carried in eleven of thirteen districts embraced in the proposal. The Stanhope District, a 12 grade district, which voted against the reorganization, brought an action against the boards stating that by 275.1 such a pre-1962 attachment could be made only after approval by the voters of the district being attached. The court held that because the Stanhope district was already a 12 grade district "and hence is not included in the area over which a county board is given authority to attach to a twelve-grade system," and because the situation did not involve an "attachment by a county board" under 275.1, that section of the statute was not applicable. The reorganization was then held to meet the more general requirements of 274.37.

Because the Peterson case involved a pre-1962, reorganization encompassing parts of thirteen separate districts, it would appear to be distinguishable upon its facts from the present situation. A post-1962 redistricting in which territory from one district is simply placed in a second district, would clearly appear to come within both the intent and language of 275.1.

Thus, it appears that school district boundaries cannot be legally changed under section 274.37 to put area from a 12 grade system district into a district that does not maintain a 12 grade system when the General Assembly has declared in 275.1 that it is a policy of the state that all area within the state be in school districts maintaining a 12 grade system.

Respectfully submitted,

/S/ Joseph S. Brick

JOSEPH S. BRICK
Assistant Attorney General

ms

CITIES AND TOWNS. Boards of Trustees. §§363.3, 397.1, 397.8, 397.29, 397.34, 398.1, 398.9, 398.10, 399.5, 1962 Code of Iowa. The boards of trustees have full authority over the placement of street lights, the wattage and design of such lights, the placement of water levies, the size of water pipes, and the placement of fire hydrants, so long as that authority is not exercised illegally or unreasonably in light of other city policies or programs. The costs of replacements and improvements of water systems are met by levies by the city council and the rentals or rates charged by the water board of trustees. The costs of replacements and improvements of electric systems are to be met by the rentals or rates charged by the light trustees. The trustees have full and absolute control over the application and disbursement of their funds.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

July 15, 1965

Hon. Adrian Brinck
West Point, Iowa

Dear Mr. Brinck:

I am in receipt of your letter of March 30, 1965 to the Attorney General in which you solicit the opinion of this office in regard to the following questions concerning city government:

> "1. Who determines the placement of street lights and the wattage and design of such lights?
>
> "2. Who determines where the water lines are to be laid, the size of the pipes to be used, and the placement of fire hydrants?
>
> "3. Who determines how the cost of these replacements and improvements are to be met?
>
> "4. Is the budget of these various Boards of Trustees subject to revision and approval of the Council?"

Section 397.1 and 397.8 of the Iowa Code gives cities the power to erect, maintain and operate light and water systems and the power to condemn and appropriate such private property as may be necessary to establish such systems. However the state may, if it desires, prescribe the manner in which a municipality shall exercise its powers. Thus, section 397.29 of the code makes provisions for the possible control and management of electric light and waterworks

facilities by one or more boards of trustees after approval of such a method by city voters in a general election. I assume that it is such boards of trustees that you are referring to in your letter.

Your first two questions concern the determination of the placement of street lights, the wattage and design of such lights, the placement of water lines, the size of water pipes, and the placement of fire hydrants.

Section 397.34 specifies that a board of trustees shall have all of the power and authority of management and control as is conferred upon waterworks trustees under Chapter 398. Section 398.9 of Chapter 398 in conferring power and authority on the waterworks trustees states in part as follows:

> "The said board of trustees shall have the power to carry into execution the contract or contracts for the purchase or erection of such waterworks, and to employ a superintendent and such other employees as may be necessary and proper for the operation of such works, for the collection of water rentals, and for the conduct of the business incident to the operation thereof...."

Where a statute specifies and directs in definite terms the manner in which municipal corporate acts are to be executed, and points out the departments, officers or agents who are to perform them, such specification must be substantially followed. The direction of a definite and certain method of procedure in the grant of power to municipal authorities, it is usually held, excludes all other methods by implication of law. Ebert v. Short, 199 Iowa 147, 201 N.W. 793, 796 (1925); Des Moines v. Gilchrist, 67 Iowa 210, 25 N.W. 136 (1885); McQuillin, Municipal Corporations §10.27. It is clear, however, that such powers must be exercised in a legal and reasonable manner. Central Life Assurance Society of United States v. City of Des Moines, 185 Iowa 573, 171 N.W. 31 (1919) McQuillin, Municipal Corporations §10.27. Under section 363.3 of the Iowa Code, all powers not conferred by statute, are held by the council.

In light of the powers given to section 397.29 boards of trustees to contract and to conduct business incident to the operation with which such a board may be concerned, it appears that such a board has full authority and control over all of the matters listed in your first two questions. It is also clear, however, that that authority ends when it is exercised illegally or unreasonably in light of other city policies or programs. What is determined as

being reasonable or unreasonable will depend upon the particular factual situation.

Your third question concerns the determination of the method by which the costs of replacing and improving the light and water systems of a city are to be met. Section 399.5 of the Iowa Code gives cities the power to levy a tax of one and one-fourth mills on the dollar on taxable city property, such money to be used for waterworks purposes. Section 398.1 gives cities the power to levy, in addition to the regular water tax, a tax of one-half mill for the purpose of creating a sinking fund to be used on waterworks expenditures. These taxes are levied by the council. Section 398.10 gives the board of trustees power to fix the water rentals or rates to be charged.

Since section 397.34 gives the board of trustees all the power and authority in the management and control of the utilities with which they are concerned as is conferred upon waterworks trustees under Chapter 398, and since section 398.10 gives the board of trustees power to fix water rentals or rates, the same section would appear to permit trustees concerned with electric power to set similar rates.

Thus, the costs of the mentioned replacements and improvements by water systems are to be met by levies by the city council and the rentals or rates charged by the water board of trustees. The costs of the mentioned replacements and improvements of electric systems are to be met by the rentals or rates charged by the light trustees.

Your final question relates to the budgets of the various boards of trustees. Section 398.9 states in part as follows:

> "...All money collected by the board of waterworks trustees shall be deposited at least weekly by them, with the city treasurer; and all money so deposited and all tax money received by the city treasurer from any source, levied and collected for and on account of the waterworks, shall be kept by the city treasurer as a separate and distinct fund. The city treasurer shall be liable on his official bond for such funds the same as for other funds received by him as such treasurer. Such moneys shall be paid out by the city treasurer only on the written order of the board of waterworks trustees, who shall have full and absolute control of the application and disbursement thereof for the purposes prescribed by law, including the payment of all indebtedness arising in the construction of such works, and the maintenance, operation, and extension thereof."

The language of this section is specific and definite and appears quite clearly to give full and absolute control over the application and disbursement of funds to the board of trustees.

In conclusion, the boards of trustees have full authority over the placement of street lights, the wattage and design of such lights, the placement of water levies, the size of water pipes, and the placement of fire hydrants, so long as that authority is not exercised illegally or unreasonably in light of other city policies or programs. The costs of replacements and improvements of water systems are met by levies by the city council and the rentals or rates charged by the water board of trustees. The costs of replacements and improvements of electric systems are to be met by the rentals or rates charged by the light trustees. The trustees have full and absolute control over the application and disbursement of their funds.

Very truly yours,

/s/ Joseph S. Brick

JOSEPH S. BRICK
Assistant Attorney General

bj

REORGANIZATION - Joint County Plan: § 275.8, 1962 Code of Iowa. A change in the internal boundaries of a joint county plan must be adopted by the joint county boards in the same manner that the original joint county plan was adopted.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

July 26, 1965

Mr. Charles Barlow
Palo Alto County Attorney
Emmetsburg, Iowa

Dear Mr. Barlow:

This is in response to your recent wherein you pose the following situation:

> "The present county reorganization plan established by joint action of the county boards extends into five (5) adjacent counties and it sets up four (4) school districts. One of the county boards is studying the possibilities of removing the internal boundaries and leaving the external boundaries of the plan unchanged."

You then ask:

> "What method of approval is necessary to change the internal boundaries of a school reorganization plan that extends into five counties?"

In answer to your question an opinion to Mr. Lynn Morrow, Allamakee County Attorney, issued by this office in 58 OAG 227 is relevant. The above opinion provides in part:

> "'For purposes of this chapter the planning of joint districts is defined to include all of the following acts:
>
> "'1. Preparation of a written joint plan in which contiguous territory in two or more counties is considered a part of the potential school district in the county on behalf of which such county plan is filed with the state department of public instruction by the county board of education in and for such county.

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"'2. Adoption of such plan at a joint session of the several county boards of education in whose counties such territory is situated...'

"Thus, a joint plan is one actually adopted by the county boards of education of the several counties within the boundaries of which territory proposed to comprise a reorganized school district is situated.

"Section 275.12, Code 1958, (Section 275.12, Code 1954, as amended by 57th G.A., Ch. 129, §§2, 12; Ch. 130, §1) provides in pertinent part:

"'A petition describing the boundaries, or accurately describing the area included therein by legal description, of the proposed district, which boundaries or area described shall conform to county plan or the petition shall request change of the county plan, shall be filed with the superintendent of schools of the county in which the greatest number of electors reside...'

"Thus, before a county board or boards can approve a proposed district it must conform to the existing plan or the existing plan must be amended. According to the facts stated in your letter, the existing plan was the joint act of four county boards of education. To consider an analagous situation, an enactment of the legislature cannot be repealed by the Senate without the House or by the House without the Senate. Similarly, it is my impression, that a plan of the type in question cannot be rescinded or amended by some of the county boards whose members constituted the joint body that originally adopted it."

In the situation that you presented the plan was adopted by the joint action of the five (5) county boards. For the reasons stated in the cited opinion I am of the opinion that any internal boundary changes to be made in your county plan must be approved in the same manner as the original plan was adopted.

Very truly yours,

/s/ Nolden Gentry

NOLDEN GENTRY
Assistant Attorney General

NG:jtm

SCHOOLS AND SCHOOL DISTRICTS: §§ 297.5, 291.13, 1962 Code of Iowa. Money resulting from levy made under Section 297.5, 1962 Code of Iowa as amended by Senate File 269, 61st G.A., for the purchase of school sites shall be placed in the schoolhouse fund and may be so expended without submission to the electors.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

July 27, 1965

Mr. Ed Samore
Woodbury County Attorney
Room 204, Court House
Sioux City, Iowa 51101

Dear Mr. Samore:

Reference is herein made to yours of the 23rd inst., in which you submitted the following:

> "Your opinion is respectfully requested concerning Code Section 297.5, Senate File 269 recently passed by the state legislature on the following:
>
> "If a school board levies this tax not exceeding the allowable one mill, is it still necessary for the qualified voters of the district to vote on the issue to purchase sites in said school district; and must the vote carry by a 60% majority."

In reply thereto, I advise that Section 297.5, 1962 Code of Iowa as amended by Senate File 269, 61st G.A., now provides the following:

> "The directors in any high school district maintaining a program kindergarten through grade twelve (12) and having a total enrollment of 600 or more may, at their regular meeting in July, or at a special meeting called for that purpose between the time designated for such regular meeting and the third Monday in August, certify an amount not exceeding one mill to the board of supervisors, who shall levy the amount so certified, and the tax so levied shall be placed in the schoolhouse fund and used only for the purchase of sites in and for said school district."

Note that according to the foregoing, money derived from the foregoing levy is placed in the schoolhouse fund to be used only for the purchase of sites in and for a school district. The school-

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house fund referred to is Section 291.13, 1962 Code of Iowa, and provides so far as applicable the following:

> "The money collected by a tax authorized by the electors or the proceeds of the sale of bonds authorized by law or the proceeds of a tax estimated and certified by the board for the purpose of paying interest and principal on lawful bonded indebtedness or for the purchase of sites as authorized by law, shall be called the schoolhouse fund and, except when authorized by the electors, may be used only for the purpose for which originally authorized or certified. All other moneys received for any other purpose shall be called the general fund. The treasurer shall keep a separate account with each fund, paying no order that fails to state the fund upon which it is drawn and the specific use to which it is to be applied."

Thus, this money derived from the levy referred to when placed in the schoolhouse fund is controlled by the terms of Section 291.13 and can only be used for the purchase of schoolhouse sites unless the electors at an election authorize its use for any other purpose.

Therefore, in answer to your question, I am of the opinion that the levy authorized by Section 297.5 as amended requires no action by the electors for its use for the purchase of sites.

Very truly,

/s/ Oscar Strauss

OSCAR STRAUSS
First Assistant Attorney General

jtm

TAXATION: Inheritance Tax -- Clearance Without Administration. Sections 450.22 and 606.15, Code of Iowa, 1962. Proceedings should be docketed in Probate or separate docket reserved for Clearance for Inheritance Tax Without Administration. Fees may be charged for certificate and seal and entering Order, but statutory probate fees may not be charged. Property should be recorded in Inheritance Tax and Lien Book.

LAWRENCE F. SCALISE
ATTORNEY GENERAL

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

August 3, 1965

Mr. Clint Ryan
Poweshiek County Attorney
Brooklyn, Iowa

Dear Mr. Ryan:

This is in reply to your letter dated July 21, 1965, enclosing a copy of an inquiry written to you by the Clerk of your District Court. For the sake of brevity we have summarized the questions asked:

1. In which docket should proceedings filed under the provisions of Section 450.22 of the Code be filed?

2. Is the Clerk entitled to fees thereunder?

3. Should property sought to be cleared by inheritance tax under provisions of Section 420.22 of the Code be recorded in the Inheritance Tax and Lien Book provided for in Section 450.13 of the Code?

Section 450.22, Code of Iowa, 1962, as amended by Section 8, H.F. 679, 61st G.A. provides as follows:

> "450.22 Administration avoided. When the heirs or persons entitled to inherit the property of an estate subject to the tax hereby imposed, desire to avoid the appointment of an administrator as provided in section 450.21, they or one of them shall file under oath the inventories and reports and perform all the duties required by this chapter, of administrators, including the filing of the lien. Proceedings for the collection of the tax when no administrator is appointed, shall conform as nearly as may be to the provisions of this chapter in other cases."

Section 606.15(29) was amended by S.F. 112, 61st G.A. to read:

> "606.15 Fees. The clerk of the district court shall charge and collect the following fees, all of which shall be paid into the county treasury for the use of

the county except as indicated: * * *

"29. For all services performed in the settlement of the estate of any decedent, minor, insane person, or other persons laboring under any legal disability, except where actions are brought by the administrator, guardian, trustee, or person acting in a representative capacity or against him, or as may be otherwise provided herein, where the value of the personal property and real estate of such a person falls within the following indicated amounts, the fee opposite such amount shall be charged.

Value	Fee
Up to $ 3,000.00	$ 5.00
Between 3,000.00 and 5,000.00	10.00
Between 5,000.00 and 7,000.00	15.00
Between 7,000.00 and 10,000.00	20.00
Between 10,000.00 and 15,000.00	25.00
For each additional $25,000.00	30.00
For each additional $25,000.00 or major fraction thereof	20.00"

In reply to your first question it is our opinion that since the proceeding contemplated by Section 450.22 deals with property of an estate, these papers should be filed and docketed in the Probate Docket or in a separate docket reserved for Clearance for Inheritance Tax without administration.

We find no authority in Section 606.15(29) for the clerk to charge the statutory probate fees where there is no administration. However, it does appear that the clerk can charge $2.00 for the certificate and seal of the Court which is placed on the Preliminary Inheritance Tax Return and Probate Inventory prior to mailing a copy thereof to the State Tax Commission. Section 606.15(13) Code of Iowa, 1962, as amended by Section 8, H.F. 47, 61st G.A. Further, the clerk can charge $2.00 for the certificate and seal which is placed on the Application for Relief from Appraisement.

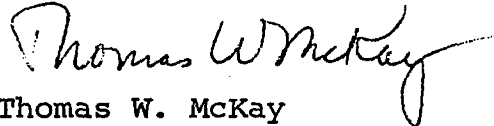
A fee of $1.00 can be charged for entering the Order relieving the estate from appraisement. Section 606.15(15), Code of Iowa, 1962, as amended by Section 9, H.F. 47, 61st G.A. In cases where there is an appraisal by the collateral inheritance tax appraisers, the clerk will, of course, tax the appraisers' fees. Section 450.25 and 450.26, Code of Iowa, 1962. In addition, the clerk may charge $2.00 for the certificate and seal on the return of appraisement which is filed by the clerk with the State Tax Commission.

Section 450.13 of the Code requires the clerk to keep an Inheritance Tax and Lien Book "in which shall be kept a full and accurate record of all proceedings in cases where property is charged _or sought to be charged_ with the payment of an inheritance tax under the laws of this State." From this clear language, we conclude that the property listed in proceedings under Section 450.22 must be recorded in the Inheritance Tax and Lien Book.

You will note that Section 8 of H.F. 679, 61st G.A. removes the statutory 18 months limitation on "No Administration" proceedings under Code Section 450.22. This change was proposed to the legislature in order to conform the law to the established practice of accepting Inventories, Applications for Relief from Appraisement, and Appraisals filed with the

State Tax Commission later than 18 months after the date of death of the decedent.

Very truly yours,



Thomas W. McKay
Special Assistant Attorney General

TWM:dj

Strauss

COUNTY AND COUNTY OFFICERS: Clerk of the District Court -- 606.15(29), 1962 Code of Iowa, as amended by S.F. 112, 61st G.A. The fees of the Clerk of the District Court in probate matters includes only the proceeds of life insurance which are subject to administration.

State of Iowa

LAWRENCE F. SCALISE — DEPARTMENT OF JUSTICE

ATTORNEY GENERAL — Des Moines, Iowa

August 5, 1965

Mr. Robert F. Schoeneman
Butler County Attorney
614 - 11th Street
Aplington, Iowa 50604

Dear Mr. Schoeneman:

In your letter dated July 21, 1965, you stated as follows:

> "The Clerk of the District Court has requested an opinion on the following two points regarding the new fee schedule for the Clerk of the District Court as set out in Senate File 112 and House File 47, Act of the 61st General Assembly:
>
> 1. Is the new probate fee schedule retroactive to estates opened before July 4, 1965, but not closed;
>
> 2. Whether the new probate fee is computed on one-half of the joint property and insurance listed in the probate inventory."

Your first question is answered by 1952 O.A.G. 40. This opinion holds that the fees charged and collected from estates in process of probate on the effective date of the legislation increasing the fees should be the fees applicable at the time the estate was opened. In other words, the new fee schedules are only applicable to estates opened after July 4, 1965.

Section 606.15(29), as amended by S.F. 112, 61st G.A. (1965) reads as follows:

> "606.15 Fees. The clerk of the district court shall charge and collect the following fees, all of which shall be paid into the county treasury for the use of the county except as indicated. * * *

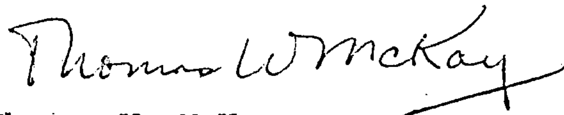
"29. For all services performed in the settlement of the estate of any decedent, minor, insane person, or other persons laboring under any legal disability, except where actions are brought by the administrator, guardian, trustee, or person acting in a representative capacity or against him, or as may be otherwise provided herein, where the value of the personal property and real estate of such a person falls within the following indicated amounts, the fee opposite such amount shall be charged.

Value	Fee
Up to $3,000.00	$ 5.00
Between 3,000 and 5,000.00	10.00
Between 5,000.00 and 7,000.00	15.00
Between 7,000.00 and $10,000	20.00
Between 10,000 and 15,000.00	25.00
For each additional $25,000.00	30.00
For each additional $25,000.00 or major fraction thereof	20.00"

The Attorney General ruled on May 24, 1965, in an opinion to Mr. Ray Yarham, Cass County Attorney, (copy enclosed) that the value of joint tenancy property should not be included in determining the probate fees taxed by the clerk. The rationale of this opinion is that joint tenancy property passes by operation of law and does not require administration. Since the clerk's probate fees are allowed for services rendered "in the settlement of the estate," they do not attach to property which does not require administration.

Applying the same reasoning to the proceeds of life insurance, only such proceeds as are payable to the estate or the executor or administrator thereof, and thus subject to administration, are includible in the computation of the clerk's probate fees.

Very truly yours,



Thomas W. McKay
Special Assistant Attorney General

TWM/f

COUNTY AND COUNTY OFFICERS: Additional compensation of County Treasurer. Sect. 340.3(14) as amended by H use File 349, 61st G.A. The County Treasurer of a county having a population of 40,000 or over and a city of 75,000 or over is entitled to such additional compensation only as is allowed by the Board of Supervisors in an amount not less than $25.00 nor more than $50.00 for each 5,000 population in excess of 75,000 but in no case shall such allowance exceed $500.00.

State of Iowa
Department of Justice
Des Moines, Iowa.

July 20, 1965

Mr. Edward F. Samore
Woodbury County Attorney
204 Court House
Sioux City, Iowa 51101

Dear Sir:

Reference is herein made to yours of the 7th inst., in which you submitted the following:

> "May I have your opinion concerning the interpretation of the law of this state as amended concerning the salaries of the County Treasurer, more specifically, that of the Woodbury County Treasurer.
>
> "Your attention is respectfully called to Section 340.3, subsection 14, and House File 349 which has been enacted into law, more specifically Section 2 of said House File 349, which states as follows:
>
> "'In counties having a population of forty thousand (40,000) or over in which there is a city of fifteen thousand (15,000) or more population, of any form of government, the board of supervisors may allow additional compensation to the county treasurer not to exceed fifty (50) dollars per annum for each five thousand (5,000) population of such cities in excess of fifteen thousand (15,000). When such county has a city with a population of seventy-five thousand (75,000.00) or over, the board of supervisors shall allow additional compensation in an amount not less than twenty-five (25) dollars nor more than fifty (50) dollars for each five thousand (5,000) population of such cities in excess of seventy-five thousand (75,000); provided, however, that

in no case shall such allowance exceed five hundred (500) dollars.

"Your attention is respectfully called to the last 8 lines of said Section 2.

"Your opinion is respectfully requested as to whether or not the Woodbury County Treasurer is entitled to compensation based upon either or both of the above cited portions of Section 2 of House File 349."

In reply thereto, I advise as follows:

I am of the opinion that the County Treasurer of Woodbury County is entitled to additional compensation solely under the second situation prescribed in section 340.3. Under the language of the statute there are two separate situations in which the County Treasurer is entitled to additional compensation: (1) in a county of forty thousand population having a city of fifteen thousand or more population; (2) in a county of forty thousand population or more having a city of seventy-five thousand or more population. It will be seen that both increases concern the same size county, a county of the population of forty thousand or more.

These increases must be construed separately if all of the language of the statute is to be given effect. Otherwise there would be no necessity for legislating situation number two because it would be included within the category of situation number one, to wit: A county of forty thousand or more having a city of a population of fifteen thousand or more. Woodbury County is a county of forty thousand population or more having a city of seventy-five thousand or more; therefore additional compensation for the County Treasurer is confined to the increases provided for in that category. That is, the County Treasurer of Woodbuty County is entitled to such additional compensation as is allowed by the Board of Supervisors in an amount not less than $25.00 nor more than $50.00 for each five thousand population in excess of seventy-five thousand, but in no case shall such allowance exceed $500.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

COUNTIES AND COUNTY OFFICERS: County Hospital enlargement and improvements: §347A.7, 1962 Code of Iowa. Section 347A.7 is not applicable to a county hospital organized under chapter 347 of the 1962 Code of Iowa.

State of Iowa
Department of Justice
Des Moines, Iowa.

August 5, 1965

Mr. Robert W. Burns
Dubuque County Attorney
457 Fisher Building
Dubuque, Iowa

Dear Mr. Burns:

This is in reply to your recent request where you submitted the following questions:

1. "Does the Dubuque County Nursing Home which was organized under Chapter 347, come within the provisions of Chapter 347A?

2. "Can the Dubuque County Nursing Home issue negotiable interest bearing bonds, either general obligation or revenue bonds, as provided for in Chapter 347A?"

In answering your request, the following portions of Section 347A.7, 1962 Code of Iowa, are relevant:

> "347A.7. Enlarging and improving county hospital. For the purpose of enlarging and improving <u>any county hospital or hospitals theretofore acquired and being operated under the provisions of this chapter 347A.</u>***
>
> "This section shall be construed as providing an <u>alternative</u> and <u>independent method for the enlargement and improvement of such county hospital</u>; shall not be construed as limiting or superseding any other method of enlargement and improvement of such county hospital; <u>and shall not be construed as an amendment of or subject to the provisions of any</u> other law. (Underlineing added)

The portion of the first sentence set out above clearly indicates that the provisions of Section 347A.7 are only applicable to those county hospitals acquired and operated under the provisions of Chapter 347A. The rule of statutory construction that is applied in situations like this is that express mention of one thing in a statute implies the exclusion of all others. <u>Archer v. Board of</u>

Education, 251 Iowa 1077, 1084; 104 N.W. 2d 621, 626 (1960; North Iowa Steel Company v. Staley, 253 Iowa 355, 357, 112 N.W. 2d 364, 365 (1961). In other words, legislative intent can be expressed by omission as well as inclusion. Archer v. Board of Education, supra. Inasmuch as the relevant section specifically limits the provisions of Section 347A.7, 1962 Code of Iowa, to county hospitals acquired and operated under Chapter 347A, the county hospitals organized and operated under other chapters of the code are excluded from the provisions of Section 347A.7, 1962 Code of Iowa.

The 59th General Assembly amended Chapter 347A by adding Section 347A.7 in 1961. Chapter 192 Section 1, Acts of the 59th G.A. This section was adopted by the legislature in the exact form that it was introduced in the House of Representatives (HF 703) The explanation of HF 703 was as follows:

> "This bill will permit a revenue bond county hospital to be enlarged. General obligation bonds are necessary for this purpose, since the entire revenue of the hospital is already pledged to secure the original revenue bonds used to build the hospital.
>
> "Muscatine County has the only revenue bond county hospital in Iowa at the present time. This hospital does not have enough beds to meet anticipated needs in the near future. This bill has been recommended by the bonding attorneys." (Underlining added)

From the above explanation I am of the opinion that what is now Section 347A.7 was a piece of special legislation to aid only county hospitals financed via revenue bonds in the manner provided in Chapter 347A. Therefore, I am of the opinion that Dubuque County Nursing Home is not included within the provisions of Chapter 347A.

Inasmuch as the answer to your first question was negative, it is not necessary to answer your second question at this time.

Very truly yours,

NOLDEN GENTRY
Assistant Attorney General

WELFARE: Customary and usual fees - Section 3, Senate File 567
The State Board of Social Welfare has the power to determine whether or not the fees charged by nursing and custodial homes are customary and usual; the cost of care in any one such home not being the sole determining factor.

August 9, 1965

Mr. A. Downing, Chairman,
State Board of Social Welfare
State Office Building
Des Moines, Iowa

Dear Mr. Downing:

In your letter of July 26, 1965, you requested an opinion from this office on the intention of the Sixty-first (61st) General Assembly in enacting Section 3, Senate File 567.

> "In making this appropriation, it is the intent of the general assembly that supplementation by private and/or public funds is permitted to nursing homes and custodial homes if usual and customary fees are not met from the funds appropriated hereunder" (Emphasis added)

> Section 3, Senate File 567, as originally introduced, read:

> "In making this appropriation, it is the intent of the general assembly that supplementation by private and/or public funds is permitted if full cost care is not paid from the funds appropriated hereunder." (Emphasis added)

In the same area, a section of a different bill, Section 4, Senate File 565, concerning medical assistance to the aged, as quoted immediately above.

During the legislative processes relative to Senate File 565, an amendment was proposed which called for the omission of the "cost care" section of that bill as above quoted and substitution made therefor as follows:

> "Sec. 4. In making this appropriation, it is the intent of the general assembly that supplementation by private and/or public funds is permitted to nursing homes and custodial homes if usual and customary fees are not met from the funds appropriated hereunder."

It is readily apparent that the language of the proposed amendment to Senate File 565 and the language of Section 3 of Senate File 567, now at issue, are identical. As a result of the specific use of the words "customary and usual" in lieu of "cost care" in Section 3, Senate File 567, and the opposite implementation in Section 4, Senate File 565, the conclusion is inescapable that any equation between the terms "customary and usual fees" and "cost care" was not intended nor expected.

In accordance with the foregoing, the necessity arises that there be a method of determining whether a fee is customary and usual; since the funds appropriated by Senate File 567 are for disbursement by the Department of Socail Welfare, it is the opinion of this office that the Board of Social Welfare is the appropriate division to make such determination.

It should also be noted that the assembly has extended the aforementioned power of determination only insofar as it pertains to nursing and custodial homes, since Section 3 is thus expressly restricted.

It is, therefore, the opinion of this office that Section 3, Senate File 567, extends to the Board of Social Welfare the power to determine whether or not the fees charged by nursing and custodial homes are customary and usual; The "cost care" in any one such home not being the sole determining factor.

Respectfully submitted,

NOLDEN GENTRY
Assistant Attorney General

CONSERVATION: Soil Conservation Districts, Coverage of Certain Employees under Workmen's Compensation Act - §§ 467A.3, 85.61, 1962 Code of Iowa. A soil conservation district which has the power to hire and fire, and control the work of such persons, even though the wages of such persons are paid from funds other than state appropriated, are employees of the soil conservation district for purposes of the Iowa Workmen's Compensation Law.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

August 12, 1965

Mr. William H. Greiner
Director
State Soil Conservation Committee
L O C A L

Dear Mr. Greiner:

You have requested an Attorney General's opinion as to whether employees of a County Soil Conservation District who are paid out of funds furnished by farmers within the district, rather than state appropriated funds, are covered under the Iowa Workmen's Compensation Act.

