

MUNICIPALITIES: Police Retirement System — §§411.1(2) and 411.3, Code of Iowa, 1977. A person who does not pass a civil service examination, even though a police officer in the department, cannot receive the benefits of Chapter 411 of the Code. (Blumberg to Hansen, State Senator, 1-31-79) #79-1-1(L)

January 31, 1979

The Honorable Willard R. Hansen
State Senator
L O C A L

Dear Senator Hansen;

On November 13, 1978, we issued an opinion to you, No. 78-11-6, regarding police retirement systems. The facts upon which we based that opinion were that a police officer was hired by a city without taking the required civil service examination. After several years in the department he terminated his employment and withdrew his accumulated contributions in the retirement system under Chapter 411 of the Code. Sometime later, he rejoined the force properly and wanted to re-invest his accumulated contributions to get credit for the first years in the department. We held that since he had not taken the civil service examination he could not legally be a member of the retirement system. Therefore, he could not return his accumulated contributions and receive credit for those years. You now wish a clarification of that opinion. Specifically, you wish to know whether the fact that the failure to take the examination was caused by the City not offering examinations changes the result.

The prior opinion was correct based upon the facts given to us at that time. Your additional question does not change that result. Again, §411.1(2), 1977 Code of Iowa, provides that a "policeman" is one who passes a regular mental and physical civil service examination. Therefore, under §511.3, one who passes a civil service examination and becomes a policeman is a member of the retirement system. Stated conversely, if one does not pass a civil service examination, one is not a member of the retirement system.

An additional issue is apparent. Does a person who has been employed in a civil service position for a considerable time without having taken a civil service examination nevertheless attain civil service status? In 3 E. McQuillen, Municipal Corporations §12.78 (1973) it is stated:

"Where [civil service] examinations are required, they have been said to be essential and not to be dispensed with, and one who has not taken the examination has no civil service status." [Emphasis added].

In Elliott v. City of Covington, 1947, 304 Ky. 802, 202 S.W.2d 621, a city employee was fired after several years on the job. He contended that he acquired civil service status even though he never took the required civil service examination. In holding that he had not obtained civil service status, the Court held (202 S.W.2d at 622-623):

"It is true that the civil service law provides that whenever a city adopts an ordinance under such law and accepts pension plan wage deductions from city employees, an inviolable contract shall be created between city and employees so as to maintain a continuing relationship of employment thereafter, subject to be broken only in the manner mentioned by the law