Section 85.61 of the 1962 Code of Iowa, relating to the definition of employer for Workmen's Compensation purposes states:

> "1. 'Employer' includes and applies to any person, firm, association, or corporation, states, county, municipal corporation, school district, county board of education and the legal representatives of a deceased employer." (Emphasis Added)

It is provided in § 467A.3 of the 1962 Code of Iowa, in reference to a soil conservation district, that:

> "Wherever used or referred to in this chapter, unless a different meaning clearly appears from the context:
>
> "1. 'District' or 'soil conservation district' means a governmental subdivision of this state, and a public body corporate and politic, organized in accordance with the provisions of this chapter, for the purposes, with the powers, and subject to the restrictions hereinafter set forth." (Emphasis Added)

#65-8-7

We see that the statutory definition of an employer under the Iowa Workmen's Compensation Act does not specifically include a "soil conservation district." However, since such a district is "a governmental subdivision of the state," it thus appears to fall under the designation of the "state" as an employer for the purposes of the act.

In referring to the statutory definition of an employer Hop v. Brink, 205 Iowa 74, 81, 217 N.W. 551 (1928), fortifies this conclusion in stating:

> "Did the Legislature, by omitting to include townships, intend that such townships as employers should not be within the scope of the chapter? Every other body politic within the state having authority to employ labor has been included within the terms used." (Emphasis Added)

Since the statute defining a "soil conservation district," supra, specifically provides that it is a public body politic, it is apparent that it falls within the "every other body politic within the state having authority to employ labor" referred to in this case and thus that such a district is an employer under the Iowa Workmen's Compensation Act.

This conclusion is buttressed by the statement in Heiliger v. City of Sheldon, 236 Iowa 146, 18 N.W.2d 182, 186 (1945), that:

> "We have held that an employer or employee is ordinarily within the Act, unless it expressly excludes him. In Gardner v. Trustees of Main St. M. E. Church, 217 Iowa 1390, 1393, 250 N.W. 740, 741, the court quoted with approval from the commissioner's award, as follows: 'We are now assuming that the statute means what it says in imposing compensation obligation on every actual employer, except in employments specifically excluded from the operation of the law.' ... And in Crooke v. Farmers' Mut. Hail Ins. Ass'n, 206 Iowa 104, 107, 108, 218 N.W. 513, 514, 62 A.L.R. 342, the court said: 'Some workmen's compensation laws are specifically limited to hazardous or extrahazardous employments, and the particular case must be brought within the statute. Ours is drafted on the reverse theory, of entitling to the benefit of the act employees other than those which the Legislature has excluded.'"

Section 85.61 of the 1962 Code of Iowa provides in reference to the Workmen's Compensation Act that:

> "2. 'Workmen' or 'employee' means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer, except as herein specified."

That is, as was pointed out in Sister Mary Benedict v. St. Mary's Corporation, 255 Iowa 847, 124 N.W.2d 548, 550 (1963), in construing Section 85.61(2), that:

> "... A person 'who has entered the employment of an employer' is 'a person who works under contract of service, express or implied ....'

> "In other words, employment implies the required contract on the part of the employer to hire and on the part of the employee to perform service."

Your letter requesting this opinion, in conjunction with the enclosed correspondence from the Kossuth County Soil Conservation District, indicates that there is the required contract of employment between the Soil Conservation District and the employees in question. They indicate that the Soil Conservation District will hire these employees and that the employees will in turn perform services for the District.

It was stated in Sister Mary Benedict v. St. Mary's Corporation, supra, 124 N.W.2d at 551, and cited with approval in Usgaard v. Silver Crest Golf Club, ____ Iowa ____, 127 N.W.2d 636, 637 (1964), that:

> "The major elements of the employer-employee relationship for the purposes of Workmen's Compensation under the Iowa Act are: (1) the employer's right of selection, or to employ at will, (2) responsibility for the payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) is the party sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed."

Your request, and the letter enclosed therein, indicate that these elements are met in this instance. They indicate that the Soil Conservation District (1) has the right to select the employee and to

employ at will. (2) It appears that the Soil Conservation District has the responsibility for the payment of the wages of the employees. Although others may volunteer to make payments to the District to meet the expense of these wage payments it is the District that has the actual responsibility for the payment of wages to these employees. That is it is the district, and not the farmers of the district or anyone else, that is responsible to these employees for their wage payments and who must make the payments to them. It also appears that the District, (3) has the right to discharge or terminate the employment relationships and that it (4) has the right to control the work that is done. Further it is apparent that (5) the District is the responsible authority in charge of the work.

From this analysis it appears that the relationship of the District and the employees in question is one that provides the necessary elements of the employer-employee relationship for the purposes of the Workmen's Compensation Act. The criterion provided for making this determination specifies only that the employer be responsible for the payment of the wages. It makes no reference to the source from which he obtains the money for the payments thus it appears that the employer's source of these funds is immaterial in making the decision as to whether the necessary employment relationship exists for the Workmen's Compensation Law to apply although this question has not specifically arisen in any Iowa case decisions from other jurisdictions indicate that this is the correct approach. In Cunningham v. Department of State, etc., 255 App. Div. 729, 6 N.Y.S.2d 823 (1938), the court held that a referee was under the control of the State Athletic Commission and that, although he was not paid by the state but by an athletic club, he was entitled to compensation under the Workmen's Compensation Act as an employee of the state. A further verification is found in Mayze v. Town of Forest City, 207 N.C. 168, 176 S.E. 270 (1934), where it was held that the Workmen's Compensation claimant was an employee of a town. The court then stated:

> "... The fact that plaintiff's wages were paid out of funds procured by the town from the Reconstruction Finance Corporation was immaterial on the question involving the relationship between the plaintiff and the town of Forest City. Such relationship was established by contract between the plaintiff and the defendant town of Forest City, and for that reason was a relationship of employee and employer." 176 S.E. at 270-271.

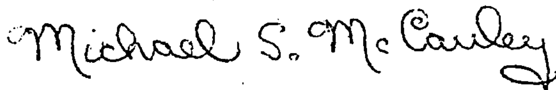
Finding that the soil conservation district is an employer under the Workmen's Compensation Act, that the necessary contract of

service exists, that the major elements of the required employer-employee relationship are met and that the source from which the employer obtains the funds for the payment of wages is immaterial it is my conclusion that the Iowa Workmen's Compensation Law applies to the employees in question.

This conclusion is fortified by the statement in Usgaard v. Silver Crest Golf Club, supra, 127 N.W.2d at 639, that:

> "In case of doubt the Workmen's Compensation Act is liberally construed to extend its beneficent purpose to every employee who can fairly be brought within it. Doggett v. Nebraska-Eastern Express, Inc., 252 Iowa 341, 346; 107 N.W.2d 102, 105; and Crouse v. Lloyd's Turkey Ranch, 251 Iowa 156, 163, 100 N.W.2d 115, 119."

Respectfully submitted,



MICHAEL S. McCAULEY
Assistant Attorney General

ms

TOWNSHIPS: Justice of the Peace & Constable; meaning of the term, "Civil Officers" §§ 602.1, 748.1, 748.3 and 748.5, 1962 Code of Iowa; Chapter 601, 1962 Code of Iowa; Senate File 77, Acts of the 61st G.A. Townships Justice of the Peace and Constable are 'civil officers' as contemplated by Senate File 77.

August 19, 1965

Honorable Edward Bremmer
Pottawattamie County Representative
1112 Cachelin Drive
Carter Lake, Iowa 68110

Dear Mr. Bremmer:

You have asked the following question:

> "I would like to have your official written opinion on whether the term 'civil officers' as contained in lines one and two of Section 2 of Senate File 77, which is now law, includes township Justices of the Peace and Constables."

Section 602.1 of the 1962 Code of Iowa, prior to the enactment of Senate File 77, read as follows:

> "602.1 Court established - district defined, A municipal court may be established in any city having a population of five thousand or more, by proceeding as hereinafter provided. All the civil townships in which such city or any part thereof is located shall constitute the municipal court district."

Senate File 77 in its first two sections stated as follows:

> "Section 1. Section six hundred two point one (602.1) Code 1962, is amended by striking all of the last sentence therefrom and inserting in lieu thereof the following:
>
> "'All that part of each civil township within the corporate limits of such city shall constitute the municipal court district.'"
>
> Section 2. This act shall operate to reinstate any civil officers whose elective terms may not have yet expired on the effective date of this Act, but whose offices were abolished by operation of law prior to the enactment hereof by annexation of a portion of a civil township to adjoining municipal corporation" (Emphasis added)

Chapter 601 deals with Justices of the Peace and while a Justice of the Peace is not defined in that particular chapter, this position is defined in Section 748.1 to be that of a "magistrate." At Section 748.3 Constables are defined to be "peace officers."

Section 748.5 states as follows:

> "Magistrates and peace officers are sometimes designated as "officers of justice"

Constables are further defined in Section 601.121 as follows:

> "Constables are ministerial officers of justices of the peace, and shall serve all warrants, notices, or other process directed to them by and from any lawful authority, and perform all other duties now or hereafter required of them by law"

The definitions in Chapter 748 are accompanied by what powers and duties magistrates and peace officers have. It is to be noted that the definition in Section 748.5 is not exclusive.

67 C.J.S., Officers, Section 3, at page 104 defines a civil officer as follows:

> "... such officers as in whom part of the sovereignty or municipal regulations, or the general interests of society, are vested. The expression means any officer who is not a military officer and includes all officers connected with the administration of government..."

We find that words "civil officer," "civil office," 'judicial officer" and "public officer" defined in Black's Law Dictionary, 4th Edition, as follows:

> "Civil officer. The word "civil," as regards civil officers, is commonly used to distinguish those officers who are in public service but not of the military. U.S. v. American Brewing Co., D.C. Pa., 296 F. 772, 776; State v. Clarke, 21 Nev. 333, 31 P. 545, 18 L.R.A. 313, 37 Am. St. Rep. 517. Hence, any officer of the United States who holds his appointment under the national government, whether his duties are executive or judicial, in the highest or the lowest departments of the government, with the exception of officers of the army and navy, is a "civil officer." 1 Story, Const. §792. See, also, Com'rs v. Goldsborough, 90 Md. 193, 44 A. 1055."

"Civil Office. An office, not merely military in its nature, that pertains to the exercise of the powers or authority of civil government. State ex rel. Landis v. Futch, 122 Fla. 837, 165 So. 907, 909. Requisites are continuity, creation and definition of powers and duties by Constitution or Legislature, or their authority, possession of governmental power, and independence unless controlled by superior officers. State ex rel. McIntosh v. Hutchinson, 187 Wash. 61, 59 P. 2d 1117, 1118, 105. A.L.R. 1234."

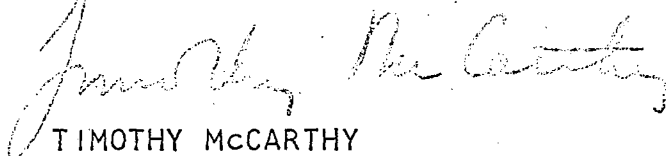
"Judicial Officer. The term, in the popular sense, applies generally to an officer of a court, but in the strictly legal sense applies only to an officer who determines causes between parties or renders decision in a judicial capacity. Hitt v. State, 182 Miss. 184, 181 So. 331: Alexander v. Holmes, 180 Ga. 397, 179 S.E. 77, 78. One who exercises judicial function. Adams v. State, 214 Ind. 603, 17 N.E. 2d 84, 118 A.L.R. 1095. A person in whom is vested authority to decide causes or exercise powers appropriate to a court. Settle v. Van Evrea, 49 N.Y. 284; People v. Wells, 2 Cal. 203; Reid v. Hood, 2 Nott & McC., S.C., 170, 10 Am. Dec. 582."

"Public Officer. An officer of a public corporation; that is, one holding office under the government of a municipality, state, or nation. One occupying a public office created by law. Shanks v. Howes, 214 Ky. 613, 283 S.W. 966, 967; Schmitt v. Dooling, 145 Ky. 240, 140 S.W. 197, 36 L.R.A., N.S., 881, Ann. Cas. 1913B, 1078. One of necessary characteristics of "public officer" is that he perform public function for public benefit and in so doing he be vested with exercise of some sovereign power of state. Leymel v. Johnson, 105 Cal. App. 694, 288 P. 858, 860.
In English law. An officer appointed by a joint-stock banking company, under the statutes regulating such companies, to prosecute and defend suits in its behalf."

In all the definitions it is apparent that civil officer includes all those officers connected with the administration of government who are not military officers. The work "civil" denotes the absence of military and does not exclude judicial officers.

Therefore, it is my opinion that the term "civil officers", as contained in Senate File 77 includes township justices of the peace and constables.

Respectfully submitted,



TIMOTHY McCARTHY
Solicitor General

jd

CITIES AND TOWNS: Mayor-Council government. §373A.4, 1962 Code of Iowa. Whether a mayor in a mayor-council form of government is a full or part-time position must be determined from the facts of each individual case. Important factors are: (1) The amount of time per week which the mayor devotes to his official duties or the business of his office; (2) the number of employments pursued by the mayor; (3) the special agreements between the mayor and council stipulating the nature of the position.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

August 27, 1965

Mr. Edmund R. Longnecker, Chief
Retirement Division
Iowa Public Employees Retirement System
1000 East Grand Avenue
L O C A L

IN RE: Letter from Thomas C. Parrott
14:CP:CC, Account No. 480-54-2485

Dear Mr. Longnecker:

I am in receipt of Mr. Parrott's recent letter to the Attorney General in which he requests an opinion of this office as to whether the mayor of Victor, Iowa occupies a full or part-time position. As a basis for this request he submitted the following factual data:

> "On December 16, 1964, Mr. Ross M. Carrell, Chairman of the Iowa Employment Security Commission, on behalf of the State of Iowa requested a review pursuant to procedures in Section 218(s) of the Social Security Act of an assessment of amounts due made by the Social Security Administration. The assessment was based on a determination by the Social Security Administration that the services of Mr. James M. Callahan, Account No. 480-54-2485, as mayor of the town of Victor, Iowa, were performed in employment covered under the agreement entered into between the State of Iowa and Secretary of Health, Education, and Welfare pursuant to Section 218 of the Social Security Act.
>
> "The point at issue is whether the mayor of Victor occupied a full-time or part-time position; part-time elective positions are excluded from coverage under the agreement. The Social Security Administration determined that the services performed by Mr. Callahan as mayor of the town of Victor were performed in a full-time elective position. The determination was based on the position that the concept of part-time position is satisfied only if an affirmative finding can be made that the authority which created the position contemplated that the incumbent would spend a limited time, shorter than the usual work period, in the discharge of the duties of the position. The Administration concluded that although the Iowa statutes set out the duties of the mayor they do not refer to the amount of time expected to be spent in the performance of these duties and therefore that the statutes appear to contemplate the full performance of all the executive powers. The Administration in reaching this conclusion has noted the case of <u>State v.</u>

> Henderson, 145 Iowa 657, in which the court stated '...The duties of mayor are continuing at least during business hours and his office is deemed open during such hours and his official responsibility is continuing....'
>
> "In indicating disagreement with the Administration's position Mr. Carrell on behalf of the State has taken the position that Mr. Callahan's services as mayor of the town of Victor were performed in a part-time elective position and therefore excluded from coverage under its agreement. In support of this determination there has been furnished Interpretation No. 35 of the Employment Security Commission, approved by its counsel, which takes the position that 'in the absence of understanding an agreement by ordinance or otherwise, between the mayor and the council the mayor under this type of government, is a part-time elective official....'
>
> "The materials furnished by the State do not comment on the effect of the case of State v. Henderson. Since this is a matter within your province as the highest legal officer of the State, we would appreciate an expression of your views on how the State regards this court decision in relation to the matter at issue. It would also be particularly helpful if you would, in commenting on this matter, include your views on whether the State has for purposes of other programs determined the amount of time required of the incumbent of mayors' positions in those municipalities which have the mayor-council form of government and whether there has been a classification of mayors' positions with respect to the time requirements for such matters as retirement, civil service, etc."

First of all, I think it is appropriate to begin with a discussion of the case cited in your submitted material. The case of State v. Henderson, supra, involved a removal proceedings instituted against the mayor of Marengo, Iowa, pursuant to Acts of the 33rd G.A., Chapter 78. This Act provided for the removal of a mayor from office for "intoxication or upon conviction for being intoxicated."

The defendant mayor argued that "private misconduct or intoxication" as distinguished from "official misconduct" could not be made a ground for removal under the statute. In 145 Iowa at page 662 the court in response to this argument said:

> "The practical fact, however, in this case, is that the defendant was intoxicated on various dates during business hours in the town of his jurisdiction, when such intoxication would necessarily interfere with the proper discharge of his official duties. The most that could be claimed for him would be that he undertook no official duties during the period of intoxication. The argument is that this would be private misconduct, and not official."

The evidence presented at trial indicated that the defendant mayor was intoxicated during business hours in a manner sufficient to interfere with the proper discharge of his official duties. The defendant mayor claimed, that even though he was intoxicated during business hours, he performed no official duties and, therefore, could not have been guilty of official misconduct. In response to this argument the court said at page 662:

> "An official cannot thus justify himself for voluntarily incapacitating himself for the performance of his official duties. The duties of a mayor of a city are continuing duties, at least during business hours. His office is deemed open during such hours and his official responsibility is constant."

The court concluded that the defendant mayor's intoxication constituted both private and official misconduct and held that because the mayor was intoxicated during business hours, the fact that he did not perform any official duties during these periods of intoxication did not preclude such intoxication from being official misconduct. The court did not specify the number of hours the mayor was required to devote to the official business of his office, but rather stated that during the business hours of his office, however, many or few, the mayor's duties were continuing and his official responsibility constant.

The decision in this case does not, in the opinion of this office, lend support to the proposition that the office of mayor is a full-time position within the context of full-time or principle employment.

It should be noted at this point that Iowa is primarily a rural state with many small incorporated cities and towns. In fact, the <u>1960 census of population</u>, U.S. Department of Commerce, Bureau of Census, Vol. 1, Party at page 17-23, indicates that in 1960 there were over 700 incorporated towns in Iowa with populations of less than 1,000. This fact points up the crux of the problem at hand. In many of these small towns the elective officials not only perform their official duties each week, but also are gainfully employed in occupations on which their livelihood depends. In other instances these elective offices are filled by retired persons who devote part of their time to public office and the remainder to the pursuit of their retirement activities.

The General Assembly was certainly cognizant of comparable statistics in existence at the time they enacted the law setting up governing machinery for these small municipalities. It is easy to discern this legislative awareness when one examines the multitude of statutes relating to municipal government. For

example, Chapter 363A of the 1962 Code of Iowa deals generally with the mayor-council form of municipal government. Section 363A.4 provides that the council shall prescribe the rate of compensation of all elected or appointed officers whose compensation is not fixed by law. There is no statute under this form of municipal government which fixes the mayor's rate of compensation. Thus, the council may prescribe a rate of compensation which is commensurate with the amount of services the respective mayor performs.

A full-time position connotes a job or position to which the holder devotes an amount of time which is considered standard or customary for that particular employment. A part-time position must necessarily consist of employment which falls short of this customary standard. On the basis of time alone this customary standard means working approximately forty hours a week. The usual situation in Iowa in regard to a mayor under the mayor-council form of government finds this elected official performing the duties of his office each week in a minimal amount of time and spending the great majority of his employed time in the pursuit of a business or occupation. The conclusion is inescapable that in such a case the business or occupation would be considered full-time and the elective position would be part-time within the context of our discussion.

In summary then, it is the opinion of this office that the question of whether a mayor under the mayor-council form of municipal government is a full-time or part-time position, is a question of fact which must be determined upon an ad hoc basis. Some of the facts which may be taken into consideration in reaching a conclusion in a particular case are: (1) the amount of time per week which the mayor devotes to his official duties or the business of hisoffice; (2) the number of employments pursued by the mayor; (3) the special agreements between the mayor and council stipulating the nature of the position.

Respectfully submitted,

/s/ Joseph S. Brick

JOSEPH S. BRICK
Assistant Attorney General

bj
cc: Thomas C. Parrott

> "29. For all services performed in the settlement of the estate of any decedent, minor, insane person, or other persons laboring under any legal disability, except where actions are brought by the administrator, guardian, trustee, or person acting in a representative capacity or against him, or as may be otherwise provided herein, where the value of the personal property and real estate of such a person falls within the following indicated amounts, the fee opposite such amount shall be charged. * * * "

Section 606.15(29), Code of Iowa, 1962, prior to amendment, used as a basis for computing probate fees "the value of the personal property of the estate including real estate sold for the payment of debts." The new statute authorizes the collection of probate fees based on the value of the personal property and real estate of estates of any "decedent, minor, insane person, or other person laboring under any other legal disability." The new act includes the value of real estate owned by the ward or held in trust for the beneficiary of a testamentary trust in the basis upon which probate fees are to be computed.

Very truly yours,

/S/ Thomas W. McKay
Thomas W. McKay
Special Assistant Attorney General

TWM:dj

COUNTIES AND COUNTY OFFICERS: Clerk of the District Court--§606.15 (29), 1962 Code of Iowa, as amended by S.F. 112, 61st G.A. The value of real estate owned by a ward or held in trust for the beneficiary of a testamentary trust is included in the basis used for computing probate fees.

State of Iowa
Department of Justice
Des Moines, Iowa

Lawrence F. Scalise
Attorney General

August 31, 1965

Earl T. Klay, Esq.
Sioux County Attorney
Orange City, Iowa

Dear Mr. Klay:

This will acknowledge receipt of your letter dated August 11, 1965, concerning S.F. 112, 61st G.A., which amended Section 606.15 (29), 1962 Code of Iowa. Your question is as follows:

> "You will note such section provides in cases other than the administration of an estate, i.e., guardian, trustee or person acting in a representative capacity would appear to be required to pay a fee based upon the value of real estate owned by the ward. The inquiry of my Clerk is therefore is cases of guardianships, conservatorships or trustees shall the Clerk by required to charge and collect a fee based upon the value of real estate owned by the ward or beneficiary."

Section 606.15 (29) as amended by S.F. 112, 61st G.A., provides as follows:

> "606.15 Fees. The clerk of the district court shall charge and collect the following fees, all of which shall be paid into the county treasury for the use of the county except as indicated. * * *"

COUNTIES AND COUNTY OFFICERS: Clerk of the District Court -- §606.15(29), 1962 Code of Iowa, as amended by S.F. 112, 61st G.A. The Clerk of the District Court is not entitled to make an additional charge for the recording of orders in estates, guardianships, and conservatorships where the fee is based on the value of the estate.

LAWRENCE F. SCALISE
ATTORNEY GENERAL

STATE OF IOWA
DEPARTMENT OF JUSTICE
DES MOINES, IOWA

August 31, 1965

Richard E. Lee, Esq.
Hamilton County Attorney
628 Second Street
Webster City, Iowa

Dear Mr. Lee:

This will acknowledge receipt of your letter dated August 12, 1965, in which you ask the following question:

> "Is the Clerk of Court entitled to make the usual charge for the recording of orders, in addition to the overall charge provided for by 606.15?"

Section 606.15(29), Code of Iowa, as amended by S.F. 112, 61st G.A., provides as follows:

> "606.15 Fees. The clerk of the district court shall charge and collect the following fees, all of which shall be paid into the county treasury for the use of the county except as indicated.* * *
>
> "29. <u>For all services performed</u> in the settlement of the estate of any decedent, minor, insane person, or other persons laboring under any legal disability, except where actions are brought by the administrator, guardian, trustee, or person acting in a representative capacity or against him, or as may be otherwise provided herein, where the value of the personal property and real estate of such a person falls within the following indicated amounts, the fee opposite such amount shall be charged. * * * (Emphasis supplied.) "

It is our opinion that the words "for all services performed" in Section 606.15(29), as amended, means that the Clerk is not entitled to make an additional charge for the recording of orders in estates, guardianships, and conservatorships where the fee is based on the value of the estate.

Very truly yours,

/s/ Thomas W. McKay

Thomas W. McKay
Special Assistant Attorney General

TWM:dj

COUNTY AND COUNTY OFFICERS: County Sheriff; County Jails. §§ 356.5, as amended, and 356.15, 1962 Code of Iowa; Senate Files 136 and 394, Acts of the 61st G.A. Section 8 of S.F. 394 places a mandatory duty upon the keeper of a jail (1) to provide a matron whenever a female is incarcerated, and (2) to make nighttime inspections whether the prisoners are male or female. The Board of Supervisors must pay the matron, after setting her compensation. If this compensation is not budgeted, the Board of Supervisors must amend the budget to provide for payment of a statutory duty.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

August 23, 1965

Mr. John Dillon
Louisa County Attorney
Columbus Junction, Iowa

Dear Mr. Dillon:

This is in reply to your recent request for an opinion on the following questions:

1. Is Section 8 of Senate File 394, Acts of the 61st General Assembly of Iowa, which amends Section 356.5, Code of Iowa, 1962, mandatory in its operation?

2. Does Section 8 of Senate File 394, Acts of the 61st General Assembly of Iowa, require nighttime inspection at all times or only when female prisoners are incarcerated?

3. Who will set the pay for the matron and on what basis?

4. If Section 8 of Senate File 394 is mandatory and with no amount budgeted for the balance of 1965, how is she to be paid?

I.

Section 8 of Senate File 394 provides an amendment to Section 356.5, Code of Iowa, 1962 by adding the following subsection:

> "To have a matron on the jail premises at <u>all</u> times during the incarceration of <u>any</u> <u>one</u> or more female prisoners and to make nighttime inspections while <u>any</u> prisoners are kept in confinement." (Emphasis supplied.)

By this additional amendment it would appear that the section is mandatory as the section (356.5) can now read as follows:

> "356.5 Keeper's duty. The keeper of each jail shall:
>
> * * *
>
> "6. To have a matron, etc...." (Emphasis supplied.)

Therefore, the controlling word when read as a complete section is "shall". This word has been construed generally to be mandatory, Vale v. Messenger, 184 Iowa 553, 168 N.W. 281 (1918); Jefferson County Farm Bureau v. Sherman, 208 Iowa 614, 226 N.W. 182 (1929); State v. Hanson, 210 Iowa 773, 231 N.W. 428 (1930). Furthermore, the word "shall" when addressed to an official, is definitely mandatory, McDunn v. Roundy, 191 Iowa 976, 181 N.W. 453 (1921).

Hence, since Section 356.5 is directed to an official, the word "shall" must be considered mandatory and, therefore, Section 8 of Senate File 394 must also be mandatory.

II.

In answer to your second question, the word "any" must be construed. The Iowa Supreme Court in the case of Iowa-Illinois Gas and Electric Co. v. City of Bettendorf, 241 Iowa 358, 41 N.W.2d 1, stated at page 363 of the Iowa Reports:

> "The term 'any' is synonymous with 'either' and is given the full force of 'every' or 'all.'"

Also:

> "The term 'any' is frequently construed to mean 'every.'"

On the basis of this construction by the Iowa court, it would appear that nighttime inspections must be carried out whenever there are any prisoners in confinement, regardless of sex.

Furthermore, this section must be given the plain meaning which the legislature has set out. That meaning is that the keeper shall have two different duties. First, there must be a matron on duty whenever there are any female prisoners incarcerated. Secondly, there is an additional duty that nighttime inspection must be made whenever there are any prisoners in confinement.

III.

In relation to your third question as to who shall pay the matron and on what basis, it should be pointed out that since Section 8 of Senate File 394 amends Chapter 356, 1962 Code of Iowa, it is subject to the provisions of that chapter. On this basis, the matron's expense is to be governed by Section 356.15 which provides in part:

> "All charges and expenses for the safekeeping and maintenance of prisoners shall be allowed by the board of supervisors ...."

Furthermore, Senate File 136, Acts of the 61st General Assembly, in Section 4, provides: "... the board of supervisors shall fix all compensation for extra help and clerks."

Therefore, the County Board of Supervisors will be responsible for the matron's expense and on the basis which they feel is necessary.

IV.

Since there was no amount budgeted for the balance of this year, the question of how the County Board of Supervisors are to pay the matron is to be answered by 48 OAG 55 at page 57 as follows:

> "We are of the opinion therefore, that the foregoing Chapter 183 of the Acts of the 52nd General Assembly, operates as authority in the tax certifying and tax levying bodies to amend their 1946 budget to provide the necessary revenue required to pay the additional salaries directed by the foregoing chapter. The amendment of the budget is effectuated by the same statutory procedure as that provided for the making of the original budget."

By the provisions of this opinion, it would appear that the County Board of Supervisors must pay the expenses of the matron for the balance of this year, and if there are not sufficient funds, they should amend the budget so that their statutory duties can be met.

Respectfully submitted,

/s/ Timothy McCarthy

TIMOTHY McCARTHY
Solicitor General

ew

STATE OFFICERS AND DEPARTMENTS. Board of Control - Mental Health Services. §§ 229.42, 230.20, 1962 Code of Iowa. Amount due state from counties for necessary mental health services includes only funds appropriated from tax sources and excludes collections from voluntary mental illness patients. Paying the cost of hospitalization of voluntary mental patients is the obligation of the county of legal settlement, § 229.42.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

August 27, 1965

Mr. Marvin R. Selden, Jr.
State Comptroller
State House
LOCAL

Dear Mr. Selden:

Reference is herein made to yours of the 6th inst., in which you submit the following:

"I ask that you review the Attorney General's opinion dated July 1, 1964, addressed to Jim O. Henry, Chairman, Board of Control for the reasons stated below.

"The opinion interprets Chapter 230.20, Code of Iowa, 1962, that the costs to be certified to the counties for patients shall include only funds appropriated from tax sources needed to provide mental health services, but shall not include amounts collected in the payment of service provided voluntary mental illness patients, divided by total patient (Example 1, page 3). The opinion also states that it would be proper for the Board of Control and its professional and administrative personnel to enjoy a certain expertise in ascertaining what is necessary for the care, comfort and proper treatment in the fulfillment of their duties in providing mental health services. Therefore, the Board of Control can determine how much of the appropriation from tax sources is for mental health services.

"Prior to the 58th G.A. (Chapter 168, Acts of the 58th G.A.), the certification to the county was determined by dividing the total actual expenditures by the total patient days for each calendar quarter. The General Fund was reimbursed for the full amount of expenditures

(ignoring State cases). The 58th G.A. amended the method of certification by saying that only funds appropriated from tax sources needed to provide mental health services should be used for billings and voluntary patient collections should be excluded from the certification to the county. (This has not been amended through the 61st G.A.)

"If the certification should exclude the voluntary patient collections, then, should the voluntary patient days be excluded from the computation in determining the daily per diem rate. This would apply Chapter 230.20, Code of Iowa, 1962, directly to the committed patient only, since the provision for billing the voluntary patient is provided for in Chapter 229.41, Code of Iowa, 1962. The July 1, 1964 opinion is in direct conflict with the above interpretation of how the patient per diem is calculated.

"The opinion would allow the appropriation to be divided by the total patient days (including voluntary patients), allowing the General Fund to be reimbursed by the counties for approximately $2,500,000 less than the appropriations made for mental health services. Under the other method, appropriation divided by committed patient days, the General Fund would be reimbursed for the full amount of the appropriation and, therefore, the General Fund would not show a loss.

"Please review the July 1, 1964, opinion to the Board of Control to determine if the legal interpretation is correct and please give us a formal opinion on the legal interpretation of the following:

"1. Should the patient per diem be determined by dividing the appropriation by total (committed and voluntary) or committed patient days?

Example One - Institution

60th G.A. Appropriation (Cherokee) - $2,169,600

Total (Committed and Voluntary) Patient Days -	196,632
Committed Patient Days -	153,568

Cost Per Day -

$2,169,600 - 196,632 equals $11.0338
$2,169,600 - 153,568 equals $14.12794

General Fund Reimbursement		Loss to General Fund
Total Patient Days	$1,694,439	$475,161
Committed Patient Days	$2,169,600	$ - 0 -

Without specific review of the contents of the request of the Board of Control referred to by you, by reference I make this request of the Board of Control and the opinion in answer thereto a part of this opinion. The answer, therefore, is made as an original opinion.

The question in short is the proper and legal procedure of the Board of Control in certifying to the various counties the amount due the state for services performed for mental patients.

The duty of making this certification is imposed upon the Board of Control by Section 230.20 of the 1962 Code of Iowa which provides as follows:

> "230.20 Expenses certified to counties. Each superintendent of a state hospital where mentally ill patients are cared for shall certify to the state comptroller on the first days of January, April, July, and October, the amount not previously certified by him due the state from the several counties having patients chargeable thereto, and the comptroller shall thereupon charge the same to the county so owing. In determining the amount due the state from the counties the superintendent shall include only funds appropriated from tax sources needed to provide the mental health services but shall not include amounts collected in the payment of services provided voluntary mental illness patients whether provided by the patient, relatives or other persons on behalf of the patient or by the county of residence of the patient. A duplicate certificate shall also be mailed to the auditor of each county having patients chargeable thereto. This section shall apply to all superintendents of all institutions having patients chargeable to counties."

This is plain and unambiguous to the extent at least that, if complied with, the amount paid to several hospitals for services performed for voluntary patients shall not be included in the amount due the state from the several counties. Under the foregoing statute, only appropriated money shall be used in computing the amount to be certified to be paid by the county. Obviously, the amount paid by voluntary patients is not appropriated money and, therefore, has no place in computing the per diem costs of these services.

To make this computation of the per diem costs by the addition of cost days spent on a voluntary basis to those days spent upon committed patients without adding to the appropriation any sum secured from services performed for the voluntary patients, is granting to the county a share of state money to which the county has no claim. In other words, by using the per diem of both committed and voluntary patients, state money is being used to pay for patients' services payable by the county. This is pointed up by the provisions in Section 229.42 of the 1962 Code of Iowa whereby "the costs of the hospitalization shall be paid by the county of legal settlement." The formula provided by Section 230.20 for certification is thus complied with and the answers are in the negative to the following questions provided in the letter from the Board of Control:

> "1. Is the manner of determining the 'patient per diem rate' for providing mental health services legally accomplished by:

a. Dividing the total days of mental health services rendered to all patients into the legislature's appropriation of funds from tax sources, 'not including any amounts collected in the payment of services provided voluntary mental illness patients.'

b. Dividing the total days of mental health services rendered to all patients into the legislature's appropriation of funds from tax sources deducting therefrom the amounts collected in the payment of services provided voluntary mental illness patients.

c. Dividing the total days of mental health services rendered to all patients into the amount of expenditures needed to provide such services providing the total of such expenditures do not exceed the amount of legislative appropriation for the quarter.

d. Dividing the total days of mental health services rendered to all patients into the net amount of expenditures after deducting from the total expenditures for the period such amounts collected in the payment of services provided voluntary mental illness patients."

The present method of certifying is contrary to the statute and should not include days devoted to services for voluntary patients, nor should such days be included in the computation according to which payment is made. In short, when the computation is made in the manner now being done, the county is getting the benefit of the state service without paying for it.

The opinion of this department issued July 1, 1964, insofar as it conflicts herewith, is now withdrawn.

Very truly yours,

/s/ Oscar Strauss

OSCAR STRAUSS
First Assistant Attorney General

ew

TAXATION: Real Property Tax: Exemptions. §427.1(9), and 427.1(24), 1962, Code of Iowa. A partial disallowance of the real property tax exemption should be made where the use of a portion of the property of a Masonic lodge is not for the appropriate objects of the organization.

LAWRENCE F. SCALISE
ATTORNEY GENERAL

STATE OF IOWA
DEPARTMENT OF JUSTICE
DES MOINES, IOWA

September 9, 1965

Richard G. Davidson, Esq.
Page County Attorney
Clarinda, Iowa

Dear Mr. Davidson:

We acknowledge receipt of your letter dated August 16, 1965, in which you enclosed a letter from your county assessor, Louis E. Barr. Mr. Barr's problem is whether or not the lot or land on which a building, owned by a fraternal body (Masonic Lodge) and partially rented by that body to a commercial establishment, is to be valued or assessed to the fraternal body.

Section 427.1, Code of Iowa, 1962, provides in part as follows:

> * * *
>
> "The following classes of property shall not be taxed:
>
> "9. Property of religious, literary, and charitable societies. All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment."

"24. Statement of objects and uses filed. Every society or organization claiming an exemption under the provisions of either subsection 6 or subsection 9 of this section shall file with the assessor not later than February 1 of the year for which such exemption is requested, a statement upon forms to be prescribed by state tax commission, describing the nature of the property upon which such exemption is claimed and setting out in detail any uses and income from such property derived from such rentals, leases or other uses of such property not solely for the appropriate objects of such society or organization. The assessor, in arriving at the valuation of any property of such society or organization, shall take into consideration any uses of the property not for the appropriate objects of the organization and shall assess in the same manner as other property, all or any portion of the property involved which is leased, let or rented and is used regularly for commercial purposes for a profit to any party or individual. In any case where a portion of the property is used regularly for commercial purposes no exemption shall be allowed upon property so used and the exemption granted shall be in the proportion of the value of the property used solely for the appropriate objects of the organization, to the entire value of the property. No exemption shall be granted upon any property upon or in which persistent violations of the laws of the state of Iowa are permitted. Every claimant of an exemption shall, under oath, declare that no such violations will be knowingly permitted or have been permitted on or after January 1 of the year for which

> a tax exemption is requested. Claims for such exemption shall be verified under oath by the president or other responsible heads of the organization."

At the outset it must be pointed out that Section 427.1, Code of Iowa, 1962, is an exempting statute and as such must be strictly construed. If there is any doubt upon the question, it must be resolved against the exemption and in favor of the taxation. National Bank of Burlington vs. Huneke, 250 Iowa 1030, 98 N.W. 2d 7 (1959), Trinity Lutheran Church of Des Moines vs. V.L. Browner, 255 Iowa 197, 121 N.W. 2d 131 (1963).

Subsections 6 and 24 must be read together, for subsection 24 is a procedural section rather than an exemption section. The purpose of the statement of the objects and uses of the organization which files the statement with the assessor is to establish whether all or part of the property is used for purposes that can be considered tax exempt. A partial disallowance should be made only in those cases where the use of a portion of the subject property is not for the appropriate objects of the organization. 1956 OAG 176, 177.

The language of subsection 9 (quoted above) authorizes the exemption of the property of a benevolent society when said property is used solely for their appropriate objects and not used with a view to pecuniary profit. Such a provision must be strictly construed. The courts have stated that "use of the property rather than charter declarations" is the controlling factor as to an exemption from taxation. Theta Xi Building Association of Iowa City vs. Board of Review, 217 Iowa 1181, 251 N.W. 76 (1933).

This subsection has been construed by the Iowa Supreme Court and the Attorney General several times. In Fort Des Moines Lodge No. 25, I.O.O.F. vs. The County of Polk, et al, 56 Iowa 34, 8 N.W. 687 (1881), the Supreme Court of Iowa held that the rental of a building owned by a benevolent society prevented exemption from taxation under the Iowa statute. In 1934, the Attorney General held that where part of a Masonic Lodge building was leased for profit and part used for lodge purposes, the entire building was taxable. 1934 OAG 116. The Attorney General's opinion was based on the Fort Des Moines Lodge case.

However, the Attorney General has held that if any part of a lodge property owned by the American Legion was rented permanently for profit, the portion used for profit making purposes would not be exempt from taxation. 1923-24 OAG 233. The apparent conflict here indicates a situation in which there is room for clarification.

There is a conflict of authority from other jurisdictions. In Simpson et al vs. Bohon et al, 159 Fla. 280, 31 So. 2d 406 (1947), the Florida Supreme Court held that where the Elks Club rented out over 43% of the floor space of its lodge building, that portion used for commercial purposes was not exempt from taxation. The Oklahoma Supreme Court held in Oklahoma County vs. Queen City Lodge, No. 197, I.O.O.F. 195 Okla. 131, 156 P. 2d 340 (1945) that where an Odd Fellows Lodge used the twelfth story of a building for its lodge work, the tax exemption provided by the Oklahoma Statutes would be applicable only to that part of the building used for "charitable or benevolent" purposes. The court stated that where the exempt and non-exempt portions are physically separable, the part used for exempt purposes should be held non-taxable and the other part taxable. Both Oklahoma and Florida have exemption statutes similar to Section 427.1(9) of the Iowa Code.

The West Virginia Supreme Court held in State vs. McDowell Lodge, 96 W. Va. 611, 123 S.E. 561 (1924) that property of a Masonic lodge leased for profit was not exempt from taxation under a statutory provision exempting all property "used for charitable purposes, and not held or leased out for profit," although the rents were used for charitable and benevolent purposes and for the upkeep of property rented.

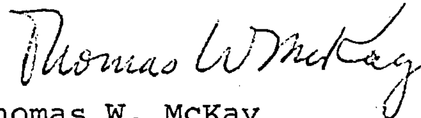
The Kansas Supreme Court also applied the rule of strict construction in Manhatten Masonic Temple Assoc. vs. Rhodes, 132 Kan. 646, 296 Pac. 734 (1931). In that case the court held that the Masonic Temple and the two adjacent lots were not exempt since they were not exclusively used for purposes of benevolence and charity.

Since the Iowa courts have held that use of the property is the controlling factor as to an exemption from taxation, it is our opinion that these should be an apportionment of the taxes, so that the part of the property used for the objects and purposes of the organization would be granted an exemption while the portion of the property used for commercial purposes would be taxed. The idea of an apportionment has been indorsed by the courts of other jurisdictions (supra) and the Attorney General of Iowa. 1924 OAG 233, 1956 OAG 176; opinion dated May 21, 1965, to Gordon Winkel, Esq., Kossuth County Attorney.

Throughout this opinion we have assumed that the fraternal order (Masonic Lodge) you are concerned with, qualifies as a "literary, scientific, charitable, benevolent, agricultural, . . . (or) religious institution. The question as to whether a lodge is a charitable organization within the meaning of the statute is a question of fact that must be determined by the assessor. 1924 OAG 233, 235. However, the Supreme Court of Iowa in Morrow vs. Smith, et al, 145 Iowa 514, 124 N.W. 316 (1910) held that a Masonic Lodge is a "charitable institution." Therefore, property of a Masonic lodge used for the appropriate objects and purposes of the organization can be exempted under Section 427.1(9).

In conclusion, it is our opinion that the apportionment principle discussed supra should be applicable to the building and lot in question. Since the Masonic lodge is considered to be a charitable organization, that portion of the property it owns and uses for its appropriate objects would be tax exempt.

Very truly yours,



Thomas W. McKay
Special Assistant Attorney General

TWM:JRS:dj

CITIES AND TOWNS: Water Works Trustees; Pledge Warrants. §§ 397.9, 397.10 and 397.11, 1962 Code of Iowa. Trustees of a municipally owned water works, established by election, have the statutory authority (1) to enter into contracts for the extension and improvement of a plant without an election; and (2) to finance such contracts from the future net earnings of the plant by the issuance of "pledge warrants."

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

September 10, 1965

The Honorable Jake Mincks
300 Paramount Building
Des Moines, Iowa

Dear Senator Mincks:

You have asked this office for its opinion as to whether the Water Works Trustees of the City of Ottumwa, Iowa, have abused their authority by having outstanding $455,000 in obligations which have been considered to be "warrants."

As I understand the history of the City of Ottumwa Water Works, the establishment of said water works was authorized by election as required by Section 397.5 of the 1962 Code of Iowa, some time ago, and there have been extensive water works, river channel, and main extension work over the past six years. The bond issue was issued in the amount of $4,750,000. Because of increased costs brought on by inflation and delays, and because of lack of income from the water works, a shortage of approximately $475,000 arose.

Because of the difficulty in issuing second lien water revenue bonds which cannot be paid until the outstanding issue was retired in the year 2001, because of the high interest involved, and because of a favorable revenue picture, the water works trustees were advised by bond counsel and their own counsel to issue temporary revenue obligations to the local banks. I believe that these obligations have been reduced from $475,000 to $455,000.

I understand that the instrument that was issued was entitled "Ottumwa Water Works Warrant" and had printed on the face of the instrument the following:

> "This warrant is not a general obligation of the City nor payable in any manner by taxation, but is payable solely and only from the net earnings of the Municipal Water Works Plant and System, subject to the prior pledge of said earnings of the outstanding Water Revenue Bonds."

The statutes of the State of Iowa which apply are Sections 397.9, 397.10 and 397.11 of the 1962 Code of Iowa, which read as follows:

> "397.9 Contract Authorized. They shall have power to pay for any such plant, improvement or extension thereof out of the past earnings of the plant and/or out of the future earnings and/or may contract for the payment of all or part of the cost of such plant, improvement, or extension out of the future earnings from such plant, and may secure such contract by the pledge of the property purchased and the net earnings of the plant."
>
> "397.10 Bonds. For the purpose of defraying the cost of any such plant, improvement or extension thereof, any such city or town is hereby authorized to issue negotiable, interest-bearing revenue bonds payable from and secured by the net earnings of the plant, and may also be secured by the pledge of the property purchased, which bonds shall not constitute a general obligation of such city or town or be enforceable in any manner by taxation. Such revenue bonds may be delivered to the contractor or contractors in payment for such improvement or they may be sold by the municipality and the proceeds used to pay for such improvement; and/or such bonds may be used as collateral security for money borrowed to pay the cost of such improvement, such loan to be repaid only out of the net earnings of the plant."
>
> "397.11 Refunding bonds. Cities and towns shall have power to refund bonds or obligations issued for the cost of any heating plants, waterworks, gasworks, or electric light or power plants, or for any improvement or extension of any such plants, when such bonds or obligations are payable from and secured by the net earnings of any such plant and which bonds or obligations do not constitute a general obligation of such city or town, and shall have the power so to refund any such bonds or obligations when the same become due and payable, or prior thereto in any case where such bonds or obligations reserve the right to pre-pay the same prior to the date fixed therein.
>
> "All such refunding bonds or obligations issued as authorized in this section, shall conform to the provisions of this chapter, shall be payable only from the net earnings of the plant, and shall not constitute a general obligation of any such city or town or be enforceable in any manner by taxation.

> "Such refunding bonds or obligations may be exchanged for outstanding bonds or obligations issued to pay for any such plant, or for any improvement or extension of any such plant; or such refunding bonds or obligations may be sold and the proceeds used only in payment of outstanding bonds or obligations issued to pay for any such plant, or for any improvement or extension of such plant."

It should be first noted that the instruments used by the Water Works Trustees are a pledge of payment out of earnings and are not what are generally to be considered as "warrants." The Water Works Trustees have no power to issue warrants that a state or sub-division thereof has. However, they do have authority to incur obligations in addition to bonds which are pledges on the property purchased. The use of the term "pledge warrant" is mentioned in the case of Wyatt v. The Town of Manning, 217 Iowa 929, 250 N.W. 141 (1933), at page 944 of the Iowa Reports where we find the following language:

> "What the situation might be were the municipality attempting to mortgage or pledge property already owned, we do not now decide or suggest. By using the pledge warrants contemplated in the case at bar, the city of Manning does not extend the obligation beyond that limited by sections 6134-d1 and 6134-d2 of the 1931 Code. Therefore, the cost of the electric plant under consideration is not within the constitutional or statutory limitation of indebtedness."

Section 6134-d1 is now Section 397.9 which is cited above.

The case of Swanson v. City of Ottumwa, 118 Iowa 161, 91 N.W. 1048 (1902), is quoted as authority at 32 OAG 90 as follows:

> "'A city expressly authorized by statute may levy a special tax for a public purpose and pledge or appropriate the same for a series of years, and if, in a contract for making the public improvement for which such tax is levied, the city limits its liability to the mere duty of levying and collecting such tax, no municipal indebtedness is incurred within the meaning of the constitution.'"

We must return to our analysis of Chapter 397 which has been known as the Simmer law. Section 1 provides for the authority that cities and towns may purchase utility plants, including water works. Section 5 provides that an election is required. Section 397.9 provides that power to pay may be had in all or in part out of future earnings and may be secured by a pledge. Section 397.10 provides

for the issue of bonds and for the securing of pledges. Section 397.11 provides for bonds and obligations secured by earnings and provides that said obligations or earnings do not constitute a general obligation of the city and town. This section provides that the cities and towns have the power to refund and prepay the bonds or obligations.

The Iowa Supreme Court in the case of Chitwood v. Lanning, 218 Iowa 1256, 257 N.W. 345 (1934), clearly indicated that an election is not necessary to pledge the net earnings for improvements to municipally owned water works. The court made the following statement at pages 1258 and 1259 of the Iowa Reports:

> "By Code, section 6134-d1 /now Section 397.9/, the trustees, who exercise the powers of the city in relation to the waterworks plant, are authorized to pay for improvements and extensions to the plant out of future earnings of the plant, and are authorized to secure payment by a pledge of such net earnings and the proposed works. The instruments creating the liens may undoubtedly be 'revenue' bonds, and other appropriate instruments....
>
> "... It must be noted that Code, section 6134-d1 /now Section 397.9/, authorizes the trustees to pay for any such plant, improvement, or extension thereof, out of future earnings, while Code, section 6134-d3 /now Section 397.15/, provides only that a plant shall not be established without an election. We think this selection of language is significant of discrimination in the acts authorized in one section and prohibited in the other. We hold that the trustees may proceed with the contemplated work without first submitting the matter to the voters."

The latest Law Review article in regard to Iowa municipal bonds is at 42 Iowa Law Review 390 and I quote from page 393:

> "The Iowa statutes also permit the issuance of revenue bonds in connection with the financing of various self-liquidating projects. Bonds falling in this category are payable solely from the earnings derived from the operation of the particular project and are not supported by taxation."

The cost of the improvements secured by the bonds and by the pledge warrants is not within the constitutional or statutory limitation of indebtedness of the City of Ottumwa. In fact, the pledges and bonds are not debts of the City of Ottumwa. Neither are the so-called

"warrants" actually warrants. They are, in fact, obligations of the Board of Ottumwa Water Works Trustees which are authorized under Chapter 397 of the 1962 Code of Iowa. These warrants are proper where the statutory requirement that it be a pledge for property purchased is apparently met.

The warrants issued in the amount of $455,000 are proper obligations and within the statutory authority of the Water Works Board of the City of Ottumwa.

Respectfully submitted,

TIMOTHY McCARTHY
Solicitor General

ew

TAXATION: Federal Income Tax and FICA withholding. §3401, Internal Revenue Code of 1954 and §97C.3, Code of Iowa, 1962. Withholding of Federal Income Taxes and FICA from the per diem of the members of the State Board of Regents is a correct practice.

LAWRENCE F. SCALISE   STATE OF IOWA
ATTORNEY GENERAL   DEPARTMENT OF JUSTICE
DES MOINES, IOWA

September 14, 1965

Mr. David Dancer
Secretary
State Board of Regents
L O C A L

Dear Sir:

We acknowledge receipt of your letter dated August 18, 1965, in which you request an opinion as to whether or not your practice of withholding for FICA and Federal Income Tax from Board of Regents members' per diem allowances is correct.

For purposes of the FICA, the definition of who is an employee is contained in Section 210 (k) and 218 (b) (3) (5) of the Social Security Act. Under the provisions of the Social Security Act, the term employee includes:

1. An individual who under the usual common law rules applicable in determining an employer-employee relationship, has the status of an employee (Section 210 (k)).

2. An officer of a State or political subdivision (Section 218 (b) (3)).

It is our opinion that members of the State Board of Regents are officers of the State of Iowa. Chapter 262, Code of Iowa, 1962, specifically points out that the board shall consist of nine members appointed by the governor with the approval of two thirds of the members of the senate. At least four meetings are required each year. Specific powers and duties are granted to the board. Sections 262.7 and 262.9, Code of Iowa, 1962. The members serve a six year term.

A public office implies definite assignment of public activity, fixed by appointment, tenure, and duties. Helvering vs. Powers, 293 U.S. 214, 55 S. Ct. 171, 79 L. Ed. 291 (1934). The Iowa Supreme Court held that a public office must be "created by the constitution or legislature . . . (and) posses . . . (a) delegated portion of the governments soverign power, have duties defined by . . . (the) legislature . . . (and) perform such duties independently and without the control of a superior power other than the law . . ." Hutton vs. State, 235 Iowa 52, 16 N.W. 2d 18 (1944). Thus, the members of the State Board of Regents meet the requirements of a public officer as set down by the courts and we consider them as such.

Section 218 of the Social Security Act provides that the State and the Secretary of Health, Education, and Welfare can enter in agreements for the purpose of extending coverage to services performed by individuals or employees of the State. Pursuant to enabling legislation, Chaper 73, 55th G.A., 1953, now Section 97C.3, Code of Iowa, 1962, the State of Iowa entered into an agreement with the Secretary of Health, Education, and Welfare which could have excluded all elective and appointed officials of the state. Section 218 (c) (3) (b). The agreement did specifically exclude certain officials as follows:

(a) Members of the general assembly.
(b) Elective officials in positions for which compensation is on a fee basis.
(c) Elective officials of school districts.
(d) Elective officials of townships, and
(e) Elective officials of other political subdivisions

who are in part time positions. (includes per diem to county supervisors).

Since the members of the State Board of Regents are not specifically excluded by the agreement and since the agreement covers all services performed by individuals as exployees of the state, it is our opinion that your office is correct in withholding FICA from the board members's per diem checks.

With respect to withholding of Federal Income Taxes, it must be pointed out that "withholding taxes" are income taxes which the employer must deduct from wages of employees and for payment of which tax the employer is liable to the Government. Menich vs. Hoffman (C.A. Cal.) 205 F. 2d 365 (1953). Withholding is required only in wages as defined by the Internal Revenue Code. The definition of wages is very broad. Section 3401 of the 1954 Internal Revenue Code states in part as follows:

> "(a) Wages. For purposes of this chapter, the term 'wages' means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash;"

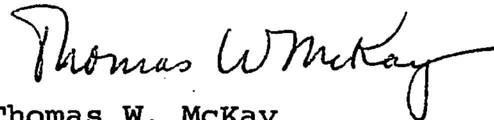
The terms employee and employer are defined in Section 3401 which states in part as follows:

> "(c) Employee-For purposes of this chapter, the term 'employee' includes an officer, employee, or elected official of the United States, a State, Territory, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing.
>
> * * *
>
> "(d) Employer-For purposes of this chapter, the term 'employer' means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person. . . .".

It is our opinion that your office is also correct in withholding Federal Income Tax from the board members' per diem allowances. We have already determined that the members of the State Board of Regents are public officers of the State of Iowa. Thus, the definition in Section

3401 (c) (supra) of the term "employee" includes the members of the State Board of Regents. The State of Iowa is the "employer" and the per diem they receive is "wages" as defined by Section 3401 (a) supra. Therefore, we conclude that your practice of withholding Federal Income Tax in this situation is correct.

Very truly yours,



Thomas W. McKay
Special Assistant Attorney General

TWM:JRS:ceb

TAXATION; Property Tax; Refunding erroneous or illegal tax. §445.60, 1962, Code of Iowa. Refund provisions of Section 445.60 apply where private individual erroneously paid taxes on lots owned by county.

LAWRENCE F. SCALISE STATE OF IOWA
ATTORNEY GENERAL DEPARTMENT OF JUSTICE
DES MOINES, IOWA

September 21, 1965

T.C. Poston, Esq.
Wayne County Attorney
Corydon, Iowa

Dear Sir:

We are in receipt of your letter dated August 30, 1965, in which you state as follows:

> "The County has offered for sale two lots in Humeston which the County took over for a nonpayment of taxes in 1947. Now it has been discovered that a private individual has been paying taxes on the lots since 1947. Assuming the title in the County is good, must the taxes paid by the individual be reimbursed to him, must the property be deeded to him, or must the County refund the taxes if the County sells to someone else?"

It is our opinion that if there is any refund to be given to this taxpayer, it must be granted under Section 445.60, Code of Iowa, 1962, which states as follows:

> "445.60. Refunding erroneous tax. The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

In Jewett Realty Company vs. Board of Supervisors, 239 Iowa 988, 993, 33 N.W. 2d 377 (1948) the Supreme Court of Iowa considered the meaning of "erroneously or illegally exacted or paid" and stated:

> "Griswold Land & Credit Co. vs. County of Calhoun, 198 Iowa 1240, 1245, 201 N.W. 11, carefully considers the meaning of 'erroneously or illegally exacted or paid' as used in what is now section 445.60. The rule there laid down from a consideration of our prior decisions is that a tax is erroneous or illegal so that a refund may be enforced when: (1) the tax is levied without statutory authority or (2) upon property not subject to taxation or (3) by some officer or officers having no authority to levy the same or (4) in some other similar respect illegal."

At common law, taxes voluntarily paid, although erroneous or illegal, could not be recovered back. Hammerstrom vs. Toy National Bank of Sioux City, (C.C.A. Iowa) 81 F. 2d 628 (1936). However, later Iowa cases do not follow the common law rule, and a "taxpayer would be entitled to a refund of taxes 'erroneously or illegally exacted or paid' within the meaning of the statute, though the payment was voluntary." Jewett Realty Company vs. Board of Supervisors, (supra). Slimmer vs. Chickasaw County, 140 Iowa 448, 118 N.W. 779 (1908). Therefore, any recovery by the taxpayer must be based upon the statute quoted above. Skimmer vs. Chickasaw County, supra at 453.

In the instant case, you state that the title in the county is a good title. If the property in question is owned by the county it would not be subject to taxation so long as it is devoted to public use and not held for pecuniary profit. Section 427.1(2), Code of Iowa, 1962. The Attorney General has held that after a county has received the tax deed, the

property should not be assessed for taxation. 1940 OAG 42.

It is our opinion that since the property is not subject to taxation, said tax was "erroneously or illegally exacted or paid." Therefore, the taxpayer is entitled to a refund under the provisions of Section 445.60 supra, provided the taxpayer pursues his administrative remedy to obtain the same. First National Bank vs. Harrison County Iowa, C.C.A. (Iowa) 57 F. 2d 56 (1932). Cedar Rapids Hotel Co. vs. Stirm, 222 Iowa 206, 268, N.W. 562 (1936).

The taxpayer must seek his relief from the board of supervisors. Section 445.60, supra. The manifest design of this statute is that the board of supervisors first ascertain whether the taxpayer is entitled to be reimbursed for taxes alleged to have been illegally or erroneously exacted and if so, that the treasurer will be directed to repay the same from the several funds to which these have passed. Commercial National Bank of Council Bluffs vs. Board of Supervisors, 168 Iowa 501, 150 N.W. 704 (1915). The final disposition of this matter, subject to an appeal to the courts, rests with the board of supervisors.

Very truly yours,

Thomas W. McKay
Special Assistant Attorney General

TWM:JRS:dj

TAXATION: Real Property Tax: Exemptions -- Dormitories leased by college. §427.1(9), 1962 Code of Iowa. A private college is considered a charitable organization. Property leased by the college for domitory purposes is tax exempt. H.F. 331, 61st G.A. (1965) concerning assessment and valuation of such property is applicable and is effective as of January 1, 1965

LAWRENCE F. SCALISE
ATTORNEY GENERAL

STATE OF IOWA
DEPARTMENT OF JUSTICE
DES MOINES, IOWA

September 24, 1965

Lee J. Farnsworth, Esq.
Crawford County Attorney
Crawford County Court House
Denison, Iowa

Dear Sir:

We acknowledge receipt of your letter dated August 13, 1965, in which you ask whether or not two hotels in Denison, Iowa, which are to be leased to Midwestern College for use as college dormitories, will be, when so leased, tax exempt.

Section 427.1(9), Code of Iowa, 1962, provides in part as follows:

> * * *
>
> "The following classes of property shall not be taxed:
>
> * * *
>
> '9. Property of religious, literary, and charitable societies. All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate object, not exceeding three hundred twenty acres in extent and not leased or otherwise used with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property

> herein described shall be omitted from the assessment.'"

At the outset it must be pointed out that Section 427.1, Code of Iowa, 1962, is an exempting statute and as such must be strictly construed. If there is any doubt upon the question, it must be resolved against the exemption and in favor of the taxation. National Bank of Burlington vs. Huneke, 250 Iowa 1030, 98 N.W. 2d 7 (1959), Trinity Lutheran Church of Des Moines vs. V.L. Browner, 255 Iowa 197, 121 N.W. 2d 131 (1963).

Subsection 9 and 24 must be read together, for subsection 24 is a procedural section rather than an exemption section. The purpose of the statement of the objects and uses of the organization which files the statement with the assessor is to establish whether all or part of the property is used for purposes that can be considered tax exempt. 1956 OAG 176, 177.

The Supreme Court of Iowa held in In re Cooper, 229 Iowa 921, 295 N.W. 448 (1940) that an educational institution under the tax exemption statutes, Section 6955, Code of Iowa 1935, (now Section 427.1, Code of Iowa, 1962) is a charitable organization. The Court stated at 229 Iowa 931:

> "The word 'charity,' as used in law, has a broader meaning and includes substantially any scheme or effort to better the condition of society or any considerable part thereof. Any gift not inconsistant with existing laws which is promotive of science or tends to the education . . . of mankind or the diffusion of useful knowledge . . . is a charity."

It is therefore our opinion that Midwestern College would be considered a charitable institution under the provisions of subsection 9. Therefore any property used by the college "not exceeding three hundred twenty acres in extent and not leased or otherwise used with a view to pecuniary profit" would be considered tax exempt.

In Laurent vs. City of Muscatine 59 Iowa 404, 13 N.W. 409 (1882), the Iowa Supreme Court held that property was not exempt from taxation where legal title is in a private individual and the property is used for a school and church. The Court interpreted Section 797, Code of Iowa, 1873. That section provided:

> ". . . that all public libraries, grounds, and buildings of literary, scientific, benevolent. . . institutions and societies, devoted solely to the appropriate objects of these institutions . . . (are free from taxation) . . . "

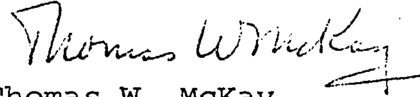
While Section 797 (supra) deems ownership of the property to be of prime importance when it states "'buildings of' . . . benevolent. . . institutions," Section 427.1(9), Code of Iowa, 1962, specifically states that all grounds and buildings used by charitable organizations shall be tax exempt. Subsection 9 concludes by stating that "all deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment."

Therefore, so long as the college has a valid lease filed for record on the property in question and so long as said property is being used by the college for its appropriate objects, it is our opinion that the property is tax exempt.

Your letter refers to certain new legislation amending Section 427.1(9). We refer you to H.F. 331, of the 61st G.A. (1965), which states in substance that any property used by or under construction for charitable organizations shall be listed upon the tax rolls of the district in which it is located and shall have ascribed to it its full market value and assessed or taxable value, as contemplated by Section 441.21, Code of Iowa, 1962. The legislature has prescribed that property be assessed and valued whether subject to a levy or to an exemp-

tion. The legislation is applicable to all property as of January 1, 1965.

Very truly yours,



Thomas W. McKay
Special Assistant Attorney General

TWM:JRS:dj

SCHOOLS: Enlargement of School Districts. § 275.27, 1962 Code of Iowa. Independent School Districts enlarged under the provisions of Chapter 275 thereafter become community school districts. (Gentry to Samore, Woodbury Co. Atty.) 9/22/65
65-9-12

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

September 22, 1965

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

Dear Mr. Samore:

This is in reply to your recent request for an opinion on the following factual situation:

> "After the reorganization of the Concord Township School District and the Lawton Community District there were 3.8 acres remaining in the Concord Township School District. Since the latter district was reduced to less than four (4) governmental sections, the County Board of Education attached this area to the Independent School District of Sioux City in accord with the provisions of Section 275.1, 1962 Code of Iowa.
>
> "Since the enlargement of the Sioux City Independent School District, shall this district be known as a community school district and is it part of the County School System of Woodbury County?"

In response to your question the following section of the 1962 Code of Iowa is relevant:

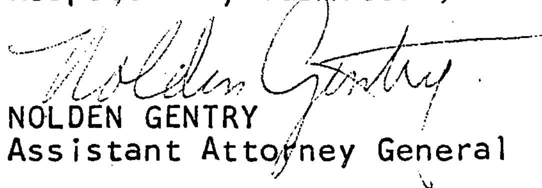
> "Section 275.27. Names. School districts created or enlarged under the provisions of this chapter shall be known as community school districts and shall be part of the county school system * * *." (Emphasis Added)

Your letter indicated that the remaining 3.8 acres were attached in accord with Section 275.1. Section 275.27, 1962 Code of Iowa, specifically states that any school districts enlarged under the provisions of Chapter 275 "shall be known as community school districts and shall be part of the county school system." In dealing with this subject the Attorney General has previously stated:

> "Section 275.27 expressly applies to community school districts which it defines as districts created or enlarged under the provisions of Chapter 275. Since under the facts of your letter the district in question was enlarged under Chapter 275, it is a "community" school district by express statutory definition and a part of the county school system by virtue of the mandatory 'shall' used in the said section." 58 OAG 199, 200.

In accord with the above I am of the opinion that the Sioux City School District is now a community school district and it is part of the county school system.

Respectfully submitted,



NOLDEN GENTRY
Assistant Attorney General

ms

SCHOOLS. High School Defined. § 286.2, 1962 Code of Iowa. A school district operating ninth, tenth, eleventh or twelfth grades or any portion thereof is operating a high school for the purposes of State supplementary aid.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

September 22, 1965

Mr. Urban J. Hageman
State Representative
Winneshiek County
R. R. # 3
Decorah, Iowa

Dear Mr. Hageman:

This is in reply to your recent letter in which you requested an opinion on the following question:

> "If a school district operates a school consisting of grades K through nine (9), but does not operate grades ten (10) through twelve (12) is this school district to be considered a high school district for the purposes of supplementary aid?"

Chapter 286, 1962 Code of Iowa governs the distribution of supplementary aid to school districts. Section 286.4(2) requires districts with high schools to compute the estimated proceeds of their standard local tax rate at 15 mills of the assessed valuation of the district while the rate for elementary schools is set at 10 mills. However, the above chapter does not expressly define what constitutes a high school. In determining what constitutes a high school within the scope of this chapter the following section of the 1962 Code is relevant:

> "Section 286.2. Definitions. For the purposes of this chapter an elementary pupil is a pupil of school age attending public school who has not entered ninth grade, and a high school pupil is a pupil of school age attending public school school in any of the grades ninth to twelfth inclusive." (Emphasis Added)

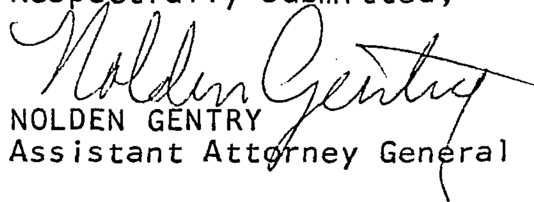
65-9-14

From the above we have seen that by statutory definition a high school pupil is "a pupil * * * attending public school in any of the grades ninth through twelfth inclusive." Inasmuch as any child enrolled in grades nine through twelve is a high school pupil, it logically follows that a school district operating any portion of grades nine through twelve would be operating a high school for the purposes of this chapter. This view was adopted by the Attorney General when he stated:

> "The term '* * * high school' * * * has been construed by this department to mean any school where instruction is given in the 9th, 10th, 11th or 12th grade work and that <u>it need not be a school furnishing the work in all of such grades before it should be treated as a high school</u>." (Emphasis Added) 12 OAG 867.

In accord with the above I am of the opinion that North Winneshiek Community School District is presently operating a high school within the scope of Section 286.4(2).

Respectfully submitted,



NOLDEN GENTRY
Assistant Attorney General

ms

LABOR: Commissioner of Labor - Jurisdiction over Unfired Pressure Vessel - §§ 89.4, 89.12. The Commissioner of Labor is not empowered to prescribe rules and regulations in respect to unfired pressure vessels when said vessels do not contain water or steam thus not covered under Chapter 89 of the Code of Iowa.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

September 22, 1965

Mr. Dale Parkins
Commissioner of Labor
L O C A L

Dear Mr. Parkins:

You have requested an opinion from this office based on the following excerpt quoted from the body of your letter:

> "Section 89.4 of the Iowa Code empowers the Labor Commissioner to prescribe rules for the testing and construction of Power Boilers and Unfired Pressure Vessels.
>
> Section 89.12, the second paragraph after the word,
>
> DEFINITIONS: Specifically designates that the A.S.M.E. (American Society of Mechanical Engineers) Code and amendments and interpretations thereto are hereby adopted and shall be known as the Iowa Construction Code.
>
> In view of the enclosed dissenting letter from the M. W. Kellogg Company of New York City, I respectfully ask from your office, an opinion, as to whether this department has jurisdiction over the described vessels."

On the basis of your submitted request letter and the M. W. Kellogg Company dissenting letter dated May 14, 1965, we are assuming that the "described vessels" are in fact unfired pressure vessels and the question to be answered is specifically are these unfired pressure vessels subject to the jurisdiction of the Commissioner of Labor pursuant to Section 89.4 and/or Section 89.12 of the 1962 Code of Iowa as amended.

#65-9-16

The applicable Code provisions are as follows:

> "89.4 Rules - Records:
>
> The commissioner of Labor is hereby authorized and empowered to prescribe rules within the provisions of this chapter, for the purpose of carrying the same into effect including rules for the methods of testing equipment and construction and installation of new equipment covered by this chapter, and said rules shall, as nearly as possible, conform to the rules formulated by the boiler code committee of the American Society of Mechanical Engineers and known as the American Society of Mechanical Engineers boiler code of 1937 as amended." (Emphasis Added)
>
> "89.12 Fired and unfired vessels.
>
> 1. A pressure vessel in which steam is generated by the application of heat resulting from the combustion of solid, liquid or gaseous fuel shall be classed as a fired steam boiler.
>
> 2. Any steam boiler or steam vessel in which steam may be generated or transferred, but one in which the heat resulting from combustion of solid, liquid or gaseous fuel is not applied directly to the boiler or vessel shall be classified as an unfired steam vessel." (Emphasis Added)

On the basis of the enclosed letter from M. W. Kellogg our understanding of the total operation of the vessels is as follows: Nitrogen and hydrogen gases are under pressure in both ammonia converters. Ammonia is formed within the converters by means of a chemical reaction between the nitrogen and hydrogen gases. The ammonia gas is then transferred to the ammonia separator. The ammonia separator then cools the ammonia gas received from the converters by means of heat exchanges to form a liquid of the gas. The ammonia liquid is then extracted from the separator. It is the contention of the M. W. Kellogg Company that at no time is there water or steam contained within the converter nor were the converters used to transmit steam for power or involved with steam under pressure, nor is the separator in any way concerned with steam or water. Section 89.12 specifically describes vessels using steam. Assuming the company's vessels contain no water or steam, then we

would be in agreement that Sec. 89.12 would not confer jurisdiction to the Commissioner over these unfired pressure vessels.

Section 89.4 empowers the Commissioner of Labor to prescribe rules and regulations for the testing and construction and installation of new equipment "covered by this chapter" (Chapter 89), which is entitled Boiler Inspection.

It further says that these rules should conform, as nearly as possible to the rules formulated by the boiler code committee of the American Society of Mechanical Engineers.

The applicable sections of the 1962 Iowa Departmental Rules are as follows, page 268:

BOILER INSPECTION DIVISION
Definitions

> "State of Iowa Construction Code is used to designate the accepted reference for construction, installation, operation, and inspection of boilers and unfired pressure vessels and should hereafter be referred to as the Iowa Boiler Code.
>
> The A.S.M.E. Boiler Code and amendments and interpretations thereto are <u>hereby adopted</u> and shall hereafter be known as the "Iowa Construction Code" (Iowa Code). A copy of this Code is on file in the office of the Commissioner of Labor, and in the state law library in the statehouse." (Emphasis Added)

Section VIII of the 1965 A.S.M.E. boiler and pressure vessel code is entitled unfired pressure vessels, on page one the applicable section reads as follows:

> "U-1 Scope
> The rules in this Section of the Code cover minimum construction requirements for the design fabrication, inspection and certification of unfired pressure vessels.
>
> Section VIII is divided into three subsections. Subsection A consists of Part UG covering the general requirements applicable to <u>all pressure vessels</u>." (Emphasis Added)

"UG-1 Scope
The requirements of Park UG are applicable to all unfired pressure vessels and vessel parts and shall be used in conjunction with the specific requirements in subsections B and C. that pertain to the method of fabrication and the material used." (Emphasis Added)

In reference to the specific A.S.M.E. code provisions it would appear that the department of Labor would acquire jurisdiction over all unfired pressure vessels in regard to general requirements for materials and methods of construction and installation. However, the statutory language used in Section 89.4 permitting the adoption of the A.S.M.E. code must be alluded to in order that the A.S.M.E. code could be applicable. It provides in part:

"The comissioner of Labor is hereby authorized and empowered to prescribe rules within the provisions of this chapter ...."

To include these unfired pressure vessels (which do not use steam), it is the writer's opinion that they (described vessels) would have to be "within the provisions of this chapter" or "covered by this chapter." Then it must be determined what is covered by Chapter 89 of the 1962 Code of Iowa entitled Boiler inspection.

All references in Chapter 89 are as to boilers and more often than not are referred to as boilers containing steam of water. (See Sec. 89.2(1), 89.7(6) and 89.12(2). As heretofore mentioned, the term "unfired pressure vessel" is not referred to in Chapter 89. We are restrained from enlarging on legislative enactments.

The cases defining boilers are uniform as to requirement of containing water or steam. It was stated in the case of Werner v. Pioneer Coverage Co., Mo. App., 155 S.W.2d 319, 324 as follows:

"By the word boiler we understand as meaning a metal chamber containing water which is caused to boil by the direct application of heat to the outer wall of the chamber." (Emphasis Added)

A policy insuring a steam boiler against explosion or rupture, which defined "boiler", as used therein as

"any vessel * * * which is used for the generation of steam, and shall include * * *

> all connecting pipes and fittings up to and including the valve nearest the boiler ...." (Emphasis Added) Norfolk & W. Ry. Co. v. Royal Indemnity Co., D.C. Pa., 257 F. 848, 850.

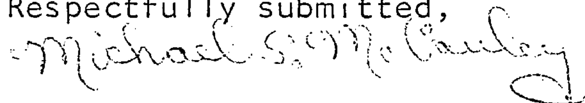
Webster's Dictionary defines "boiler", as commonly used, as meaning "any vessel in which water or other liquids or semi-liquids may be raised to ebulition by heat." This definition was cited with approval in the case of Hartford Steam Boiler Inspection & Insurance Co. v. Kleinman, Civ. App., 293 S.W. 894, 895.

It seems clear the purpose of Chapter 89 is to provide for the inspection of boilers. The chapter was enacted into law by the 49th G.A. and cited in the Acts of the 49th G.A., Chapter 97. In that session it was Senate File 174 and its title giving indications of what was desired stated as follows:

> "AN ACT creating a boiler inspection department within the Department of Labor, providing for notice of intention to install and inspection of steam boilers, generators, superheaters, and creating the office of state boiler inspector, defining his duties, and providing for the enforcement of boiler inspection provisions of the act and providing penalties for the violation thereof." (Emphasis Added)

Based on the foregoing, and assuming the ammonia converters and the separators in question do not contain water or steam then it is my opinion that said vessels would not be included under the provisions of Chapter 89 and therefore 89.4 would not be applicable. It would then follow that the Bureau of Labor would not have jurisdiction over such vessels.

Respectfully submitted,



MICHAEL S. McCAULEY
Assistant Attorney General

ms

LIQUOR CONTROL COMMISSION: Duty of state liquor store employee before selling liquor to prospective purchaser who appears to be under age twenty-one enumerated in Chapter 116, § 11, Acts of the 60th G.A. Should employee fail to adhere to dictates of Chapter 116, § 11, Acts of the 60th G.A., he may be subject to liability under provisions of § 123.92, 1962 Code of Iowa.

September 24, 1965

Mr. Gene Needles
Director, Law Enforcement Division
Iowa Liquor Control Commission
L O C A L

Dear Mr. Needles:

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

1. May state liquor store employees be held criminally liable for sale of liquor to a person under twenty-one years of age, even though such purchaser has first signed a statement which provides, "I certify that I am of legal age"?

2. At what point is the sale of liquor in a state liquor store consumated?

3. Should the response to the first question be in the affirmative, which state liquor control employee or employees would be criminally liable, the employee checking the addition on the salesslip, the employee receiving the purchase price, or the employee who hands the liquor to the purchaser?

Section 123.43, 1962 Code of Iowa, prohibits the selling, giving or otherwise making available of liquor to a person under the age of twenty-one.

Chapter 116, Section 11, Acts of the 60th General Assembly enacted to amend Chapter 123, 1962 Code of Iowa, provides that:

> "1. Upon attempt to purchase alcoholic liquor in any state liquor store . . . by any person who appears to the vendor . . . to be under twenty-one (21) years of age, such vendor . . . shall demand and the prospective purchaser shall display satisfactory evidence that the purchaser is twenty-one years of age or over."

Section 123.92, 1962 Code of Iowa, provides that:

> "Any . . . employee of the commission who shall knowingly or willfully violate any of the provisions

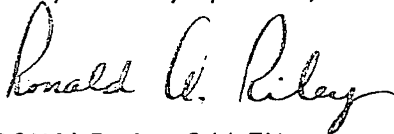
of this chapter, or knowingly and willfully aid, assist or permit any such violation, shall be guilty of a misdemeanor and be punishable by a fine of not to exceed one thousand dollars, nor less than three hundred dollars, or by imprisonment in the county jail for not less than three months, nor more than one year, or by both such fine and imprisonment . . ."

It thus appears from the foregoing provisions that the response to your first inquiry must be in the affirmative. Chapter 116, Section 11, Acts of the 60th General Assembly, places an affirmative duty upon the employees of state liquor stores to demand evidence from a prospective purchaser who appears to such employee to be under age twenty-one, that such person is of legal age to purchase liquor. The fact that a prospective purchaser signs a statement printed on the order form or sales slip certifying that he is of legal age should not remove the duty on the part of the state liquor store employee to require satisfactory evidence that the purchaser is of legal age if a doubt exists. However, Section 123.92, 1962 Code of Iowa, requires that the employee must "knowingly or willfully" violate a provision of Chapter 123, 1962 Code of Iowa, before he will be held liable for a violation of said chapter. In this regard, where an employee has followed the dictates of Chapter 116, Section 11, satisfactory evidence having been obtained from a prospective purchaser in the instance where the employee had reason to doubt that such purchaser was over age twenty-one, such employee should not be guilty of selling liquor to a minor should it be later discovered that the purchaser was, in fact, under age twenty-one. In this regard see Section 123.46 (5), 1962 Code of Iowa, as amended, which removes liability in the instance of a licensee under such circumstances. The Iowa Liquor Control Commission, under the provisions of Section 123.17 (e), 1962 Code of Iowa as amended, has been authorized to prescribe the nature and character of the proof to be furnished upon the occasion of the attempted purchase by a person who appears to a liquor store employee to be under the age of twenty-one.

The word "sale", as used in the statute making the sale of liquor to a person under age twenty-one an offense, has the same meaning as in the law of sales, Commonwealth v Lundin, 326 Mass. 514, 95 N.E. 2d 659, 660. However, under the statute which makes it an offense to sell liquor to a person under twenty-one years of age, the word "sell" should not be used in its strict technical sense, for one of the elements of a "sale" is competent parties, and, a minor not being a competent party to obtain liquor there can be no sale to him in the strict technical sense. Newsome v

State, 1 Ga. App. 790, 58 S. E. 71, 72. In the instant situation, the sale of the liquor would appear to be consumated upon the payment of the purchase price and the delivery of the liquor. The operation of a state liquor store, as understood by this writer, is that one employee receives the purchase price, while a second employee delivers the liquor. These persons appear to be the parties involved in the sale. Only that employee who willfully acts in violation of Chapter 123, 1962 Code of Iowa, would appear to be subject to possible prosecution under Section 123.92, 1962 Code of Iowa. The employee who merely checks the addition upon the order form does not appear to be an actual party to the sale, and thus not involved in the sale so as to incur liability under Section 123.92, 1962 Code of Iowa.

Very truly yours,



RONALD A. RILEY
Assistant Attorney General

/dlw

TAXATION: Federal Income Tax and FICA Withholding. §3401, Internal Revenue Code of 1954; §§356.22 and 97C.3, Code of Iowa, 1962. Federal Income Taxes and FICA are not to be withheld from amounts credited to county jail prisoners.

STATE OF IOWA
DEPARTMENT OF JUSTICE
DES MOINES, IOWA

LAWRENCE F. SCALISE
ATTORNEY GENERAL

October 7, 1965

Donald E. Doyle, Esq.
Chief Corporation Counsel
Office of the County Attorney
Davenport, Iowa

Dear Sir:

We acknowledge receipt of your letter dated September 20, 1965, in which you ask if there must be withholding for FICA and Federal Income Tax from amounts credited to county jail prisoners.

We refer you to Section 356.22, Code of Iowa, 1962, which states as follows:

> "356.22. Credit for labor. For every day of labor performed by any convict under the provisions hereof, there shall be credited on any judgment for fine and costs against him the sum of one dollar and fifty cents."

Withheld Federal Income Taxes are income taxes which the employer must deduct from wages of employees, and for payment of which the employer is liable to the Internal Revenue Service. Menick vs. Hoffman (C.A. Cal.) 205 F. 2d 365 (1953). Withholding is required only in wages as defined by the Internal Revenue Code. The definition of "wages" is very broad. Section 3401 of the 1954 Internal Revenue Code (26 USC 3401) states, in part, as follows:

> "(a) Wages. For purposes of this chapter, the term 'wages' means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash," (emphasis supplied)

The term "employer" is defined in Section 3401 which states, in part, as follows:

> "(d) Employer.-For purposes of this chapter, the term 'employer' means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, * * * "

The Internal Revenue Service in Publication 15, dated February, 1964, states on page 4 that an employee is:

> "Every individual who performs services subject to the will and control of an employer, both as to what shall be done and how it shall be done, is an employee for purposes of these taxes. It does not matter that the employer permits the employee considerable discretion and freedom of action, so long as the employer has the legal right to control both the method and the result of the services."

It is our opinion that a prisoner cannot be considered an employee as defined above, for a prisoner is one who is deprived of his liberty; one who is against his will kept in confinement or custody. U.S. vs. Curran, (C.C.A. N.Y.) 297 F. 946 (1924). Although the credit he receives for his labor can be considered "wages" in the broad sense, he is not an employee, for he has lost his privilege of discretion and his freedom of action. Therefore, for Federal Income Tax purposes, it would not be necessary to withhold from the amount credited to him.

With respect to withholding for purposes of FICA, Section 218 of the Social Security Act (42 USC 418) provides that the State and the Secretary of Health, Education, and Welfare can enter into agreements for the purpose of extending coverage to services performed by individuals or employees of the State. Pursuant to enabling legislation, Chapter 73, Laws of the 55th G.A., 1953, now Section 97C.3, Code of Iowa, 1962, the State of Iowa entered into an agreement with the Secretary of Health, Education, and Welfare. The agreement did specifically exclude services performed in a hospital, home, or other institution by a patient or inmate thereof.

We therefore conclude that withholding for FICA and Federal Income Tax for amounts credited to the county prisoners is not appropriate.

Very truly yours,

Thomas W. McKay
Special Assistant Attorney General

TWM:JRS:ceb

CITIES AND TOWNS: Civil Service, §365.17, 1962 Code of Iowa, as amended. Amendment to §365.17 became effective July 4, 1963 and operated prospectively; after that date the language changed by the amendment had no prospective legal effect.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

October 4, 1965

Mr. Stanley R. Simpson
Boone County Attorney
Boone, Iowa

Dear Mr. Simpson:

The Attorney General has referred to me your letter of September 21, 1965, in which you request the opinion of this office in regard to the following enumerated questions.

I

> "At a recent session of the State Legislature, the law concerning the resident requirements of an applicant for a City Police job under local Civil Service was changed so that the applicant would not have to fulfill the local resident requirements. My question is: was this law changed to the effect that after the applicant became a member of the local Police Department or those officers employed by a local Police Department at the time of the change of the law, are they still required to reside within the confines of the City Limits?"

Section 365.17, 1962 Code of Iowa, as amended, sets out requirements which must be met by all persons appointed or employed in any capacity in the police department. Prior to July 4, 1963 section 365.17 stated, in part:

> "...In no case shall any person be appointed or employed in any capacity in the fire or police department, or any department which is governed by civil service, unless such person:
>
> "1. Is a citizen of the United States and has been a resident of the city for more than one year, but such residence in the city shall not be a necessary qualification for appointment as chief of fire department."

Chapter 231, Acts of the 60th G.A., amended section 365.17, by striking all of subsection 1, quoted above, and inserting in lieu thereof, the following:

> "1. Is a citizen of the United States and has been a resident of the state of Iowa for at least one year and meets such other and further residence requirements as the council may by ordinance provide."

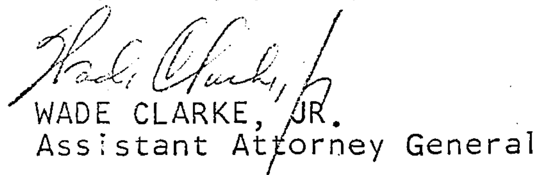
That amendment became effective upon July 4, 1963. After that date policemen had only to meet the requirements then in effect; as of July 4, 1963, the former law no longer had any prospective legal significance. If, for example, a policeman was living within the confines at the time of the change in law, he could, after July 4, 1963, move outside of the city so long as he stayed in Iowa and so long as the council had made no ordinance requiring that policemen reside within the confines of the city.

II

> "A recent legislature changed some sections of the Police and Firemen Retirement act, Chapter 411, Code of Iowa, concerning pension benefits. My question is: Can an officer covered under Chapter 411 Code of Iowa complete 22 years active service leave the Department in good standing and then be eligible to receive the pension benefits when he attains the age of 55?"

Your second question is answered in opinions issued by this office on May 1, 1957 and August 13, 1958, copies of which are enclosed. These opinions state that by the language of section 411.6(1) a policeman or fireman may retire from the service after twenty-two years of service and then wait until age fifty-five to start drawing his pension only if he attains the age of fifty-five within ninety days after filing his application for retirement.

Very truly yours,



WADE CLARKE, JR.
Assistant Attorney General

bj
Enc.

LIQUOR CONTROL COMMISSION - Living Quarters Permit. §123.27(5), 1962 Code of Iowa, as amended. Liquor Control Commission does not have authority under §123.27(5), 1962 Code, as amended, to require that licensees agree to allow peace officers to inspect and search his adjoining residential or sleeping quarters at any time, without obtaining a warrant, as a condition precedent to the licensee obtaining a living quarters permit.

September 15, 1965

Mr. Gene L. Needles
Director, Law Enforcement Division
Iowa Liquor Control Commission
L O C A L

Dear Mr. Needles:

We are in receipt of your letter of July 26, 1965, wherein you request the opinion of this office in regard to the following question:

> "Whether or not the Iowa Liquor Control Commission has authority to charge an inspection fee and require an applicant to agree to allow peace officers the right to enter upon their premises without a warrant to inspect for violations of Title VI of the Code in those cases where a special living quarters permit is applied for and issued by the Iowa Liquor Control Commission."

In connection with the above request you have enclosed four proposed forms to be used in connection with a licensee's obtainment of a special living quarters permit. These forms are: (1) Living Quarters Inspection Report, (2) Affidavit of Licensee, (3) Application for Connecting Living Quarters Permit, (4) The permit itself.

The Living Quarters Permit which you have submitted as the recommended form to be adopted, provides, inter alia:

> "By your signed agreement with the Iowa Liquor Control Commission any enforcement officer may enter, examine, inspect and search, without a search warrant, any time during the twenty-four hour day, your living quarters, directly connected with your licensed premises, and also that alcoholic beverages will not be permitted at any time in the living quarters which are directly connected with the licensed premises."

This proposed living quarters permit is to be issued under the authority of Section 123.27 (5), 1962 Code of Iowa, as amended,

which provides:

> "No liquor control license shall be issued for premises which do not conform to all laws, ordinances and resolutions, health and fire regulations applicable thereto. Nor shall any licensee have or maintain any interior access to residential or sleeping quarters, unless permission is specifically granted by the Iowa Liquor Control Commission in the form of a living quarters permit."

The purpose of this section is clearly to prohibit the issuance of a liquor control license to any applicant whose premises fail to conform to the enumerated regulations. In addition, this section compels a licensee to obtain permission from the liquor control commission, to be manifested by a permit, to have or maintain an interior access to his residential or sleeping quarters. The statute makes no provision which would authorize the liquor commission to regulate the residential or sleeping quarters proper. Only the interior access to such living quarters is the subject of the permit.

It therefore becomes apparent that an extension of the regulations applicable to licensed premises, and the correspondent right to inspect and search without obtainment of a warrant, would not be warranted in the instance of a private residence of the licensee, even though such private quarters may be directly connected to the licensed premise by means of an interior access. Accordingly, restricting the resident of such private premises, even though connected to a licensed premise, from any activity not otherwise prohibited by law would not be warranted absent authority in addition to Section 123.27(5), as amended.

Section 123.17 (2)(d), 1962 Code of Iowa, cited in your opinion request, authorizes the liquor control commission to prescribe the forms or information blanks that will be used for the purpose of the chapter or the regulations made thereunder and the terms and conditions under which permits and licenses may be issued or granted. In this regard, it is to be noted that Section 123.17 (1), 1962 Code of Iowa, allows that the "Commission may make such rules and regulations not inconsistent with this chapter . . . ." (Underlining supplied). Since the Commission has not been empowered to regulate private dwellings adjacent to licensed premises, the imposition of restrictions and the requirement that the constitutional rights be waived by the licensee in regard to his private residence, would be without the authority and rule making power of the Iowa Liquor Control Commission.

The action which the Liquor Control Commission contemplates, that of regulation of one's private residence or sleeping quarters merely because such sleeping or residential quarters have an interior ac-

cess to a licensed establishment, appear to be in direct contravention to the constitutional protections which are afforded all citizens. Possession of a liquor control license should not require the possessor to waive certain constitutional guarantees as regards his personal home, effects and papers which are not physically in the licensed premises. The Fourth Amendment to the Constitution of the United States provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." An essentially identical guarantee of personal privacy is set forth in Article I, Section 8 of the Iowa Constitution. The United States Supreme Court, in Wolf v People of State of Colorado, 338 U.S. 25, 27 - 28, 69 S. Ct. 1359, 1361, 93 L. Ed. 1782, stated:

> "The security of one's privacy against arbitrary intrusion by the police - - which is at the core of the Fourth Amendment - - is basic to a free society."

The Court further provided that:

> "The knock at the door, whether by day or by night as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English - speaking peoples.
>
> "Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

The Supreme Court in Mapp v Ohio, 367 U.S. 643, 81 S. Ct. 1684, expressly declared that the Fourth Amendment's right of privacy would be enforceable against the States through the Due Process Clause of the Fourteenth Amendment.

Thus both the United States Constitution and the Iowa Constitution make it emphatically clear that important as efficient law enforcement may be, it is more important that the right of privacy guaranteed by these constitutional provisions be respected.

In Ker v California, 374 U.S. 23, 83 S. Ct. 1623 (1963), the

Court asserted:

> "The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and concomitant command that evidence so seized is inadmissible against one who has standing to complain."

In Mutchall v City of Kalamazoo, 323 Mich. 215, 35 N.W.2d 245 (1948), an ordinance required the owner of a business operated under a state license to allow the police to enter such premises at all hours and also to submit to a reasonable inspection by health and fire departments. In reply to the licensee's argument that such ordinance deprived him of the right to be free from unreasonable searches and seizures, the Court stated:

> ". . . statutes . . . requiring inspections and reports, do not violate the Fourteenth Amendment of the Federal Constitution by depriving one of the valuable right to use his premises in a lawful manner without due process of law."

However, it is to be noted that the court, in the above case, specifically enumerated that "the chief of police, police officers, health officers and others charged with the enforcement of the ordinance should have access to all parts of the premises licensed." (underlining supplied).

Frank v Maryland, 359 U.S. 360, 79 S. Ct. 804 (1959), concerned itself with a warrantless inspection of a private residence by a city health inspector. The Court, in approving such a search, stated:

> "The attempted inspection of appellant's home is merely to determine whether conditions exist which the Baltimore Health Code proscribes. If they do appellant is notified to remedy the infringing conditions. No evidence for criminal prosecution is sought to be seized." (Underlining supplied).

In the instant matter, an applicant for a living quarters permit must agree that any evidence of violations of Title Six (VI) of the Code which is obtained may be used as evidence at any trial or before the Liquor Control Commission.

Since the proposed permit concerns inspection of a persons' private residence, it is submitted the regulation of a connected licensed premise should not form the basis for abrogation of one's constitutionally guaranteed right to be secure in his person, house, papers and effects from unreasonable searches and seizures. If there is reasonable and probable cause to believe that the laws of this state are being violated in such residence, a search warrant under the provisions of Chapter 751, 1962 Code of Iowa, could be obtained and a search conducted.

Since it appears that regulation of a private residence or sleeping quarters by the Iowa Liquor Control Commission is not authorized, the corresponding imposition of an inspection fee would appear to be equally without authority.

Very truly yours,

RONALD A. RILEY
Assistant Attorney General

/dlw

CITIES AND TOWNS: Local Registrar. §§ 144.6, 144.8(2), 144.8(3), 144.9, 144.35, 1962 Code of Iowa. The Local Registrar is an employee of the State of Iowa and not an employee of the city or county.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

October 8, 1965

Mr. Ray A. Fenton
Polk County Attorney
Polk County Court House
Des Moines, Iowa

Dear Mr. Fenton:

This is in reply to your recent request for an opinion from this office on the following question:

> Is the local registrar an employee of the State, City, Local Health Department or Polk County?

I am of the opinion that an answer to your question can be found within the statutory language of Chapter 144, 1962 Code of Iowa, and the legislative intent and purposes applicable thereto. In order to determine who is to be considered the employer of the local registrar a determination of the employer-employee relationship must be made. The Iowa court has said that:

> The right to control is the principal test for determining whether an 'employer-employee' relationship exists. Kaus v. Unemployment Compensation Commission, 230 Iowa 860, 299 N.W. 415 (1941)

In light of this pronouncement one must look to the statutory language to find whether or not elements of control exist within the statutory framework involved in the present case.

The first element of control expressed in the statute is found in Section 144.7, 1962 Code of Iowa, which states:

> "Any local registrar who in the judgment of the state department fails or neglects to make prompt and complete return of births and deaths . . . shall be forthwith removed by the department." (Emphasis supplied)

Further control can be witnessed in Section 144.8(2), 1962 Code of Iowa, which states that the state registrar shall:

> "Have supervisory power over local registrars . . . ."

Also under Section 144.9, 1962 Code of Iowa it is stated that:

> "The local registrar shall, <u>subject to the direction and supervision of the state registrar:</u> . . . ." (Emphasis supplied)

Based upon the statutory language cited above one can see that the element of control discussed in the <u>Kaus Case</u>, supra, is present.

One specific factor which must be considered is that which involves the fees which are to be paid to the local registrar. Section 144.35, 1962 Code of Iowa, states that:

> "All amounts payable to a registrar under the provisions of this chapter shall be paid by the county in which the registration district is located, immediately upon certification by the state registrar, in the manner in which other claims are paid by the county . . . ."

In considering this language one must weigh with it the language found in <u>Hayes</u> v. <u>Jensen</u>, 89 F. Supp. 1 (U.S.D.C. S.D. I.C.D.) (1950) where the court said:

> Methods or times of payment of consideration for services performed <u>are not in and of themselves a sufficient test to establish an employer-employee relationship.</u> (Emphasis Supplied)

Therefore in the present case the language of the <u>Kaus Case</u> would in my opinion be the basis for the determination that the local registrar should be considered an employee of the State of Iowa. Further support for the proposition that the local registrar is an employee of the state can be witnessed in the need for a registration procedure controlled by the state as shown in Section 144.8(3), 1962 Code of Iowa, where it is stated that the registrar shall:

"Prepare and issue such detailed instructions as may be required to procure the uniform observance of the provisions of said law and the maintenance of a perfect system of registration."

Therefore based upon the above cited statutory language and the supporting case law, it is my opinion that the local registrar should be considered to be an employee of the State of Iowa.

Respectfully submitted,

Richard Thornton

RICHARD THORNTON
Assistant Attorney General

RT:ms

INSURANCE: Tax Sheltered Annuities. Ch. 294, 1962 Code of Iowa, as amended by S.F. 276, 61st G.A. A board of education, having elected to accept the annuity program, may not restrict the contracts to pure annuities without incidental life insurance protection.

State of Iowa
LAWRENCE F. SCALISE DEPARTMENT OF JUSTICE
ATTORNEY GENERAL Des Moines

October 12, 1965

Hon. Francis Messerly
State Senator
R.R. No. 3
Cedar Falls, Iowa

Dear Senator Messerly:

This is in reply to your letter dated October 5, 1965, in which you inquire if a board of education may accept a request for a tax sheltered annuity but refuse to allow the annuity contract to include any incidental life insurance protection. For a broad discussion of this subject matter, we invite your attention to an opinion of the Attorney General dated August 17, 1965, addressed to State Senator Tom Riley, a copy of which is enclosed.

With regard to the specific question posed in your letter, we have consulted the Iowa Insurance Department concerning the types of policies which have been approved for writing in Iowa. A number of companies having on file contracts qualifying for tax sheltered treatment write only policies containing incidental life insurance features. Thus, a school board imposed limitation on the type of contract which the employee may select would necessarily put certain companies and agents "out of the market." This would be contrary to the legislative mandate of S.F. 276, 61st G.A., which provides in pertinent part:

> ". . . a school district may purchase an individual annuity contract for an employee, from such insurance organization authorized to do business in this state and through an Iowa licensed insurance agent <u>as the employee may select</u>, . . ." (emphasis supplied)

It is our opinion that a board of education, having elected to accept the annuity program, may not restrict the contracts to pure annuities without incidental life insurance protection.

Very truly yours,

Thomas W. McKay
Special Assistant Attorney General

TWM:dj

Enclosure

COUNTY AND COUNTY OFFICERS: Special census affecting salaries. § 4.1, 1962 Code of Iowa; S.F. 111; S.F. 136; H.F. 349, Acts of 61st G.A. The special census taken under S.F. 111, relating to the taking of such census in cities and towns is not available for computing salaries authorized under H.F. 349 and S.F. 136.

State of Iowa
Department of Justice
Des Moines

October 14, 1965

Mr. Charles E. Vanderbur
Story County Attorney
Story County Court House
Nevada, Iowa

Dear Mr. Vanderbur:

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

> "The county salary acts enacted by the last General Assembly - House File 349 and Senate File 136 - are based in whole or in part upon the population of the county involved. Our county, for one, is experiencing two special census enumerations conducted by the U.S. Census Bureau. The one at Slater shows an increase in population of between two and three hundred and the one here in Ames shows an increase of over 7,000 persons. Our 1960 census from the county lacked approximately 700 persons of being 50,000. The obvious conclusion is that the county population is now considerably above the 50,000 figure. In the case of both the bills mentioned above, an increase for all county officials would be indicated if the new census figures are to be substituted for the old. My question, obviously, is then - are the revised census figures to be used as a basis for computing salaries contemplated under House File 349 and Senate File 136 of the most recent Assembly, and if so, from what date should they be so computed?"

In reply thereto I would advise that the special census referred to by you is undertaken under the authority of Senate File

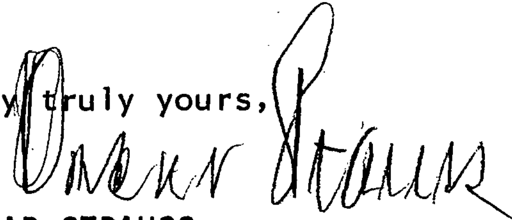
111 enacted by the 61st General Assembly. Section 5 of this Act with respect to the result of such special census and the use of such census provides that:

> "Section four point one (4.1), Code 1962, is amended by adding thereto the following: 'However the population figure disclosed for any city or town as the result of a special federal census shall be considered for no other purposes than the application of sections one hundred twenty-three point fifty (123.50) and three hundred twelve point three (312.3), Code 1962.'"

Section 123.50 referred to therein concerns the distribution of liquor control funds and Section 312.3 is concerned with the disposition of the road use tax funds.

Therefore, I advise that any revised census figure as disclosed by this special census is not available for computing salaries contemplated under House File 349 and Senate File 136, Acts of the 61st General Assembly.

Very truly yours,



OSCAR STRAUSS
First Assistant Attorney General

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SCHOOL & SCHOOL DISTRICTS: School District Treasurer. § 291.13, 1962 Code of Iowa. The treasurer of a school district is not required by the language of § 293.13 to keep separate bank accounts where the statutory language requires "a separate account for each fund." Because of the requirements of separateness of the schoolhouse fund and the general fund, it is a better practice to maintain separate bank accounts.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

October 14, 1965

Mr. Lorne Worthington
Auditor of State
State House
LOCAL

ATTN: E. H. Creese, Deputy Auditor

Gentlemen:

You have submitted the following question:

> "The question has come up as to whether it is necessary for a School District to have separate and distinct bank accounts for the General Fund and the Schoolhouse Fund.
>
> "While many School Districts have only one bank account which includes the General Fund and the Schoolhouse Fund, they do however keep separate accounting records for each fund. The question here seems to be does 'a separate account with each fund' mean a separate bank account or a separate accounting record?"

The statutory language that controls is found in Section 291.13 of the 1962 Code of Iowa which reads as follows:

> "The money collected by a tax authorized by the electors or the proceeds of the sale of bonds authorized by law or the proceeds of a tax estimated and certified by the board for the purpose of paying interest and principal on lawful bonded indebtedness or for the purchase of sites as authorized by law, shall be called the schoolhouse fund, and except when authorized by the electors, may be used only for the purpose for which originally authorized or certified. All other moneys received for any other purpose shall be called the general fund. The

> treasurer shall keep a separate account with each fund, paying no order that fails to state the fund upon which it is drawn and the specific use to which it is to be applied." (Emphasis supplied)

The question you pose is answered by determining whether the above underlined portion of the statute requires that the separate account be a separate bank account or not.

The following uses of the word "account" are found in Volume 1A of Words and Phrases under the caption "Account" at pages 337, 338, 343, 348 and 353:

> "The word 'account' has no fixed technical meaning and may connote a mere claim and counterclaim which have never been reduced to writing, but in ordinary use it signifies a written memorial of business transactions between parties. State v. Rouzer, 32 S.E.2d 865, 867, 127 W.Va. 392."

> "Although an 'account' in its technical, legal sense is evidenced by a book record, in its broader, general sense, an account is equivalent to a 'claim' or 'demand' based on a transaction creating a debtor-creditor relation and it need not be evidenced by any written obligation or record, but it does not include tort claims. In re Stratman's Estate, 1 N.W.2d 636, 642, 231 Iowa 480."

> "An 'account' is a reckoning of money transactions; a register of pecuniary transactions; a written or printed statement of business dealings, or debts and credits, or of a certain class of them, or of other things subject to a reckoning or review; hence a right or claim, the items of which make up such a statement. Tillson v. Peters, 107 P.2d 434, 438, 41 C.A.2d 671."

> "The duty of an agent to 'account' for expenses which he is to receive in addition to salary is not fulfilled 'by reporting to his principal that he has spent a round sum of money in prosecuting his employment, and then swearing to the fact in a suit to recover the sum. His duty to keep and preserve true and correct statements of account is a necessary consequence of his duty to account. An account is a detailed statement. It must be something which will furnish to the person having the right thereto information of a character

> which will enable him to make some reasonable test of its accuracy and honesty, otherwise the obvious design of requiring it must be virtually fruitless.' Fred W. Wolf Co. v. Salem, 33 Ill. App. 614, 617."
>
> "An 'account' has been defined as a written statement of pecuniary transactions; a detailed statement of demands in the nature of debit and credit between parties, arising out of contract or some fiduciary relation. 1 Am. & Eng. Ency. Law 2d Ed., p. 434. Another text-book says an 'account' is no more than a list of items, whether debits or credits; an exhibit of charges and credits growing out of mutual dealings presented in such form as to facilitate the determination of the balance due by simple calculation; that the term has no clearly defined legal meaning, but the primary idea is that of debit and credit. 1 Cyc. p. 362. The conclusion from these definitions is that giving the dates of various transactions is not indispensable to an account, though dates are usually affixed in stating a bill of debits and credits. Kneisley Lumber Co. v. Edward B. Stoddard Co., 88 S.W. 774, 779, 113 Mo. App. 306."

The last of the above cited Words and Phrases citations generally covers what is found in dictionaries. The Iowa case which is cited in Words and Phrases does not go beyond citation and it would not aid us to cite any of the case in detail.

There is one Iowa case which involved a fact situation where the treasurer had two separate accounts. It is cited as the Independent Consolidated School District of Dow City v. Crawford County Trust and Savings Bank, et al, 232 Iowa 506, 3 N.W.2d 175 (1941). The closest the case comes to the issue at hand is Judge Oliver's dissent at page 517 of the Iowa Reports where, after citing what was then Section 291.13, the Judge made the following statement:

> "These and all other pertinent statutes regulate the powers and duties of a depository bank as well as those of a school district and its treasurer. They are read into and become a part of the deposit agreement between a school district and its legal depository. Among the statutory provisions here involved are those providing for two separate funds, a general fund and a schoolhouse fund, that the schoolhouse fund shall be used only for the purposes for which voted and that the treasurer shall keep a separate account

with each fund. Priest v. Whitney L. & Tr. Co., 219 Iowa 1281, 1287, 261 N.W. 374, 378."

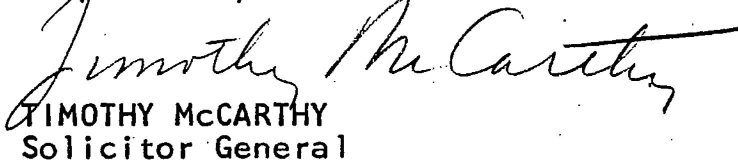
The Attorney General has never been submitted this precise question although he did discuss whether the account had to be in the treasurer's name at 20 OAG 193.

The question presented is one of the meaning of the statutory language. Unless the statute deals with technical matters, the ordinary meaning of the words will be used by the courts. Byers v. Iowa Emp. Sec. Comm., 247 Iowa 830, 76 N.W.2d 892 (1956).

The requirement placed on the treasurer is that he shall keep a separate account with each fund. The word "account" is not restricted to bank accounts by any of the definitions cited above. In fact, the courts have held that a savings deposit is not an account.

Therefore, our answer to your question must be that the language, "a separate account with each fund" does not mean a separate bank account. However, it should be noted that Section 291.13 bars the school treasurer from paying any warrant that fails to state the fund upon which it is drawn and the specific use to which it is to be applied. The school secretary is required by Section 291.8 to designate the fund upon which the warrant is drawn. The secretary is required by Section 453.1 to deposit funds in such banks as first approved by the board of school directors. While Section 291.13 does not require separate bank accounts, the purpose of Chapter 291 would best be served by keeping the schoolhouse fund in a bank account separately from the general fund.

Respectfully submitted,



TIMOTHY McCARTHY
Solicitor General

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TAXATION: Property Tax -- Monies and Credits. §§429.2 and 431.1, 1962 Code of Iowa, as amended by S.F. 583 and S.F. 642, 61st G.A. (1965). Shares of stock of a subsidiary Iowa corporation owned by the parent Iowa corporation are subject to assessment and taxation in the hands of the parent, where such shares are not assessed and taxed at the source.

LAWRENCE F. SCALISE STATE OF IOWA
ATTORNEY GENERAL DEPARTMENT OF JUSTICE
DES MOINES, IOWA

October 18, 1965

Ray A. Fenton, Esq.
County Attorney
Polk County Court House, Room 406
Des Moines, Iowa

Dear Mr. Fenton:

This is to acknowledge receipt of your letter in which you state as follows:

> "The Meredith Broadcasting Company which has its principal place of business in Omaha, Nebraska, conducts no business in Iowa. All of its property is located in states other than Iowa. It is incorporated under Chapter 496A of the 1962 Code of Iowa as an Iowa Corporation. The Meredith Publishing Company of Des Moines owns the stock of the Meredith Broadcasting Company.
>
> "The shares of stock of the Meredith Broadcasting Company were assessed in 1964 as provided in Section 431.1 and a moneys and credits tax was levied against the Broadcasting Company in the sum of $25,809.51.
>
> "On October 20, 1964, the Supreme Court of Iowa, in the case of J.J. Harris Company vs. Browner, held that the shares of stock of a corporation organized and incorporated

> under Chapter 496A of the 1962 Code of Iowa, could not be taxed if its principal place of business is located outside of Iowa.
>
> "The Meredith Broadcasting Company has now filed a petition to cancel the assessment made against its stock as illegal, and, in view of the holding of the Supreme Court their petition should be granted.
>
> "The question now arises: Can the shares of stock of the Broadcasting Company owned by the Meredith Publishing Company be taxed under Chapter 429.2, as shares owned in a foreign corporation?
>
> "A resident of Iowa is not taxed on shares he owns in an Iowa Corporation, because the Iowa Corporation is obligated to pay the moneys and credits tax directly. He is taxed for shares held in a foreign corporation.
>
> "Does the fact that the Broadcasting Company is an Iowa Corporation and its shares are not taxable because its principal place of business is in Omaha relieve the Meredith Publishing Company from paying a moneys and credits tax on its shares of stock in the Broadcasting Company?"

The following sections of the Iowa Code are applicable: Section 429.2, Code of Iowa, 1962, as amended by S.F. 583 and S.F. 642, Acts of the 61st G.A. (1965) states as follows:

"429.2 Moneys--credits--annuities--bank notes--stock. Moneys, credits, and corporation shares or stocks, except as otherwise provided, cash, circulating notes of national banking associations, and United States legal tender notes, and other notes, and certificates of the United States payable on demand, and circulating or intended to circulate as currency, notes, including those secured by mortgage, accounts, contracts for cash or labor, bills of exchange, judgments, choses in action, liens of any kind, securities, debentures, bonds other than those of the United States, annuities, and corporation shares or stocks not otherwise taxed in kind, shall be assessed and, excepting shares of stock of national, state, and savings banks, and loan and trust companies, and moneyed capital as hereinafter defined, shall be taxed upon the uniform basis throughout the state of five mills on the dollar of actual valuation, same to be assessed and collected where the owner resides.

"For the year 1966 and subsequent years, the property of an individual, administrator, executor, guardian, conservator, and trustee, including property held by an agent or nominee thereof, described in and subjected to taxation at the rate of five (5) mills by this section shall not be assessed for the purposes of collecting the said tax of five (5) mills and no tax shall be levied or collected thereon from any individual or any such fiduciary by reason of this section or section four hundred twenty-nine point three (429.3) or subsections four (4), five (5), seven (7) and eight (8) of section four hundred twenty-seven point thirteen (427.13) of the Code.

"431.1 Shares of stock. The shares of stock of any corporation organized under the laws of this state, except corporations otherwise provided for in chapters 427 to 439, inclusive, and except as provided in section 437.14, shall be assessed to the owners thereof as moneys and credits at the place where its principal business is transacted. The assessment shall be on the value of such shares on the first day of January in each year. In arriving at the assessable value of the shares of stock of such corporations, the amount of their capital actually invested in real estate or tangible personal property shall be deducted from the actual value of such shares. Such property other than moneys and credits shall be assessed as other like property. Any corporation whose shares of stock are subject to assessment under this section shall be entitled to deduct from the actual value of such shares the actual value of shares owned by it in any other corporation subject to assessment under this section, upon submitting satisfactory proof to the assessor that such shares of stock have been assessed under the provisions of this section to the corporation issuing such shares of stock.

Section 3 of S.F. 583, Acts of the 61st G.A. (1965), states as follows:

"Sec. 3. Section four hundred thirty-one point one (431.1), Code 1962, is hereby amended by adding the following new paragraph at the end thereof:

> "For the year 1966 and subsequent years, this section shall apply only to the shares of stock of any corporation which is organized under the laws of this state, is exempt from taxation under the provisions of subsection one (1) of section four hundred twenty-two point thirty-four (422.34) of the code, and is not otherwise provided for in chapters four hundred twenty-seven (427) to four hundred thirty-nine (439), inclusive, and section four hundred thirty-seven point fourteen (437.14) of the Code. However, for the purposes of the tax imposed by Section thirty-five B point eleven (35B.11) of the Code, this paragraph shall not be applicable and the preceding paragraph of this section shall be applicable."

With regard to the assessment of the Meredith Broadcasting Company, it is our opinion that said assessment should be cancelled. The Supreme Court of Iowa held in the recent case of J.J. Harris Co. vs. Browner, 256 Iowa 1243, 130 N.W. 2d 711 (1964) that a corporation organized under Chapter 496A, Code of Iowa, 1962, which conducted all of its business outside the state and maintained only statutory registered offices in Iowa are not required to pay the monies and credits tax upon its corporate stock.

The issue now resolves itself into whether or not the Meredith Publishing Company can be assessed on the shares of Meredith Broadcasting Company stock that it owns?

We must answer that question in the affirmative. Section 431.1, supra, specifically points out that, "Any corporation whose shares of stock are subject to assessment under this section shall be entitled to deduct the actual value of shares owned by it in any other corporation subject to assessment under this section, . . ." (emphasis supplied)

It is our opinion that Meredith Publishing Company can not deduct the actual value of the shares owned by it in the Meredith Broadcasting Company because, as we pointed out supra, the Iowa Supreme Court stated that said Meredith Broadcasting shares can not be assessed under Section 431.1, supra. It follows that since Meredith Publishing Company can not deduct the value of the Meredith Broadcasting shares, it is subject to assessment upon such shares.

We must also refer to an opinion of the Attorney General dated September 4, 1940, in which it was held that shares of stock in an Iowa corporation are not taxable in the hands of the shareholder, for it is presumed that the tax on these shares was paid at the source. 1940 OAG 570. Section 431.1 states that in order to gain a deduction for shares owned in another corporation, the "...assessor must be furnished proof that such shares of stock have been assessed under the provisions of this section to the corporation issuing such shares of stock."

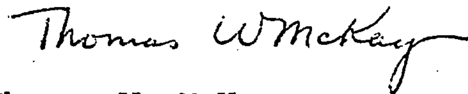
The facts in the instant case are such that the presumption is not applicable, nor can the owner of the shares furnish proof that the said shares it owns in another corporation have been assessed to the corporation issuing such shares of stock.

In view of the J.J. Harris Company case, we reach the inescapable conclusion that the specific shares of stock in the subsidiary corporation which are owned by the parent corporation, the Meredith Publishing Corporation, are subject to assessment and taxation.

The effect of Section 3, of S.F. 583, supra, is such that Iowa corporations coming within the provisions of Section 431.1, Code of Iowa, 1962, commencing with assessments as of January 1, 1966, will no longer be subject to the five (5) mills monies and credits tax provided for in Section 429.2, supra, but these "431" corporations will continue to be subject to the levy of the one (1) mill tax provided in Section 35B.11, Code of Iowa, 1962. "431"

corporations include radio and television broadcasting corporations. Therefore, commencing with assessments of January 1, 1966, for 1966 taxes collectible in 1967, shares of stock of "431" corporations will not be subject to the five (5) mill levy, and Meredith Publishing Company will only be assessed for the one (1) mill Korean Bonus levy on the shares of the Meredith Broadcasting Company.

Very truly yours,



Thomas W. McKay
Special Assistant Attorney General

TWM:JRS:dj

SCHOOLS AND SCHOOL DISTRICTS. S.F. 190, Acts of the 61st G.A., §§ 274.37, 275.1, 275.12 and 275.40, 1962 Code of Iowa. S.F. 190 is operative only if any area of the state (1) is not by April 1, 1966, a part of a reorganized district, or (2) is not at that time included in a reorganization petition filed in accordance with § 275.12. If either of these exists, then §§ 275.12, 275.40 or 274.37 are available for reorganization.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

October 15, 1965

Mr. Charles H. Barlow
Palo Alto County Attorney
Emmetsburg, Iowa

Dear Mr. Barlow:

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

> "In reviewing Senate File 190 of the 61st General Assembly pertaining to reorganization of school districts and which amends Section 275.1, Code of Iowa, the question has been raised as to whether the wording of the section as follows: '1966. If any of the area is not a part of such a district by April 1, 1966, or is not included in any reorganization petition filed in accordance with Section two hundred seventy-five point twelve (275.12) of the Code on or before April 1, 1966, the area shall be attached by the County Board of Education to a district, or districts maintaining twelve (12) grades, such attachment to become effective July 1, 1966 . . .' precludes the use of alternate reorganization procedures, to-wit: the concurrent action procedures set out in Section 274.37 and the alternate merger procedure set out in Section 275.40.
>
> "It is my thought that the alternate procedures would be precluded because it would be an impossibility for any area not now a part of a twelve grade system to become a part of a twelve grade school district on or before April 1, 1966 as all reorganized districts become effective on July 1 following their reorganization.

> "Enclosed herewith for your attention and information is a letter from the Iowa Department of Public Instruction which takes the view that any of the three statutory procedures could be used, but our County Board has some doubts and must have a clarification as soon as possible because we have school districts affected by Senate File 190 which could file petitions or take action under any one of these three reorganization procedures at any time.
>
> "In the event that the Attorney General's position would be that the Section 274.37 procedure would not be precluded, would the minimum standards outlined in Section 275.3 apply to a Section 274.37 concurrent action procedure? Also, would there be any limitation as to how many times any one school district could be involved in a Section 274.37 concurrent action procedure in a single school year?"

I.

In reply thereto I advise that this statute, Senate File 190, Acts of the 61st General Assembly, is conditioned for its operation only if any area of the state (1) is not by April 1, 1966, a part of a reorganized district; or (2) is not included in a reorganization petition filed in accordance with the provisions of Section 275.12 of the 1962 Code of Iowa.

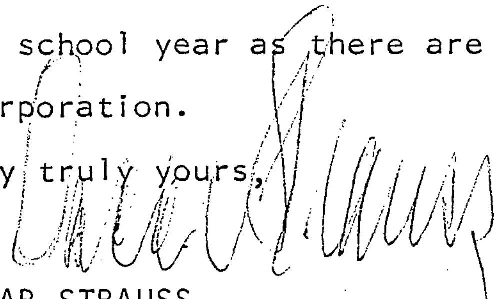
In other words, if either of the foregoing conditions exists prior to April 1, 1966, the foregoing amendment to Section 275.1 is not operative. However, that does not either expressly or impliedly exclude the use of other statutes, such as Sections 274.37 or 275.40, to become part of a reorganized district. This act is future in its operation and not having repealed the foregoing statutes, Sections 274.37 and 275.40, they both remain as statutory authority for a school district to become part of a

reorganized district according to their respective terms. As a result thereof, such district may become a part of a reorganized district by change of boundary by Section 274.37, by a merger under Section 275.40, or by the usual method provided by Section 275.12. Nor do I find any hindrance to these procedures by the provisions of Section 275.24, providing that any change in boundary or reorganization or enlargement shall become effective July 1 after such reorganization. Senate File 190, so far as it conflicts therewith, is an implied repeal of such section.

II.

Insofar as your question as to whether there is any limitation as to how many times any one school district could be involved in Section 274.37, I am of the opinion that boundary lines of a school district may be adjusted pursuant to the provisions of Section 274.37 as many times in the school year as there are districts contiguous to a school corporation.

Very truly yours,



OSCAR STRAUSS
First Assistant Attorney General

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ACCESS CONTROL, HIGHWAYS, PRIMARY ROAD EXTENSIONS, HIGHWAY COMMISSION §§306.1, 306.2(1), 306.2(7), 306A.2, 306A.3, 306A.4, 307.5, 1962 Code of Iowa, 62 I.D.R. 262, 23 U.S.C. §103(d). The Iowa State Highway Commission has the exclusive authority to control access on those portions of National Interstate and Defense Highway System located within the corporate limits of cities or towns and may also control access on extensions of Iowa primary highways within the corporate limits of cities or towns where it does so in co-operation with the respective cities or towns.

October 27, 1965

Mr. Ralph H. Goeldner
Goeldner & Goeldner
Attorneys at Law
122 S. Main Street
Sigourney, Iowa 52591

Dear Mr. Goeldner:

We are in receipt of your letter of recent date wherein you state:

> "West of the last filling station on the south side of Highway No. 149 at Hendrick, Iowa, is an area of ground that the owner is contemplating replatting. She was thinking of having the lots face the highway and have the access to the lots directly from the highway. This property is within the city limits of Hendrick. Does the Highway Commission claim any right to restrict the access to lots along a highway within the corporate limits of a city or town?"

Yes, the Iowa State Highway Commission may claim certain rights to restrict assess to lots along extensions of primary highways within corporate limits of cities or towns where such right is granted the Commission by way of agreement with the respective city or town.

It is axiomatic that cities and towns have control over their own streets and this includes extensions of primary highways. §389.12, 1962 Code of Iowa, Smith v. City of Algona, 232 Iowa 362, 5 N.W. 2d 625 (1942), 1950 OAG 176. It is by virtue of Chapter 306A, 1962 Code of Iowa, that cities, towns and highway authorities are authorized to establish access-controlled facilities.

§306A.3, 1962 Code of Iowa, states in pertinent part:

> "Cities, towns, and highway authorities having jurisdiction and control over the highways of the state, as provided by chapter 306, acting alone or in co-operation with each other or with any federal, state, or local agency...

65-10-15

> are hereby authorized to plan, designate, establish, regulate, vacate, alter, improve, maintain, and provide controlled access facilities for public use wherever such authority or authorities are of the opinion that traffic conditions, present or future, will justify such special facilities; provided, that within cities and towns such authority shall be subject to such municipal consent as may be provided by law. Said cities, towns, and highway authorities, in addition to the specific powers granted in this chapter, shall also have and may exercise, relative to controlled-access facilities, any and all additional authority now or hereafter vested in them relative to highways or streets within their respective jurisdictions... ."

Access control over extensions of primary highways can be established either by the respective city or town acting alone under §306A.3, or by agreement between the city or town and the Iowa State Highway Commission, pursuant to §306A.7, 1962 Code of Iowa. Warren v. Iowa State Highway Commission 250 Iowa 473, 93 N.W. 2d 60 (1958).

§306A.7 states:

> "Cities, towns and highway authorities having jurisdiction and control over the highways of the state, as provided by chapter 306 are authorized to enter into agreements with each other, or with the federal government, respecting the financing, planning, establishment, improvement, maintenance, use, regulation, or vacation of controlled-access facilities or other public ways in their respective jurisdictions, to facilitate the purposes of this chapter."

Thus, the Highway Commission could acquire rights to control access upon primary road extensions in accord with the resolution and ordinance granting the same.

It is therefore our opinion that under the foregoing circumstance, the Iowa State Highway Commission may have authority to control access to lots along a highway within the corporate limits of a city or town.

Very truly yours,

Raymond T. Walton

RAYMOND T. WALTON
Special Assistant Attorney General

RTW/JEG/jw

SCHOOLS: Incompatibility of office. The offices of County school psychologist and district director within the county are incompatible.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

November 1, 1965

Mr. W. T. Edgren
Assistant Superintendent of
Public Instruction
State Office Building
L O C A L

Dear Mr. Edgren:

This is in reply to your recent letter in which you requested an opinion on the following question:

> If a school psychologist who serves two counties on a part time basis, and is a professor at a local college, is elected to the School District Board of Education, will a conflict of interest arise which will prove the two positions to be incompatible?

In discussing incompatible offices the Iowa Supreme Court has stated:

> "what constitutes incompatibility of offices . . . must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time . . . the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' /citation of cases/" State of Iowa ex rel Crawford v. Anderson, 155 Iowa 271, 273, 136 N.W. 128 (1912).

65-11-2

In short, there appears to be three tests relative to the question of incompatibility of a public office.

First, is one office subordinate and accountable to the other office. Second, do the duties of the one office conflict with the duties of the other office. Thirdly, may the person holding the one office, physically fill both offices at the same time. If any one of these three situations would cause an incompatibility that person may not hold both offices at the same time. 34 OAG 118.

In the past, applying these tests, it has been held by this office that a member of the county board of supervisors while being a member of the city council would be incompatible, 34 OAG 118; a member of the State Fish and Game Commission accepting a position of a federal appointment is incompatible, 34 OAG 482; the positions of police judge and justice of the peace are incompatible offices 36 OAG 313; sheriff serving as a member of the Soldier's Relief Commission is an incompatible office, 40 OAG 321; a trustee of the municipal light plant and a city council member is an incompatible office, 40 OAG 537; as is a member of a local board of education, who is elected to the state Legislature, 60 OAG 172.

On the basis of these past decisions as well as the above tests, which are to be applied, a school psychologist serving as a member of the county board of education results in an incompatible office.

First, the school psychologist is paid by the County Board of Education and is accountable to the Board. The psychologist is required to work with the superintendent of the local board on which he will become a member. Hence allowing the two offices to exist in the same person may cause a conflict and jeopardize the spirit of cooperation that must exist between the district superintendent and the county psychologist.

Secondly, the duties do not necessarily conflict, but the supervisory capacity that a board member would have over the psychologist would cause an incompatibility. Regarding the third test, it is conceivable that the position of psychologist and board member could be physically performed and held at the same time, however, in light of the first two tests causing incompatibility it is not necessary to reach this third test.

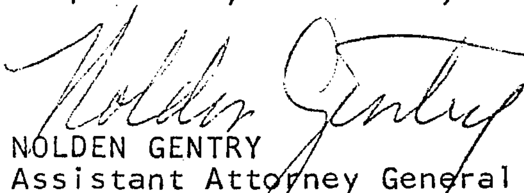
Furthermore,

> It is a well settled rule of common law that if a person, while occupying one office accept another incompatible with the first, he *ipso facto* vacates

> the first office and his title thereto is thereby terminated without any other act or proceeding. Bryan v. Cattell, 15 Iowa 538 (1864).

Therefore, in conclusion, if the school psychologist is elected to the county school board of one county, his post as school psychologist for that county would be immediately vacated. However, it would not render him incapable of holding the position as psychologist for the other county or as a professor, since those duties would in no way, under the tests set out above, cause a conflict resulting in a position of incompatibility.

Respectfully submitted,



NOLDEN GENTRY
Assistant Attorney General

NG:ms

SCHOOLS: Merger with de facto school districts. §§ 24.3(3), 275.40(3), 1962 Code of Iowa. If no appeal is taken by an aggrieved party mergers become final ten days after the County Board of the twelve grade district approves the same. At that point in time other non-twelve grade districts contiguous to the newly created de facto district can merge with the latter.

State of Iowa
DEPARTMENT OF JUSTICE
Des moines

November 4, 1965

Mr. Ira F. Morrison
Washington County Attorney
Post Office Box 67
Washington, Iowa

Dear Mr. Morrison:

This is in response to your recent request in which you stated:

> School districts not presently maintaining twelve grades must become a part of a district maintaining twelve grades by July 1, 1966, and if any non-twelve grade district does not have a reorganization petition on file by April 1, 1966; that area shall be attached by the County Board of Education to a district or districts maintaining twelve grades, such attachment to become effective July 1, 1966. Senate File 190, Acts of the 61st G.A. Senate File 190's April 1, 1966, deadline has caused serious problems for non-twelve grade districts that were not initially contiguous to twelve grade districts, but have now become contiguous via a § 275.40, 1962 Code of Iowa merger that will be effective July 1, 1966.

You then present the following diagram:

A	B	C
Twelve Grade District	Non-Twelve Grade District	Non-Twelve Grade District

and ask:

> "District B has merged with district A, said merger to become effective July 1, 1966. Does district C meet the test of contiguity so that it may now petition to merge with newly reorganized district?"

Section 275.40, 1962 Code of Iowa, as amended, which controls reorganization by mergers provides:

> "In addition to the procedure set forth in sections 275.12 to 275.23, inclusive, relating to the organization of a proposed school district, a school district not operating a high school that is contiguous to a high school district may merge with said high school district in the following manner:
>
> 1. A petition signed by at least twenty percent of the qualified voters of such school district not operating a high school, proposing that said district be included in said high school district, shall be filed with the county superintendent of the county which has jurisdiction over the high school district and a duplicate copy with the school board of the high school district.
>
> 2. The school board of the high school district involved shall, after the filing of said petition, take action at the next regular board meeting or a special meeting called for that purpose, agreeing or refusing to accept said school district not operating a high school into said high school district and filing a record of such action with said county superintendent.
>
> 3. If the said school board of the high school district agrees to accept said school district not operating a high school, said county board shall approve or disapprove said merger proposal. The county superintendent shall fix a time and place for filing objections, cause one notice thereof to be published at least ten days prior thereto in a newspaper published within the high school district or if none is published therein then in a newspaper of general circulation in the high school district; and in the event of the filing prior to said time of a petition signed by voters in the high school district involved equal in number

to at least twenty percent of the number of eligible voters or four hundred voters, whichever is the smaller number, objecting to such board action, the entire action shall be void and in order to effect said merger it shall be necessary to proceed as provided in section 275.12. In case of a controversy over county plans which would affect a proposed merger, said merger must have the approval of the state board of public instruction which decision shall be final and no further action shall be taken until such approval is granted. Any county board of education affected or either local board of education involved may submit the controversy to the state department of public instruction within ten days after the decision of the county board or county boards of education.

4. If approved as set forth above, an election shall be held as provided in this chapter in said school district not operating a high school and if approved by a majority of those voting, said district shall become merged with said high school district on the July 1 following said election.

5. A school district maintaining a high school may participate and effect more than one merger prior to July 1 in any given year, subject to the provisions of this section."

In a § 275.40 reorganization, if the County Board of the twelve grade district approves the merger and no aggrieved party appeals within ten days the merger is final. Section 275.40(3) Wapello County Board of Education v. Jefferson County Board of Education, 253 Iowa 1072, 115 N.W.2d 212 (1962). When the merger between districts A and B becomes final a de facto reorganized district is created. State ex rel Smith, et al, v. Gardner, Mo. App.; 204 S.W.2d 319 (1947). The said district becomes a de jure district on July 1, when the merger becomes effective.

There are apparent reasons for requiring that mergers shall become effective on July 1. Section 24.3 of the local budget law provides in part:

"No municipality shall certify or levy in any year any tax on property subject to taxation unless and until the following estimates have been made, filed and considered, as hereinafter provided:

(3) The amount proposed to be expended in each and every fund and for each and every general purpose during the fiscal year next ensuing, which in the case of school districts shall be the period of twelve months beginning on the first day of July of the current calendar year." (Emphasis Supplied)

From the above it becomes evident that if a merger went into effect at any time other than July 1 of a year, fiscal difficulties would be created. Therefore, the purpose behind requiring that mergers shall be effective on July 1 will not be promoted by prohibiting the merger of a non-twelve grade district, "C" with the contiguous newly created district in your example.

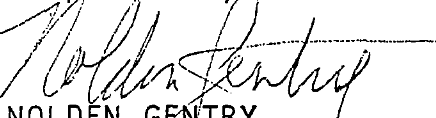
In the Wapello County Board of Education v. Jefferson County Board of Education, supra, the Supreme Court of Iowa stated:

"We have several times said that in matters of reorganization of school districts we will liberally construe the law with a view to promoting a better structure of the schools in the state. Turnis v. Board of Education of Jones County, Iowa, 109 N.W.2d 198, 208; Branderhorst v. County Board of Education, 251 Iowa 1, 6; 99 N.W.2d 433, 435, 436; * * * Indeed, the Legislative intent to encourage the reorganization of school districts into more economic and efficient units is clearly expressed in Section 275.1." (Emphasis Supplied)

In addition in State ex rel Warrington v. Community School District of St. Ansgar, 247 Iowa 1167; 78 N.W.2d 86 (1956), the Supreme Court held that the contiguity of the final product of the reorganization is the prime factor in furthering the statutory requirement that the areas to be reorganized must be contiguous.

The merger between districts "A" and "B" in your example became final when no aggrieved party appealed within the ten day period. The merger was complete except for the passage of time and there was created a new de facto school district. In view of the policy of liberally construing the law to promote reorganizations and for the reasons previously stated, I am of the opinion that district "C" can petition to merge with the newly created de facto district, as soon as the initial merger is final.

Respectfully submitted,



NOLDEN GENTRY
Assistant Attorney General

ms

CONSERVATION: Hunting on Highways. §§109.54, 110.17, 714.25, 714.27, 1962 Code of Iowa. Shooting of a rifle on or over any public highways of the State is prohibited. However, the hunting of game with shotguns on and along public highways within the easements of passageway possessed by governmental units is not prohibited.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

November 12, 1965

Mr. W. R. Gillette
State Representative
R. # 2
Spencer, Iowa

Dear Mr. Gillette:

You requested an opinion as to the use of public highways by hunters in the act of hunting.

The question is:

> "May a hunter hunt on and along a public highway and shoot game from the highway?"

Sections of the 1962 Code of Iowa which are prospectively germane include:

> "109.54 Shooting rifle over water or highway. No person shall at any time shoot any rifle on or over any of the public waters or public highways of the state or any railroad right of way."

> "110.17 License not required. Owners or tenants of land, and their children, may hunt, fish or trap upon such lands and may shoot ground squirrels, gophers or woodchucks upon adjacent roads without securing a license so to do.

> "No resident of the state under sixteen years of age or a nonresident of the state under fourteen years of age shall be required to

have a license to fish in the waters of the state.

"No license shall be required of minor pupils of the state school for the blind, state school for the deaf, nor of minor inmates of other state institutions under the board of control, except that this provision shall not apply to the inmates of the men's penitentiary at Fort Madison, the men's reformatory at Anamosa, and the women's reformatory at Rockwell City, nor shall any person during the time the United States is engaged in war who is a member of the military or naval forces of the United States on active duty, and a legal resident of the state of Iowa, be required to have a license to hunt or fish in this state. No license shall be required of inmates of county homes or any person who is receiving old-age assistance under chapter 249.

"No resident of the state under sixteen years of age shall be required to have a license to hunt game if accompanied by his or her parent or guardian or in company with any other competent adult with the consent of the said parent or guardian, if the said person accompanying said minor shall possess a valid hunting license, providing, however, that there is one licensed adult accompanying each person under sixteen years of age."

"714.25 Hunting or fishing upon cultivated or inclosed land and waters. Any person who shall hunt with dog, bow and arrow or gun upon the cultivated or inclosed lands of another, or who shall fish upon the inclosed or cultivated lands containing or encompassing an artificially constructed pond or ponds of another which have been privately stocked with fish, without first obtaining permission from the owner or occupant thereof, or his agent, shall for each offense be fined not more than ten dollars and costs of prosecution, and shall stand committed until such fine and costs are paid."

"714.27 Prosecution. No prosecution shall be commenced under sections 714.25 and 714.26 except upon the information of the owner or occupant of such cultivated or inclosed lands, or his agent."

Section 109.54 prohibits the shooting of a rifle on or over a highway at any time for any reason. Section 110.17 permits owners and tenants to shoot ground squirrels, gophers or woodchucks on their lands and upon adjacent roads without hunting licenses. Statutes which relate to the same subject matter--that are in pari materia--must be construed together. France v. Benter, 256 Iowa ________, 128 N.W.2d 268. Although Section 110.17 is silent on the precise question, it must be construed as prohibiting owners and tenants from using rifles to shoot specified rodents on highways adjacent to their properties. However, neither section proscribes hunting with shotguns on or along highways, nor is there such a prohibition elsewhere in the Code. The 45th General Assembly repealed a provision that barred hunting, without respect to the weapon used, upon public highways. But since 1933 there has been no such statutory ban.

The General Assembly has prohibited hunting on enclosed or cultivated lands without the owner's consent and made it a public offense (Sec. 714.25). It has put the burden on the owner or occupier of such lands to cause the prosecution of violators (Sec. 714.27). Under these sections a farmer may cause the prosecution of hunters who invade his enclosed or cultivated lands to retrieve birds shot from a highway. But since neither Sec. 714.25 nor any other section of the Code bars the act of shooting shotguns, a farmer who seeks to prevent it must found his right to do so elsewhere than in the Code. For even though he may own the fee interest in the lands under the highway, highway lands are not enclosed lands, and he may not invoke Sec. 714.27.

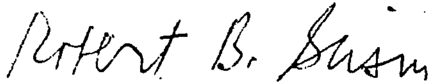
It is the opinion of this office, therefore, that hunting of game with shotguns on and along public highways within the easements of passageway possessed by governmental units is not prohibited.

Your attention is called, however, to the following statutes:

> "110.23 Manner of conveyance. No person, except as permitted by law, shall have or carry any gun in or on any vehicle on any public highway, unless such gun be taken down or contained in a case, and the barrels and magazines thereof be unloaded."

"110.24 Prohibited guns. No person shall use a swivel gun, nor any other firearm, except such as is commonly shot from the shoulder or hand in the hunting, killing or pursuit of game, and no such gun shall be larger than number 10 gauge."

Respectfully submitted,



ROBERT B. SCISM
Assistant Attorney General

slg

STATE OFFICERS AND DEPARTMENTS: State Board of Medical Examiners. §21 of Chapter 122, Laws of the 60th G.A., 1963. The Board of Medical Examiners may not issue a temporary license to the same individual upon the expiration date of a previously issued temporary license. (Bernstein to Saf, Exec. Sec. Iowa State Board of Medical Examiners, 11/22/65) 65-11-9

November 22, 1965

Mr. Ronald V. Saf, Executive Secretary
Iowa State Board of Medical Examiners
503 Empire Building
Des Moines, Iowa 50309

Dear Mr. Saf:

This is in response to your recent letter wherein you state as follows:

> "The 60th General Assembly by the enactment of Chapter 122 Section 21, authorized the issuance of temporary medical or osteopathic licenses under certain circumstances.
>
> "This legislation appears as Section 148.10 in the Iowa Code annotated, Volume 9 Accumulative Annual Pocket Parts and provides that the temporary license shall be valid for a period not to exceed one year from the date of issuance thereof and shall not be renewable.
>
> "It is quite clear that said license is not renewable, however, we respectfully request your letter opinion as to whether or not the Board of Medical Examiners may issue a temporary license to the same individual upon the expiration date of a previously issued license."

Section 21 of Chapter 122, Acts of the 60th G.A., 1963, reads in part as follows:

> "The medical examiners may, in their discretion, issue a temporary certificate authorizing the licensee to practice medicine and surgery or osteopathic medicine and surgery whenever, in the opinion of the medical examiners, a need exists therefor and the person possesses the qualifications prescribed by the medical examiners for such license, ..."

> "The license shall be valid for a period not to exceed one year from the date of issuance thereof and shall not be renewable." (Emphasis Added)

The intent of the legislature is clear that the privileges afforded by this license shall not exceed one year. The word "shall" in a statute is generally construed to be mandatory. State v. Hanson, 210 Iowa 773, 231 N.W. 428 (1930).

If the intent of the legislature was to provide for extension of the privileges under this "temporary license" it would have been a very simple matter to include a provision for renewal or provide for the re-issuance of said license.

It is generally understood that if by the language used in a statute, something is limited to be done in a particular form or manner, it induces a negative that it shall not be done otherwise. District Tp. of City of Dubuque v. City of Dubuque, 7 Iowa 262, (1858). The language of section 21 of chapter 122, Acts of the 60th G.A., 1963 specifically states that this temporary license shall be valid for one year only and shall not be renewable. There is no provision to issue this license to the same person who retains an expired one.

In construing a statute it is important to keep in mind the object and intent of the statute. Wood Bro. Thresher Co. v. Eicher, 231 Iowa 550, 1 N.W. 2d 655 (1942). The purpose of a temporary license is to enable an individual to practice his profession until he qualifies for a regular license. The legislature has provided one year to practice medicine or osteopathy under this "temporary status".

In determining the legislative intent, the consequence of a particular provision should be considered. Newgirg v. Black, 174 Iowa 636 156 N.W. 708 (1916). If the medical examiners were able to issue a temporary license to the same individual upon expiration of a previously issued license, then the recipient of said license could in effect acquire the privileges of a regular license to practice his profession for an indefinite period of time without ever becoming eligible and qualifying for a general license. This result would clearly seem to be against the purpose and intent of section 21 of chapter 122, Acts of the 60th G. A. 1963.

This "special license" is an exception to the general rule that one who wishes to practice medicine or osteopathy must obtain a general license. It is a well known principle in statutory construction that the rule is always broader than the exception, and any doubts should be resolved in favor of the rule and against the exception. Heiliger v. City of Sheldon, 236 Iowa 146, 18 N.W. 2d 182 (1945).

Thus it would seem that in respect to section 21 of chapter 122, Acts of the 60th G.A., 1963, the Board of Medical Examiners may not issue a temporary license to the same individual upon the expiration date of a previously issued temporary license.

Very truly yours,

Robert D. Bernstein

ROBERT D. BERNSTEIN
Assistant Attorney General

mrs

CITIES AND TOWNS: Contracting Procedure. § 23.18 and Chapter 397, 1962 Code of Iowa. The requirements of § 23.18 as to bid security are not available for contracting procedures under Chapter 397.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

November 24, 1965

Mr. Keith Mossman
Benton County Attorney
Benton County Court House
Vinton, Iowa

Dear Mr. Mossman:

I have yours of the 3rd inst. in which you submitted the following:

> "Chapter 397 of the Code of Iowa sets forth in Sections 397.14 to 397.18, inclusive, certain contracting procedures for utility projects performed under said chapter. These sections provide for the notice, the form of notice and the method of publication of the same. However, Chapter 397 does not provide for bid security.
>
> "Section 23.18 provides for bid security in certain cases but specifically states that the section 'shall not apply to the construction, erection, demolition, alteration or repair of any public improvement when the contracting procedure for the doing of the work is provided for in another provision of law.'
>
> "Although Chapter 397 does provide for the contracting procedure, it does not provide for bid security. Section 23.18 requires that 'all bids must be accompanied, in a separate envelope, by a deposit of money or certified check in an amount to be named in the advertisement for bids as security that the bidder will enter into a contract for the doing of the work. The municipality shall fix said bid security in an amount equal to at least 5% but not more than 10% of the estimated total cost of the work.' (Underlining supplied).

65-11-7

"Since there is no statutory guide other than 23.18 as to bid security under a project performed under Chapter 397, your opinion is requested as to whether or not the requirements of 23.18 as to bid security must be complied with in the performance of projects under 397 of the Code."

It is to be noted that what is requested is to supply one statute with a portion of another statute, a provision in one lacking in the other. Specifically, a provision for bid security is lacking in the making of contracts authorized under the provisions of Chapter 397, 1962 Code of Iowa. Such lack is proposed to be supplied from the bonding provisions of Section 18, Chapter 23, exhibited by you in your letter. Such Section 18 and the specific bond provision is not included by express reference in Chapter 397.

Inclusion by implication can be made then only by the application of the rules in pari materia. However, this situation does not lend itself to the pari materia rule. The rule contemplates that there is a proper method of statutory construction to consider cognate or related subjects and that sections and acts in pari materia and all parts thereof should be construed together. However, it is to be said also, quoting from 50 American Jurisprudence, titled Statute, pages 343, 344, that:

"It is a fundamental rule of statutory construction that sections and acts in pari materia and all parts thereof should be construed together and compared with each other. No one act or portion of all the acts should be singled out for consideration apart from all legislation on

> the subject. Under this rule each statute or section is construed in the light of, with reference to, or in connection with other statutes or sections."

This is the controlling rule of the situation presented. Obviously, singling out a provision of Chapter 23 apart from all the legislation in either Chapter 23 or Chapter 397, is not within the pari materia rule.

Chapter 397 is sought to be interpreted by and through one provision of Section 23.18 and under the foregoing rule the one provision being the bond provision of Section 23.18 is not available. This rule has had the approval of our Supreme Court in Coggeshall v. City of Des Moines, 138 Iowa 730, 735, where it is stated as follows:

> "To arrive at this the several sections of an act are to be considered as parts of a connected whole and harmonized if possible so as to aid in giving effect to the intention of the lawmakers. . . .
>
> "These different sections are interdependent, and were enacted with a view to the accomplishment of a single object, and none of the accepted canons of construction lend support to the contention of appellees that each of the first three should be held to confer separate powers each independent of the other; only the first being limited by the fourth."

I am of the opinion, therefore, that bid security not being provided for in Chapter 397, such security provided by Section 23.18 cannot be complied with.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

ew

CRIMINAL LAW: Public Offenses, Classification, Felony or Misdemeanor According to Permissible Punishment--Section 695.3, 1962 Code of Iowa. Under this Section, one convicted of a first offense concealed weapons charge stands convicted of a felony since upon such conviction the offender may be imprisoned in the state penitentiary.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

November 30, 1965

Mr. Robert W. Burdette
Decatur County Attorney
Box 61
Leon, Iowa

Dear Mr. Burdette:

This is in reference to your letter of October 21, 1965, wherein you request an opinion on substantially the following question:

> Where a penalty statute directs that the commission of a designated offense (here, carrying a concealed weapon) is a felony punishable by confinement in the penitentiary or by a fine not exceeding $1000.00 but also contains a proviso allowing the court in connection with a conviction for a first offense to reduce the penalty to confinement in the county jail or to a fine not exceeding $100.00, whether upon conviction of the first such offense one has been convicted of a felony if he is sentenced in accordance with the discretionary proviso to lesser punishment?

Statute Involved

Section 695.2, Iowa Code 1962, with immaterial exceptions, makes it unlawful for one to conceal on or about his person or in a vehicle operated by him designated weapons. In this connection, Section 695.3 of the Code, as pertinent, provides:

> "Any person who shall violate any of the provisions of Section 695.2 shall be deemed guilty of a felony and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by imprisonment in the state prison not more than five years . . . . provided that in case of the first offense the court may in its discretion reduce the punishment

> to imprisonment in the county jail of a term not more than three months, or a fine of not more than one hundred dollars." (Underscoring supplied).

Discussion

Section 695.2, Iowa Code 1962, establishes the substantive public offense commonly referred to as "carrying concealed weapons." In this regard, Section 695.3, the companion penalty provision, clearly states that one who commits the offense designated in Section 695.2 "shall be deemed guilty of a felony and upon conviction thereof" subject, at the outside, to confinement in the penitentiary. In connection with a defendant convicted for the first time of such offense, Section 695.3 contains a proviso granting the court discretion to "reduce the punishment to imprisonment in the county jail of a term not more than three months" etc. In view of this proviso clause, you have suggested that the penalty statute may admit of a construction that a defendant has not been convicted of a felony where for the first time he is convicted of a concealed weapons charge and he is sentenced in accordance with the "reduced punishment" portion of the statute. Since the punishment provided for by the discretionary proviso is of the kind ordinarily imposed upon conviction of an indictable misdemeanor, we will agree that there is at least a sematical predicate for the argument. Such a construction of this penalty statute is, however, precluded by other provisions of law and the interpretations thereof.

Section 687.1 of the 1962 Code divides public offenses into felonies and misdemeanors. Section 687.2, as amended, defines a felony as an offense "which is, or in the discretion of the court may be, punished by imprisonment in the penitentiary or men's reformatory" (emphasis supplied). Since one convicted for the first time of a concealed weapons charge may, "in the discretion of the court," be punished by imprisonment in the penitentiary, such person has by statutory definition been convicted of a felony. The Iowa Court has repeatedly so held, e.g., State v Clemenson, 123 Iowa 524, 525, 99 N.W. 139 (1904); State v District Court (Cass County), 248 Iowa 250, 255, 80 N.W. 2d 555 (1957); State v Di Paglia, 247 Iowa 79, 86 - 87, 71 N.W.2d 601 (1955); see also 1940 O.A.G. 368; Civil Consequences of Conviction For a Felony, 12 Drake Law Rev. 141 (1963).

State v Clemenson and State v District Court, supra, are right

on point and in our opinion dispose of the issue. In the Clemenson case, the Court stated that "[a]s adultery may be punished by imprisonment in the penitentiary it is a felony," 123 Iowa at p. 525. The adultery provision there in issue provided, as it still does, that a person convicted of such offense shall be imprisoned in the penitentiary not more than three years "or be fined not more than three hundred dollars and imprisoned in the county jail not exceeding one year." Section 4932 of the 1897 Code of Iowa. In State v District Court, the Supreme Court, in answer to a contention that a conviction of second offense OMVI is of a misdemeanor only, observed that "the sentence on a charge of violating Section 321.281, second offense, carried with it a possible penitentiary sentence and was a felony." 248 Iowa at p. 253, 255. In this connection, Section 321.281 of the 1954 Code of Iowa, the provision referred to in State v District Court, directed that a conviction for second offense OMVI was punishable by a "fine of not less than five hundred dollars nor more than one thousand dollars, or by imprisonment in the penitentiary not to exceed one year." It is, of course, obvious that the provisions of law considered in State v Clemenson and in State v District Court, similar to the one in issue here, invested the trial court with the discretion to impose a lesser punishment than imprisonment in the penitentiary or men's reformatory. The actual punishment imposed, however, does not control the question of whether the person was convicted of a felony. A public offense is a felony or misdemeanor "according to the punishment which may be imposed therefor, State v Di Paglia, 247 Iowa at p. 88 (emphasis added).

Accordingly, since one may be imprisoned upon conviction of a first offense of carrying a concealed weapon, it is our opinion that such conviction is of a felony.

Very truly yours,

Don R. Bennett

DON R. BENNETT
Assistant Attorney General

/dlw

BEER PERMIT: House File 66, Acts of the 61st G.A.
The provisions of House File 66, Section 5, Acts of the 61st General Assembly, are applicable only to those instances where permits have been revoked under the provisions of that section or revoked for cause under a provision of said section.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

November 22, 1965

Mr. Robert R. Beckman
Jones County Attorney
207 West Main Street
Anamosa, Iowa

Dear Mr. Beckman:

This will acknowledge receipt of your recent request wherein you submitted substantially the following:

> Where a permit, issued to an individual under the provisions of Chapter 124, 1962 Code of Iowa, has been revoked by the board of supervisors on the grounds that the permit holder's business was conducted in a disorderly manner, may such a persons wife be issued a permit for the same place of business in light of the provisions of House File 66, Acts of the 61st General Assembly?

Section 124.5, 1962 Code of Iowa, as amended, provides in part:

> "Power is hereby granted to boards of supervisors to issue, at their discretion, class 'B' and 'C' permits in their respective counties . . . and to revoke or suspend same for cause herein provided, or in the event the place of business of the permit holder is conducted in a disorderly manner."

House File 66, Section 5, Acts of the 61st General Assembly, provides:

> "The permit under this chapter shall automatically be revoked and shall immediately be surrendered by the permit holder, and the bond of the permit holder shall be forfeited, upon any of the following events:
>
> 1. If the permit holder is convicted of any violation of subsection three (3), six (6), or seven (7) of section one hundred twenty-four point twenty (124.20) of the Code.

2. If the permit holder is convicted of any violation of section one hundred twenty-four point thirty-one (124.31) of the Code.

3. If any agent or employee of the permit holder is convicted of any violation of subsection three (3) of section one hundred twenty-four point twenty (124.20) of the Code in or about the place of business for which the permit is issued.

4. If the permit holder is convicted of a felony.

"If after the effective date of this Act <u>any permit is revoked under the provisions of this section or revoked for any cause under any other provision of this section</u>, the person whose permit is revoked shall not thereafter be allowed to obtain or hold a permit under this chapter. The spouse of such person shall not thereafter be allowed to obtain or hold a permit under this chapter. No permit under this chapter shall be issued which covers any business in which such person directly or indirectly owns or controls ten (10) per cent or more of any class of stock or has an interest of ten (10) per cent or more in the ownership or profits of such business; and for the purposes of this provision an individual and his spouse shall be regarded as one person . . . ." (underlining supplied).

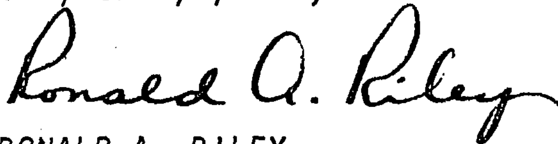
In House File 66, Section 5, Acts of the 61st General Assembly, is found the explicit language of the General Assembly that, where a permit has been revoked under the provisions of "this section," the spouse . . . shall not be allowed to obtain or hold a permit under Chapter 124, 1962 Code of Iowa. In such cases, when the statutory language is explicit, the words which are employed govern. <u>State ex rel Halbach</u> v <u>Claussen</u>, 216 Iowa 1079, 250 N.W. 195. While the meaning of the word "section" is not fixed or certain, it is to be given the meaning intended by the legislature, <u>Merchants Supply Co.</u> v <u>Iowa Employment Securities Commission</u>, 235 Iowa 372, 16 N.W.2d 572.

In the present instance, House File 66, Acts of the 61st General Assembly, is divided into eight designated sections, each of which treats a specific provision regarding the suspension or revocation of a permit for violation of the State Beer laws. What meaning the legislature intended the word "section" to have is clearly manifested by their employment of that word in House File 66.

It must therefore be concluded that a person whose permit has been revoked under the provisions of Section 5, House File 66, Acts of the 61st General Assembly, or revoked for cause under any other provisions of that section, shall not thereafter be entitled to obtain or hold a permit under Chapter 124, 1962 Code of Iowa, as amended. Nor shall the spouse of such person be allowed to obtain or hold a permit under Chapter 124, 1962 Code of Iowa, as amended.

Conversely, where a permit has been revoked under a section of Chapter 124, 1962 Code of Iowa, as amended, and not as provided in House File 66, Section 5, Acts of the 61st G.A., the provisions of House File 66, Section 5, Acts of the 61st G.A., would not be applicable.

Very truly yours,



RONALD A. RILEY
Assistant Attorney General

/dlw

ELECTIONS: Signatures on Nomination Papers. § 43.20, as amended, 1962 Code of Iowa. § 43.20 requires that nomination papers for next general election contain an aggregate number of signatures for a Democratic candidate for state office or U.S. Senator totalling at least 3,973 signatures. A Republican candidate must have at least 1,826 signatures. There is an additional requirement that in at least ten counties of this state the nominee must have signatures totalling more than 1% of his party's general election vote for Governor in that county in the last election. This is not a requirement for more signatures in the aggregate.

December 9, 1965

Mr. Gary Cameron
Secretary of State
State House
LOCAL

Dear Mr. Cameron:

You have requested an opinion as to how many signatures are required upon nomination papers filed for either a state office or for United States Senator.

The statute which applies is Section 43.20, as amended by Chapter 3 of the Acts of the Extraordinary Session of the 60th General Assembly, which reads as follows:

> "Nomination papers shall be signed as follows:
>
> "1. If for a state office, or United States senator by at least one percent of the voters of the party of such candidates, in each of at least ten counties of the state, and in the aggregate not less than one-half of one percent of the total vote of his party in the state, as shown by the last general election.
>
> "2. If for a representative in congress, senator or representative in the general assembly in districts composed of more than one county, by at least two percent of the voters of his party, as shown by the last general election, in each of at least one-half of the counties of the district, and in the aggregate not less than one percent of the total vote of his party in such district, as shown by the last general election.
>
> "3. If for an office to be filled by the voters of the county, by at least two percent of the party vote in the county, as shown by the last general election.

"In each of the above cases, the vote to be taken for the purpose of computing the percentage shall be the vote cast for governor.

"No candidate for public office shall cause nomination papers to remain filed in the office of the secretary of state or county auditor, on the last day for filing nomination papers, for more than one office to be filled at the primary election.

"Any candidate for public office, to be voted for at a primary election, who has filed nomination papers for more than one office shall, not later than the final date for filing, notify the secretary of state or county auditor by affidavit, for which office he elects to be a candidate, which in no case shall be more than one. In the event no such election is made by such date by the candidate, the secretary of state shall not certify his name to be placed on the ballot for any office nor shall the county auditor place his name on the ballot in any county." (Emphasis supplied)

The statute requires that two separate computations be made by your office. One is in regard to the total number of signatures on the nomination papers. Any party seeking state office or the position of United States Senator must use, in computing the "total vote" as used in subsection 1, the vote cast for his party's nominee for Governor in the last general election.

For example, a Democrat running for state office or United States Senator must use as "total vote" the votes cast for the Honorable Harold E. Hughes, who was elected governor in the 1964 election. The official canvass of the State of Iowa shows that Governor Hughes received 794,610 votes. The one-half of one percent required by subsection 1 means that any Democratic candidate for state office or United States Senator must have an aggregate of 3,973 signatures. On the other hand, a Republican aspirant for state office or United States Senator must have an aggregate number of signatures based on one-half of one percent of the vote received by Evan Hultman, the Republican nominee for Governor in 1964. His total vote was 365,131. One-half of one percent of that figure is 1,826.

Secondly, a nominee must have from at least ten counties a required minimum of one percent of those particular counties' vote for his party's gubernatorial candidate in the last general election. These signatures are not required in addition to the

aggregate number, but there is a requirement of at least one percent of the vote cast for his party's nominee for Governor in at least ten counties.

Your office must check the nomination papers in this regard and will have to calculate the county by county votes. When these papers are received, perhaps your office will have to check with the nominees as to which counties they are relying on so that the clerical problem will not become burdensome.

Therefore, it is my opinion that Section 43.20 requires that nomination papers for the next general election contain an aggregate number of signatures for a Democratic candidate for state office or United States Senator totalling at least 3,973 signatures. A Republican candidate must have at least 1,826 signatures. There is a requirement that from at least ten counties of this state the nominee must have signatures totalling more than one percent of his party's general election vote for Governor in that county in the last election. This is not a requirement for more signatures in the aggregate.

Respectfully submitted,

TIMOTHY McCARTHY
Solicitor General

ew

CITIES AND TOWNS: City Attorney appearing before City Council. As a matter of public policy, the City Attorney or any Assistant City Attorney is denied the right to appear before the City Council on behalf of others asking Council action, and a Council member, who is an attorney at law, may not, for the same reason, appear for the defendant before the Mayor holding Mayor's Court.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

December 3, 1965

Mr. Ray Yarham
Cass County Attorney
Savery-Weir Building
Atlantic, Iowa 50022

Dear Mr. Yarham:

In your letter of November 22 you submit the following question:

> "A newly elected member of the City Council of Atlantic, Iowa, has made inquiry to my office and asked me as chief law enforcement officer of the county the following questions which I would like to have answered by your office.
>
> "1. May an attorney, while he is City Attorney, appointed under Section 368A.20, appear before the City Council appointing him as an advocate, for persons requesting action by that City Council?
>
> "2. Would your answer be the same in the event a partner in the appointed City Attorney's law firm was appointed as Assistant City Attorney, and advised the City Council at such times?
>
> "3. Would your answer differ if an Assistant City Attorney, not connected with the appointed City Attorney, advised the City Council at such times?
>
> "In addition the question has been raised as to whether a City Councilman who is an attorney may defend individuals charged with a violation of city ordinances before the Mayor's Court."

I am of the opinion that the foregoing acts are denied to a City Attorney or any Assistant City Attorney as a matter of public policy. The County Attorney, by statute, "shall not appear before the Board of Supervisors upon any hearing in which the state or county is not interested." Section 336.2(7), 1962 Code of Iowa. While a statutory provision of this character concerning the City Attorney does not exist, I am of the opinion that the rule stated there is not limited by its terms. It is the declared public policy of the State of Iowa. In Re Barnes Estate, 128 N.W.2d 188, 192, has this to say concerning public policy:

> "The term 'public policy' itself is indefinite and is not susceptible of exact definition. It recognizes a principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good; which may be termed the policy of the law. Disbrow v. Board of Supervisors of Cass County, 119 Iowa 538, 541, 93 N.W. 585. 'The test is the evil tendency of the contract, and not its actual injury to the public in a particular instance.' Jones v. American H.F. Assn., 191 Iowa 211, 213, 182 N.W. 191, 192. It means simply that policy recognized by the state in determining what acts are unlawful or undesirable, as being injurious to the public or contrary to the public good. Haynes v. Presbyterian Hosp. Assn., 241 Iowa 1269, 1272, 45 N.W.2d 151."

Equally applicable is the following from the case of James v. City of Hamburg, 174 Iowa 301, 156 N.W. 394, where the Supreme Court said at page 396 of 156 N.W.:

> "It is an old saying that a man cannot serve two masters. . . . It is this sort of a condition that the law is intended to avoid. It

> is not necessary that there be evidence of dereliction of duty on the part of a public officer, to bring these contracts within the inhibition of the law. The inhibition applies when the contract is of such a character that, in the very contract and in the making of it, a temptation to dereliction of duty is created. The law intends these public officers should, like Caesar's wife, be above suspicion and temptation."

The same public policy that denies the right of a City Attorney to appear before the council requesting specific council action on behalf of others, denies the right of a member of the council, appearing as an attorney for a defendant, to appear before the mayor acting as a judge.

The answers to your four questions submitted in your letter are in the negative.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

ew

COUNTY AND COUNTY OFFICERS: Board of Supervisors; Powers and Duties: Section 332.3, 1962 Code of Iowa. County Supervisors have no authority to cause the county surveyor to resurvey and replat sections. The original corners and lines fixed by the government survey must be taken as true and cannot be changed by resurvey. The County Auditor can act under Section 409.31, 1962 Code of Iowa, to order a resurvey for purposes of taxation.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

December 9, 1965

Mr. J. G. Johnson, Esq.
Assistant Fayette County Attorney
22 East Charles
Oelwein, Iowa

Dear Mr. Johnson:

This is in response to your request for opinions on certain questions posed by your county assessor. The questions are:

> 1. "Do the County Supervisors have authority to request the County Surveyor to survey and plat sections to determine the exact number of acres in each, where they believe the acreage is more or less than the 640 acres platted by the government survey?"
>
> 2. "Do the County Supervisors have the authority to survey farms if they believe the acreage in those farms is more or less than the owner's deed indicates?"
>
> 3. "If the Supervisors do not have the authority to correct errors, which may have occurred in the original government survey, who does have this authority and in what manner is it possible to make such corrections?"

65-12-4

> 4. "Under Chapter 355, Code of Iowa, 1962, would the request of the County Supervisors be legal even though they may not be the owner or have any other financial interest other than for the purpose of taxation?"

With reference to your first question, it was the policy of the federal government to make no disposition of its public lands until after they had been surveyed and a plat of the survey filed with and approved by the General Land Office. Cragin vs. Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. Ed. (1888). When lands were granted by the government, or subsequently conveyed by others according to the official plat of the survey, the plat became a part of the grant or deed and binds all parties, including the government, as to the boundaries of the land conveyed. Since much of the land of the United States, and almost all of that in the Middle West, was and is embraced by government survey, the patent or other instrument from which title is traced employs descriptions from the original government surveys. See Patton, Iowa Land Title Examinations, §42.

The government township plats and the certified copies thereof kept by the counties are prima facie evidence of the area, shape, and location of the corners and boundaries of the government subdivisions. Patton, Iowa Land Title Examinations, Section 70. In making a survey of such character and magnitude, it was impossible to avoid errors. But the government is without power to correct a survey after it has conveyed the land described by it. Cragin vs. Powell, supra. The corners, including the lines fixed by them, as established by the survey, must be taken as true, whether their location, as shown by a subsequent survey, is in fact right or wrong. Vittoe vs. Richardson, 58 Iowa 575, 12 N.W. 603 (1882). In Morley vs. Murphy, 179 Iowa 853, 162 N.W. 63 (1917), the Iowa Supreme Court stated:

> "It may be conceded that the government survey originally fixed corners and lines and boundaries by which the government divisions so created were recognized and known, and it may be conceded that one who buys according to government survey is entitled to all the land within the limits of the boundaries fixed by the government, whether this be more or less, in fact, than a strict measurement according to government

> subdivisions would give. Thus, if one buys the northwest quarter of a section, he is entitled to the possession of all the land within the boundaries of the original survey, as fixed by the government, whether it contains more or less than 160 acres. So it is with each of the government subdivisions. This would be his right under a deed describing land according to government survey."

The government plat may show a township or a section to be a perfect rectangle. It may be, and probably is, not. This can be attributed to the convexity of the earth's surface, natural obstructions, and the meanderings of rivers and streams. There is no certainty that every section described on the auditor's plat as containing 640 acres does contain 640 acres. But mathematical precision in locating the corners and lines of sections as directed by Congress is not essential to the validity of the survey. Billingsley vs. Bates, 30 Ala. 376, 68 Am. Dec. 126 (1857).

We find no authority for the county supervisors to request the county surveyor to resurvey and replat sections. The object of a resurvey is to furnish proof of the location of the lost lines or monuments and not to dispute the correctness or to control the original survey. It is fundamental that whenever possible, the original survey must be retraced since it cannot be disregarded or altered after property rights have been acquired in reliance upon it. Cragin vs. Powell, supra., Akin vs. Godwin (Fla.) 49 So. 2d 604 (1950), Dittrich vs. Ubl 216 Minn. 396, 13 N.W. 2d 384 (1944). Thus, in a resurvey, the surveyor's only duty is to relocate upon the best evidence obtainable the courses and lines originally located by the government surveyor. The true corner of a government subdivision is where the United States surveyor established it whether this location is right or wrong. Lawler vs. Rich County, 147 Minn. 461, 180 N.W. 37 (1920), Beardsley vs. Crane, 52 Minn. 537, 54 N.W. 740 (1893).

To answer your second question, we refer you to our letter of June 25, 1965, in which we state in part as follows:

> "The Iowa Code is rather unclear as to the method to be used by the auditor in correcting the book of plats. Unless directed by the board of supervisors (Sec. 355.1, Code of Iowa,

> 1962), the county auditor does not direct a resurvey to correct his book of plats. Chapter 333, Code of Iowa, 1962. As a practical matter, the land owner retains a private land surveyor to physically survey the land using the 'rules prescribed by the acts of congress, and insturctions of the secretary of the interior...'. Section 355.4, Code of Iowa, 1962. The registered land surveyor, in his certificate, must certify that this survey was done in accordance with these rules and instructions.
>
> "The plat is then recorded in the Recorder's office. Section 558.41, Code of Iowa, 1962. After the plat has been photostated and the original made available for return to the owner or surveyor, the original plat should be filed in the auditor's office. Sections 448.59 and 558.63, supra.
>
> "Pursuant to Section 355.5, Code of Iowa, 1962, the plat becomes presumptive evidence of the correctness of the acreage set out therein."

From the foregoing discussion of the previous questions (and in answer to your third question) it is our opinion that the original corners and lines fixed by the original government survey must be taken as true and cannot be changed by a resurvey. However, for purposes of taxation the County Auditor can act under the provisions of Section 409.31, Code of Iowa, 1962, which states as follows:

> "409.31 Platting for assessment and taxation Whenever a congressional subdivision of land of one hundred sixty acres or less, or any lot or subdivision, is owned by two or more persons in severalty, and the description of one or more of the different parts or parcels thereof cannot, in the judgment of the county auditor, be made sufficiently certain and accurate for the purposes of assessment and taxation without noting the metes and bounds of the same, he shall cause to be made and recorded in his

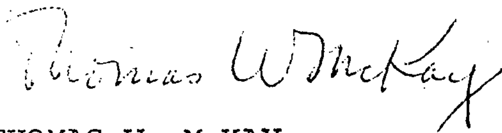
> office and the office of the county recorder a plat of such tract or lot with its several subdivisions, including and replatting in such plat such other plats or parts thereof included within the same lot or congressional subdivision of land as may seem to him to be required in accordance with the provisions of this chapter, proceeding as directed in sections 409.27 to 409.30, inclusive, and all of their provisions shall govern. No such plat of land in cities having a population of over twelve thousand by the latest federal census shall be so filed and recorded unless and until the same shall have been approved by the council of such city, and by the city plan commission as required by law in such cities where such commission exists."

Thus, the County Auditor can require an official survey and a plat made at the expense of the property owner where the purpose is to make less burdensome the descriptions of the property in question. Patton, Iowa Land Titles Examination, Section 76.

Section 409.31 allows the County Auditor to plat a tract or lot with its several sub-divisions only when they are owned by two or more persons in severalty and such a plat is necessary for property assessment and taxation. 1962 O.A.G. 84, 85.

We feel that a complete answer of the first three questions makes an answer to the fourth question unnecessary.

Very truly yours,



THOMAS W. McKAY
Special Assistant Attorney General

TWMcK:RBS:slg

COUNTY AND COUNTY OFFICERS: Clerk, District Court, County Recorder: Power to lease a photocopy machine. §§ 332.1, 332.9 and 332.10, 1962 Code of Iowa. If the Board of Supervisors determines that it is essential to the functioning of the office of the Clerk of Court and of the Recorder, they may lease a Zerox machine and pay a monthly rental for the use of the same for those offices.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

December 13, 1965

Mr. C. F. Greenfield
Guthrie County Attorney
Bayard, Iowa 50029

Dear Mr. Greenfield:

You have submitted the following question:

> "In Guthrie County the Clerk of the District Court and the County Recorder's office would like to have the Board of Supervisors lease a Zerox machine and pay a monthly rental for the use of the same for those offices. This is a high priced machine, and it is not profitable for the County to purchase one outright. Would you please let me know if it is possible for a County to lease office equipment such as that herein proposed?"

The statutes which apply are Sections 332.1, 332.9 and 332.10, 1962 Code of Iowa. They read as follows:

> "332.1 Body corporate. Each county is a body corporate for civil and political purposes, may sue and be sued, must have a seal, may acquire and hold property, make all contracts necessary for the control, management, and improvement or disposition thereof, and do such other acts and exercise such other powers as are authorized by law."

> "332.9 Offices furnished. The board of supervisors shall furnish the clerk of the district court, sheriff, recorder, treasurer, auditor, county attorney, county superintendent, county surveyor or engineer, and county assessor, with offices at the county seat, but in no case shall any such officer, except the county attorney, be permitted to occupy an office also occupied by a practicing attorney."

> "332.10 Supplies. The board of supervisors shall

also furnish each of said officers with fuel, lights, blanks, books, and stationery necessary and proper to enable them to discharge the duties of their respective offices, but nothing herein shall be construed to require said board to furnish any county attorney with law books or library."

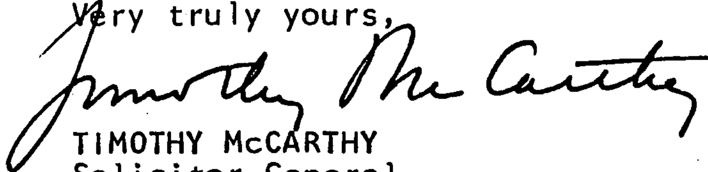
You will note that Section 332.1, in addition to giving a county the power to acquire and hold property, also gives a county power to make all contracts necessary for the control, management and improvement of such property. Section 332.9 requires the Board of Supervisors to furnish offices for county officers and Section 332.10 requires the Board of Supervisors to furnish fuel, lights, blanks, books and stationery necessary and proper to enable county officers to discharge their duties. This section was written in 1873 before the invention of the typewriter. The Attorney General at 28 OAG 307 indicated that it was proper for a County Board of Supervisors to purchase a typewriter for the County Attorney's office. The rationale of that opinion was that typewriters are essential in a public office and the Board of Supervisors had the authority to make the purchase.

Reading Section 332.10 in the light of modern business necessities, we believe that a County Board of Supervisors is required to furnish essential equipment to the county offices and that whether these chattels are furnished on the basis of a monthly rental or are obtained on a cash basis would make little difference as the Board of Supervisors has the duty to furnish the necessary equipment. The powers granted by the legislature must be express; however, powers can be applied from the express powers when they are indispensable to the exercise of the express powers. Stoner-McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956). The general rule is that counties have the authority to make contracts necessary and incident to the management and interest of the county and they may determine the manner in which such contracts are to be performed unless there is a statutory prohibition. 14 American Jurisprudence, Counties, Section 40.

If your Board of Supervisors determines that it is essential to the functioning of the office of the Clerk of Court and of the Recorder, they may lease a Zerox machine and pay a monthly rental for the use of the same for those offices. The above answer is conditioned on the fact that a long term lease is not entered into by the Board of Supervisors which would constitute an indebtedness contrary to Section 343.10, which places a limitation on the length of contract expenditures, and would be of such a term that

succeeding Boards could possibly be improperly bound by such a lease.

Very truly yours,



TIMOTHY McCARTHY
Solicitor General

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SCHOOLS AND SCHOOL DISTRICTS: Boundary changes. Chapter 240, Acts of the 61st G.A.; Chapter 273, §§ 273.3 and 274.37, 1962 Code of Iowa. A Section 274.37 boundary, involving a school district with area in two counties, need only be approved by the county board exercising jurisdiction over the said district. Section 274.37 is available as a method of reorganization regardless of its July 1, 1966, effective date.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

December 16, 1965

Mr. Frederick M. Hudson
Pocahontas County Attorney
Rolfe, Iowa

Dear Mr. Hudson:

This is in reply to your request for an opinion on the following questions:

> "The school districts of Fonda, Dover and Varina have proposed a boundary change so that the districts of Varina and Dover, with the exceptions of four governmental sections in each of the districts are to be attached to the Fonda District. However, the Fonda District at the present time is located in both Pocahontas and Calhoun counties, while Dover and Varina are situated in Pocahontas County.
>
> "1. Does Section 274.37 require the joint action of the Pocahontas and Calhoun County Boards of Education or may the Pocahontas Board approve such proposal without consulting the Calhoun County Board of Education?
>
> "2. Does Section 274.37 permit a boundary change involving an area of the state which is not a part of an existing twelve grade district to be attached to another district in view of the April 1, 1966 deadline, when in fact the effective date of such boundary change could not be until July 1, 1966?
>
> "3. Following the proposed change, to which district would the remaining eight governmental sections be attached?

> "4. Is Section 274.37 restricted by section 275.1, so as to preclude the use of Section 274.37 in the current situation?"

In answer to your first question it is necessary to construe Section 274.34, 1962 Code of Iowa, which provides in part:

> "The boundary lines of contiguous school corporations may be changed by the concurrent action of the respective boards of directors at their regular meetings in July, or at special meetings called for that purpose. Such concurrent action shall be subject to the approval of the county board or boards of education involved but such concurrent action shall stand approved if the county board or boards of education do not disapprove such concurrent action within thirty days following receipt of notice thereof. The corporation from which territory is detached shall, after the change, contain not less than four government sections of land." (Emphasis Added)

Section 274.37, seems to indicate that the County Board of Education of the county wherein the school districts are located must approve or disapprove the boundary change. However, Section 274.37 must be considered in light of Chapter 273, 1962 Code of Iowa, particularly Section 273.3, which seems to create an exception to the rule that the county boards of education have jurisdiction over school districts and portions thereof situated in their county. Section 273.3 provides in part:

> "Where districts have territory in more than one county, the district will belong to the election area of the county where the school buildings are located . . . ."

Applying the above section to the facts in your case we find that although the Fonda District encompasses area in both Calhoun and Pocahontas counties, the Fonda District school is located in Pocahontas County. The electors of that portion of the Fonda District that is located in Calhoun County will vote for and elect only candidates for the Pocahontas County Board of Education. From the above it is evident that the Legislature intended to avoid giving two county boards of education jurisdiction over one joint school district. This was accomplished by placing joint districts under the jurisdiction of the county board of education of the county in which the joint district's school is located.

In your situation Fonda school district is situated in Calhoun County, while Dover and Varina are located in Pocahontas County. Yet all three of these districts are under the jurisdiction of the Pocahontas County Board of Education and hence only the approval of that Board of Education is needed.

II

The purpose of Chapter 240, Acts of the 61st General Assembly is to insure that all the area in the State is within a district maintaining twelve grades by July 1, 1966. Section 1 of the above Chapter provides in part:

> "If any area of the state is not apart of such a district /district maintaining twelve grades/ by April 1, 1966, or is not included in a reorganization petition filed in accordance with section two hundred seventy-five point twelve * * * of the Code on or before April 1, 1966, the area shall be attached by the county board of education to a district or districts maintaining twelve * * * grades, * * *."

In an opinion issued by this office to Mr. Charles H. Barlow on October 15, 1965, we stated:

> "This act /Chapter 240, Acts of the 61st G.A./ is future in its operation and having not repealed the foregoing statutes, Section 274.37 and 275.40, they both remain as statutory authority for a school district to become part of a reorganized district according to their respective terms. As a result thereof, such district may become a part of a reorganized district by change of boundary by Section 274.37 * * *."

Therefore, it is my opinion that if a boundary change between a twelve grade and a non-twelve grade district is approved by the county board of education prior to April 1, 1966, to be effective on July 1, 1966, the county board can not subsequently attach the said non-twelve grade district under Chapter 240, Acts of the 61st General Assembly.

III

By legislative directive the eight governmental units must be attached to a contiguous twelve grade district and cannot remain isolated.

By Section 275.1, as amended by Chapter 240, Acts of the 61st General Assembly it has been declared to be the policy of the state that <u>all</u> areas shall be within a twelve grade district no later than April 1, 1966, or else it will be attached.

Therefore the remaining eight governmental units must be placed within a twelve grade district. Under the facts as you have

presented them it appears that the only district to which the eight governmental units could be attached is the Fonda District.

IV

In an opinion from this office to Mr. Charles Barlow on October 15, 1965, it was stated that Section 275.1 as amended by Chapter 240, Acts of the 61st General Assembly, did not either expressly or impliedly exclude the use of other statutes, such as Section 274.37, to become part of a reorganized district.

Therefore, the answer to your fourth question must be in the negative.

Respectfully submitted,

NOLDEN GENTRY
Assistant Attorney General

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BOARD OF ARCHITECTURAL EXAMINERS: Architectural Documents. Chapters 114 and 118, 1962 Code of Iowa, as amended. Architectural documents of architects duly registered under Chapter 118, 1962 Code of Iowa, as amended, are not required to meet the requirements of Chapter 114, 1962 Code of Iowa, as amended, before an agency of the State of Iowa or subdivision or municipal corporation of the State of Iowa may record or approve such documents.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

December 16, 1965

Board of Architectural Examiners
State of Iowa
State House
L O C A L

Gentlemen:

This letter is in answer to your recent request for an opinion upon the following question:

> Must the architectural documents of architects duly registered under Chapter 118, 1962 Code of Iowa, as amended, meet the requirements of Chapter 114, 1962 Code of Iowa, as amended, before an agency of the State of Iowa or subdivision or municipal corporation of the State of Iowa may record or approve such documents?

Section 114.16, 1962 Code of Iowa as amended by Section 2, Chapter 136, Acts of the 61st G.A., states in part:

> "No agency of this state and no subdivision or municipal corporation of this state, nor any officer thereof, shall file for record or approve any engineering document or land surveying document which does not comply with this section."

Earlier in that same code section, it is stated:

> "All engineering documents and land surveying documents shall be dated and shall contain the following: (1) the signature of the registrant in responsible charge; (2) a certificate that the work was done by such registrant or under his direct personal supervision; and (3) the Iowa registration number or legible seal of such registrant."

The word "registrant" in the last quoted paragraph refers to a professional engineer registered as provided in Chapter 114. Section 114.2 as amended by Section 1, Chapter 136, Acts of the 61st G.A., states in part:

> "The term 'engineering documents' as used in this chapter includes all plans, specifications, drawings, and reports, if the preparation thereof constitutes or requires the practice of professional engineering."

Section 114.2 as amended by Section 1, Chapter 136, Acts of the 61st G.A., also states in part:

> "The practice of 'professional engineering' within the meaning and intent of this chapter includes any professional service, such as consultation, investigation, evaluation, planning, designing, or responsible supervision of construction in connection with structure, buildings, equipment, processes, works or projects wherein the public welfare, or the safeguarding of life, health or property is or may be concerned or involved, when such professional service requires the application of engineering principles and data.
>
> "The mere execution, as a contractor, of work designed by a professional engineer, or the supervision of the construction of such work as a foreman or superintendent shall not be deemed to be an active practice in engineering work."

Chapter 118, 1962 Code of Iowa, as amended by Chapter 138, Acts of the 61st G.A., provides for the examination of and consequent registration of architects in Iowa. The practice of architecture is defined in Section 1, subsection 2 thereof as follows:

> "The practice of architecture includes any professional service, such as consultation, investigation, evaluation, planning, and design, or responsible supervision of construction, in connection with the construction of buildings, or related structures and projects, or the addition to or alteration thereof, wherein the safeguarding of life, health, or property is concerned or involved."

It has often been stated by the Iowa courts that the ultimate object in the construction of a statute is to determine the real purpose and intent of the legislature. Builders Land Co. v. Martens, 255 Iowa 231, 122 N.W.2d 189 (1963). And it has been stated that a manifest intent of the legislature will prevail over the literal import of words used in a statute. Spencer Pub. Co. v. City of Spencer, 250 Iowa 47, 92 N.W.2d 633 (1958).

A number of factors indicate that the provisions of Chapter 114 do not apply to architects properly registered under Chapter 118. The very fact that the provision regulating the practice of professional engineering and the provisions regulating the practice of architecture are in two separately entitled chapters is strong indication that those chapters are to be construed independently. If the above quoted provisions of Chapter 114 were interpreted in such a way as to apply to and regulate architects registered under Chapter 118, the provisions of the latter chapter would be rendered useless, since architects, in order to obtain approval of their documents would have to become registered engineers, and the provisions of Chapter 118 exclude engineers registered under Chapter 114. The Iowa courts have consistently held that a statute should be construed so as to avoid injustice, unreasonableness or absurdity. France v. Benter, ____ Iowa ____, 128 N.W.2d 268 (1964). If the 61st General Assembly intended to render the duties of the Board of Architectural Examiners, the architectural examination procedures, and an architectural certification of no practical effect, they could have done so by simply repealing Chapter 118. Thus, it appears that the provisions of Chapter 114 do not apply to architects properly registered under Chapter 118.

Consequently it is the opinion of this office that the architectural documents prepared by duly registered architects under Chapter 118, 1962 Code of Iowa, as amended, are not required to meet the requirements of Chapter 114, 1962 Code of Iowa, as amended, before an agency of the State of Iowa or subdivision or municipal corporation of the State of Iowa may record or approve such documents.

Very truly yours,

WADE CLARKE, JR.
Assistant Attorney General

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CIVIL DEFENSE: Joint County-Municipal Civil Defense Administration. §28A.7, 1962 Code of Iowa, Section 10, Chapter 81, Acts of the 61st G.A. Each political subdivision within a county, i.e. County, city or town is directed to appoint a director of civil defense and emergency planning. The appropriation of funds for the salaries and expenses of such organizations is permissive and if not otherwise restricted. Vacancies are filled as in Chapter 69 of the 1962 Code of Iowa. If the political subdivisions refuses to appoint a director, mandamus is the proper action to enforce this duty. Removal of officer may be had as provided in Chapter 66.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines, Iowa

December 8, 1965

Mr. Jack H. Bedell
Dickinson County Attorney
Dickinson County Court House
Spirit Lake, Iowa

Dear Mr. Bedell:

You have submitted several questions concerning the "Iowa Civil Defense Act", Chapter 28A, 1962 Code of Iowa as amended by Chapter 81, Acts of the 61st General Assembly. Those questions are as follows:

> "1. Section 28A.7 apparently make it optional for the boards of supervisors, city or town councils, and school boards to co-operate, but from my reading of this section it appears that it is mandatory that they shall form a joint county municipal civil defense and emergency planning administration, and apparently the joint administration is required to appoint a director. If I am incorrect in any of these assumptions, I would appreciate your opinion as to the point on which I am incorrect.
>
> "2. Section 28A.7 further authorizes the appropriation of money out of certain funds spelled out in that section. However, there is no designation as to what proportions these funds should come from the cities and towns and the county, nor is there any method established for the levying of a tax or any limit of millage levy for these funds. Will you kindly advise as to what procedure should be used in order to make it possible for the joint administration to acquire funds under these circumstances, and further will you please advise how the joint administration will be in a position to receive funds if the majority of the board of supervisors and/or the majority of the town councils or city councils refuse to appropriate funds requested by said joint administration, and in connection

therewith what is to be done if any town council should happen to feel that the amount it is being asked to contribute to the joint administration is inequitable?

"3. Are the funds which are authorized to be appropriated, to be appropriated on the basis of per capita, assessed valuation, or some other means of determining an equitable distribution of the cost of the program?

"4. Section 28A.7 apparently directs the joint administration to appoint a director. This same section in subsection 3 states that the county board of supervisors and the city or town councils shall appoint a director of civil defense and emergency planning for that county, city or town. Is this director referred to in subparagraph 3 a different director from the director referred to in the first paragraph of Section 28A.7?

"5. Is there any limitation as to salaries which can be paid the city, town and county directors and the director of the joint administration?

"6. Is there any limitation as to the salaries to be paid any of the employees, including secretarial staffs of the various directors and the joint administration?

"7. Assuming the council of any given town does appoint a director and refuses to appropriate any funds for any salaries, can any steps be taken to force said council to appropriate funds for salary, or does the office fall vacant unless someone is willing to serve under such an appointment without compensation?

"8. Do the various city councils and/or board of supervisors have any authority to veto, approve or disapprove of any proposed budgets or expenditures of the joint administration acting under this act?

"9. What penalty should be invoked or action taken against any town council or board of supervisors who fail or refuse to establish a director or to participate with the joint administration as is contemplated by the statute?

"10. What provision for penalty, punishment or what action can be taken against any of the officers, directors, members of the joint administration or any other personnel involved who fail to assume responsibilities created under this act?

In response to question one. Section 28A.7 as amended provides:

"County boards of supervisors, city or town councils and school boards are hereby authorized to co-operate with civil defense division, department of public defense to carry out the provisions of this chapter, and shall form a joint county municipal civil defense and emergency planning administration, hereinafter referred to as the joint administration ...."

"The joint administration shall appoint a director ...."

Your statements in question one are correct. The above section authorizes county boards of supervisors, city or town councils and school boards to cooperate with the civil defense division, department of public defense of the State of Iowa. It is also mandatory that the afore mentioned public bodies form a joint administration since the statute uses the term "shall". City of Newton v. Board of Supervisors, 135 Iowa 27, 30, 112 N.W. 167, 168. Thus question one must be answered in the affirmative.

In response to question number two and three, Section 28A.7, as amended, provides in part:

"Each County and city or town located therein is authorized to appropriate money out of any funds that are not restricted for the purpose of paying expenses relating to civil defense and emergency planning matters of such joint administration, and to establish a joint county-municipal civil defense fund in the office of the county treasurer, and the county and cities and towns located in that county may deposit moneys in such fund, which fund shall be for purpose of paying expenses relating to civil defense and emergency planning matter of such joint administration ...." (Emphasis Added)

The above section provides authority to "appropriate money out of any funds that are not restricted ...." This authority is not mandatory and therefore it is within the discretion of each county, city or town as whether they will appropriate any funds to the joint administration. It is apparent that the question of the amount

of each participant's contribution is to be determined by agreement at joint administrative meetings since no criterion is set out for this in the Act. As to the question of millage rates and the levying of a tax to provide these funds, the amount of each appropriation should be submitted as a budget proposal in each respective political subdivision. Then the procedure is controlled by Chapter 444 which concerns Tax Levies. See Op. Atty. Gen. Dec. 28, 1962.

In response to question four, the joint administration director is a different director than the director of civil defense and emergency planning for each city, town or county board of supervisors. The latter is also an operations officer for the joint administration.

In response to questions five, and six, Section 28A.7 and Section 10, Chapter 81, Acts of the 61st General Assembly are controlling. The salaries of the employees and directors of the joint administration, city town or county are governed by the merit system. As a condition precedent to receiving federal matching funds, the employees and directors at the various levels must be paid on the basis of the merit system. This is a federal requirement. Thus, there are limitations as to the salaries of the various directors and employees.

In response to question seven, each political subdivision has authority to make appropriation for the salaries and expenses of its local organizations for civil defense and emergency planning, Section 10, Chapter 81, Acts of the 61st General Assembly. This power is permissive and therefore it is within the discretion of each political subdivision as to whether salaries shall be paid to the respective city, town, or county directors. However, the duty of each city, town and county to appoint a director is mandatory as provided in Section 28A.7, as amended. If an appointee fails to qualify for office and a vacancy occurs then the provisions of Chapter 69, 1962 Code of Iowa become operative. This provides for the filling of vacancies in office and require that the vacant office be filled by another appointment.

In response to question eight, the various city councils and county board of supervisors do not have the direct power to veto the proposed budget or expenditure of the joint administration. However, each city, town and county has a representative on the joint administration which fixes and adopts the budget. Section 28A.7 as amended provides:

> "Each year the chairman of the joint administration shall, by written notice, call a meeting of the joint administration to consider such proposed budget and shall fix and adopt a budget for the ensuing federal fiscal year not later than May 15.

"At such meeting, the joint administration shall authorize:

"1. The number of personnel for civil defense and emergency planning activities, full and part-time employment.

"2. The salaries and compensation of civil defense and emergency planning employees. Those employees coming under the merit system will include salary schedules for various classes in which the salary of a class is adjusted to the responsibility and difficulty of the work.

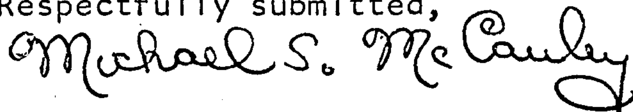
"3. Fix the operating expenses as contained in the proposed budget."

Thus, indirect control over the budget of the joint administration is provided.

In response to question nine, all efforts should be made to promote cooperation between the various political subdivisions and the civil defense division. However, if a city, town or county board refuses to appoint a director as required by the Act, since this is mandatory duty, an action in mandamus would seem proper. This action merely forces a public officer to perform a duty required by statute. See Chapter 661, 1962 Code of Iowa.

In response to question ten, if this situation were to arise the provisions of Chapter 66, 1962 Code of Iowa would be controlling. This chapter provides the method and grounds for removal of a public officer from office.

Respectfully submitted,



MICHAEL S. McCAULEY
Assistant Attorney General

MSMc:mrs

COUNTY AND COUNTY OFFICES: County Board of Supervisors. Liability of person admitted to a hospital-school for the mentally retarded. §§ 4.1(1), 223.16, 230.15, 230.25, 1962 Code of Iowa, Section 79, Chapter 207, Acts of the 61st G.A. (1) Repeal of Chapter 223 does not destroy liability for the amounts expended by the county for the support of a mentally retarded child. (2) Lien arising under Section 230.25 attaches to real estate owned by patient only.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

December 17, 1965

Mr. Curtis G. Riehm
Hancock County Attorney
338 State Street
Garner, Iowa

Dear Mr. Riehm:

You have requested an opinion concerning Chapter 207, Acts of the 61st General Assembly. In your request you state:

> "My question involves a patient from Hancock County, born April 19, 1933, who was admitted to Woodward State Hospital and School at Woodward, Iowa, on January 2, 1948, and is still a patient therein.
>
> "It appears that the parents have paid some $5,511.24 for her care at Woodward and the balance owed to the County by the parents, or for the keep that is unpaid, is $13,588.16 at the present time, or I should say as of July 1, 1965.
>
> "The Board of Supervisors would like to have your opinion on the following questions:
>
> "1. What is the parents' liability as to the balance owed as of July 1, 1965, in the sum of $13,588.16.
>
> "2. If the parents have a liability for all or part of the balance due as of July 1, 1965, how much thereof constitutes a lien on the real estate owned by the parents.

"3. As to the balance owed as of July 1, 1965, would this constitute a lien upon any real estate or other property that the patient at Woodward might inherit in the future.

"4. If the parents of the patient at Woodward pay the scale established for the care of the patient, as established by the Board, in the future, what is the liability of the parents for the balance for the care unpaid, and what, if any, is the lien for the unpaid balance above the scale rate established by the Board of Control, both as to the property owned by the parents and property that may be inherited by the patient or owned by the patient."

In response to questions one and two, and assuming that the figure quoted has been properly computed, Section 223.16, 1962 Code of Iowa /which was repealed by Senate File 444/ provides:

"All laws now existing, or hereafter made, creating liability, pertaining to liens and providing for the collection of amounts paid by counties from patients in the hospital for the mentally ill and those legally bound for their support, and those defining persons legally bound for support, shall apply to this chapter. _A patient in these hospitals and those legally bound for his support shall be liable to the county to the same degree and in the same manner as though such patient were a patient of a hospital for the mentally ill_, provided that no charge or lien shall be imposed upon the property of any patient under twenty-one years of age or upon the property of persons legally bound for the support of any such minor patient, for the cost of his support and treatment in these institutions." (Emphasis Supplied)

Chapter 230, 1962 Code of Iowa deals with the mentally ill and liability for support. The sections providing for liability are as follows:

"230.15 Personal liability. Mentally ill persons and persons legally liable for their support shall remain liable for the support of such mentally ill. Persons legally liable for the support of a mentally ill or mentally retarded person shall include

the spouse, father, mother, and adult children of such mentally ill or mentally retarded person, and any person, firm or corporation bound by contract hereafter made for support. The county auditor, subject to the direction of the board of supervisors, shall enforce the obligation herein created as to all sums advanced by the county."

"230.18. Expense in county or private hospitals. The estates of mentally ill or mentally retarded persons who may be treated or confined in any county hospital or home, or in any private hospital or sanatorium, and the estates of persons legally bound for their support, shall be liable to the county for the reasonable cost of such support."

"230.25 Lien of assistance. Any assistance furnished under this chapter shall be and constitute a lien on any real estate owned by the person admitted or committed to such institution or owned by either the husband or the wife of such person. Such lien shall be effective against the real estate owned by the husband or wife of such person only in the event that the name of the husband or the wife of such person is indexed by the auditor. No lien imposed by this statute against any real estate of a husband or wife of such person prior to the effective date of this Act shall be effective against the property of such husband or wife unless prior to July 4, 1960, the name of such husband or wife of such person shall be indexed."

"230.29 Releasing lien. The board of supervisors of the county shall release liens accruing under the provisions of this chapter when fully paid or when compromised and settled by the board of supervisors or when the estate of which the real estate affected by this chapter is a part has been probated and the proceeds allowable have been applied on such liens."

"230.30 Claim against estate. On the death of a person receiving or who has received assistance under the provisions of this chapter, the total amount paid for their care shall be allowed as a claim of the second class against the estate of such decedent."

Section 230.25 indicates that a lien attaches only to the real estate of the patient and his or her spouse. Section 230.15 indicates that the mother or father of a mentally retarded child are legally liable to the county for the support. Thus, in the case at hand, the parents liability is personal /as a charge or debt7 rather than in the form of a lien upon any real estate which they own.

Chapter 207 repeals Chapter 223 and therefore the question arises as to whether this repeal destroys the liability of the points under the statute. The answer to this question is controlled by Section 4.1(1), 1962 Code of Iowa, which provides:

> "Repeal-effect of. The repeal of a statute does not revive a statute previously repealed, nor effect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed."

The payments by the county in this case give rise to a legal right on behalf of the county as the repealed statute provided. Thus, the repeal does not effect this right which has already accrued. See Azeltine v. Lutterman, 218 Iowa 675, 254 N.W. 854 (1934)

Thus, in response to questions one and two the parents are legally liable for the amounts expended by the county for the support of their mentally retarded child but no part of this amount constitutes a lien upon the real estate owned by the parents.

In response to question three, Section 230.25 provides that any assistance furnished shall constitute a lien upon any real estate owned by the person admitted or committed to such institution. /It should be noted that in the case of patients over twenty-one, Section 223.20 reduces the percentage of care recoverable7. The Supreme Court of Iowa in the recent case of State Board of Social Welfare v. Pottawattamie County, No. 193 - 51802, which was filed on December 14, 1965, stated the proposition that the lien claimed by virtue of Section 230.25 of the 1962 Code of Iowa, would apply to after acquired real estate. Thus, this lien would attach not only to real estate owned by patients at the time but also subsequent thereto.

In reply to question four, some preliminary remarks are necessary. Section 79, Chapter 207, Acts of the 61st General Assembly provides in part:

"Provided further that the father or mother of such person shall not be liable for the support of such person after such person attains the age of twenty-one (21) years . . . ."

You stated previously that the patient was born April 19, 1933. The patient is therefore thirty-two years old now and under Section 79, the parents would no longer be liable for his support after the effective date of this act. Thus, the scale rate established by the board of control has no application to his case since it applies only to Section 79 and liability incurred under the new act. The liability of the parents will be controlled entirely by the provisions of Chapter 223 which were repealed.

It has been previously pointed out that no lien attaches to the real estate of the parents and if the patient has no real estate, then no lien exists. Therefore, we are dealing in terms of the personal liability of the parents under Section 230.15. Basically, the parents remain liable to the county, however, this debt is an open account which was terminated by repeal of Chapter 223. Therefore, the statute of limitations will begin to run thereon and suit must be brought against the parents to reduce this debt to a judgment or a compromise must be effectuated by the board of supervisors pursuant to Section 230.17. See 62 OAG 151.

In conclusion the parents liability would continue until cut-off by the statute of limitations. However, the county may secure its cause of action by a compromise settlement or by suing on the debt so as to reduce it to a judgment which will become a lien upon any real estate owned by the parents. See Sections 624.23 and 624.24, 1962 Code of Iowa.

Respectfully submitted,

Robert D. Bernstein

ROBERT D. BERNSTEIN
Assistant Attorney General

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CITIES AND TOWNS: Firemen's and Policemen's Retirement Pension Benefits. §§410.6, 411.6, 1962 Code of Iowa; Chapter 340. §§2 and 3; Chapter 341, §2, Acts of the 61st G.A. The amendment to 410.6 that "at no time shall the monthly pension or payment to the member be less than one hundred fifty dollars ($150.00)" applies to all members on pension or receiving payment under Chapter 410 of the Code. "Holiday pay" is included in recomputing all members' pension, and "Longevity pay" is included and based on the number of years of service the member had at the time of his retirement, in recomputing all members' pension.

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

December 23, 1965

Honorable Andrew G. Frommelt
State Senator
802 Roshek Bldg.
Dubuque, Iowa

Dear Senator Frommelt:

You have requested an opinion of this office on questions submitted in a recent letter. They shall be considered individually.

1

> "The last sentence in paragraph 3, of the amendment to Section 410.6 reads; 'At no time shall the monthly pension or payment to the member be less than $150.00.' Does this pertain to all members on pension under Chapter 410, or only to those 'members whose position or rank is subsequently abolished' as stated in the second sentence of paragraph 3?"

Chapter 340, Section 2, subsection 3, Acts of the 61st G.A. reads as follows:

> "The adjustment of pensions required by this Section shall recognize the retired or deceased member's position on the salary scale within his rank at the time of his retirement or death. In the event that the rank or position held by the retired or deceased member at the time of his retirement or death is subsequently abolished, adjustments in the pensions of the member or of the member's spouse or children shall be computed by the board of trustees as though such rank or position had not been abolished and salary increases had been granted to such rank or position on the same basis as that granted to other ranks and positions in the department.
>
> "At no time shall the monthly pension or payment to the member be less than one hundred fifty dollars (150.00)."

The usual grammatical rules are ordinarily observed in construing and interpreting statutes. Zilske v. Albers, 238 Iowa 1050, 29 N.W. 2d 189 (1947); Haugen v. Humboldt-Kossuth Joint Drainage Dist. No. 2, 231 Iowa 288, 1 N.W. 2d 242 (1942). Because the sentence to which you refer composes a separate paragraph, one must infer when it makes reference back that the reference is to the entire preceding paragraph. That paragraph refers back to "this section," section 2, which in turn makes reference to "Pensions payable under this chapter...." The end result is that the last sentence of subsection 3 of section 2 of Chapter 340 refers to all members on pension or receiving payment under chapter 410 of the code.

II

> "At the present time all 'positions' and 'ranks' of the Dubuque Fire Dept. and Police Dept. received 'Holiday Pay' and 'Longevity Pay'. Both are considered regular base pay, pension payments are deducted from them, and they are both included in gross yearly pay subject to Federal and State Income Tax. 'Holiday Pay' is five extra days pay per year.

> 'Longevity Pay' is $5.00 per month for each 7 1/2 years of service. Firemen and policemen began receiving holiday pay in 1962 and longevity pay in 1957. So all members who retired before these dates were not receiving this pay at the time of their retirement.
>
> "Do we include 'Holiday Pay', in recomputing <u>all</u> members' pensions?
>
> "Do we include 'Longevity Pay' based on the number of years of service the member had at the time of his retirement, in recomputing all members' pensions?"

Chapters 410 and 411 of the 1962 Code of Iowa, as amended, establish the retirement systems for policemen and firemen. Chapter 410 applies to policemen and firemen appointed prior to March 2, 1934; Chapter 411 applies to policemen and firemen appointed after that date. Chapter 340, Acts of the 61st G.A. amended Chapter 410 and Chapter 341, Acts of the 61st G.A. amended Chapter 411. Both Chapter 340 and 341 became effective upon July 4, 1965.

It is an important principle of statutory construction that statutes are to be considered as being prospective in operation unless the contrary intention is expressed or clearly implied. Hill v. Electronics Corp. of America 253 Iowa 581, 113 N.W. 2d 313 (1962); Jacobs v. Miller, 253 Iowa 213, 111 N.W. 2d 673 (1962). This principle has been applied on numerous occasions involving the construction of statutes granting pensions to public officers. Fisher v. New York State Employees' Retirement System, 110 N.Y.S. 2d 16 (1952); Kane v. Policemen's Relief & Pension Fund, 336 Pa 540 9 A 2d 739 (1939); Reynolds v. United States, 292 U.S. 443, 78 L. Ed. 1353, 54 S. Ct. 800 (1934).

Section 1 of Chapter 340 makes special and explicit provision for those members who have retired prior to the adoption of the increase in pension benefits under Chapter 410. That section states in part:

> "Upon the adoption of any increase in pension benefits effective subsequent to the date of a member's retirement,

the amount payable to each member as his regular pension shall be increased by an amount equal to twenty-five per cent of any increase in the pension benefits for the rank at which the member retired."

The similar provision in Chapter 341 is not as clear as that in Chapter 340, but nevertheless appears to be effective. Section 2 of Chapter 341 states in part:

"Section four hundred eleven point six (411.6), Code 1962, is further amended by adding thereto the following subsection:

"'Pensions payable under this section shall be adjusted as follows:

"'a. As of the first of July of each year, the monthly pensions authorized in this section payable to each retired member and to each beneficiary except children, of a deceased member shall be recomputed. The formula authorized in this section which was used to compute the retired member's or beneficiary's pension at the time of retirement or death, including all amendments to the formula which may be adopted subsequent to the member's retirement or death, shall be used in the recomputation except the pension compensation shall be used in lieu of the average final compensation which the retired or deceased member was receiving at the time of retirement or death.'" (Emphasis added)

Because pension statutes have at their object the promotion of the general welfare, the language of these statutes is liberally construed. Kochen v. Consolidated Police & Firemen's Pension Fund Commission, 71 N.J. Super 463, 177 A 2d 304 (1962); Richardson v. City of San Diego, 193 Cal App 2d 648, 14 Cal Rptr 494 (1961); People ex rel Doud v. Rochester, 116 Misc. 703, 190 N.Y. Supp. 559 (1921).

The above quoted language of Chapter 341 would appear to make sufficiently clear provision for the retroactive operation of the act. Thus, both chapter 340 and chapter 341 operate retroactively and

serve to increase the pensions of those persons who had retired prior to the effective date of those acts.

The recomputation of the pension allowances for those persons who will retire or who have already retired under the provisions of Chapter 410, as amended, or Chapter 411, as amended, is based upon "the earnable compensation payable on each July 1 to an active member having the same or equivalent rank or position as was held by such retired member at the time of retirement or death." Subsection 2, section 1, Chapter 340; Section 1 and section 2 (a), Chapter 341.

Your question thus comes down to this: Is "holiday pay" and/or "longevity pay" included within the meaning of the term" earnable compensation" as that term is used in this last quoted phrase? Section 411.1 (14) defines "earnable compensation", as used in Chapter 411, "...the regular compensation which a member would earn during one year on the basis of the stated compensation for his rank or position." Because Chapter 410 covers the same subject matter as Chapter 411, it appears that the term "earnable compensation" will have the same meaning there also unless shown otherwise. There is no indication that a different meaning for the term in Chapter 410.

Reiterating a portion of your question on this problem:

> "At the present time all 'positions' and 'ranks' of the Dubuque Fire Dept. and Police Dept. received 'Holiday Pay' and 'Longevity Pay'. Both are considered <u>regular base pay</u>, pension payments are deducted from them and they are both included in gross yearly pay subject to Federal and State Income Tax." (Emphasis added)

No Iowa case authority has been found defining "earnable compensation", and what is included therein. In <u>Moore</u> v. <u>Board of Education</u> , 84 N.Y.S. 2d 417, the Supreme Court, Appellate Division of New York had cause to consider certain aspects of the term "earnable compensation", but the precise question here under study was not presented. This court did state however that: "'Earnable' definitely means <u>possible</u> of being earned." (Emphasis added). Accepting this definition and applying it to the fact situation of "holiday pay" whether provided for by law or contract, it would appear to be regular or "earnable compensation". Especially is this true when "holiday pay" is qualified insofar as it is necessary to perform the work or services on the day before and the day after the holiday, and to hold themselves ready for work on the holiday itself, if required, as a

condition precedent to receiving holiday pay. Such a result would also be in keeping with the Kochen case, supra, indicating that pension statutes have as their object the promotion of the general welfare, and the language of these statutes will be liberally construed. As to "longevity pay" we are met with less difficulty in determining that to be "earnable compensation" when by its very nature it awards long and continuous service by increased compensation. Because the recomputation of pensions is based upon the earnable compensation payable to an active member having the same or equivalent rank or position as the retired member, the amount of the longevity pay used in the recomputation should be based upon the number of years of service the retired member had at the time of his retirement.

Concluding then, in recomputing all members pensions under chapter 410 and 411, 1962 Code of Iowa as amended, "holiday pay" and "longevity pay" should be included. The amount of the longevity pay used should be based upon the number of years of service the retired member had at the time of his retirement.

Respectfully submitted,

MICHAEL S. McCAULEY
Assistant Attorney General

mrs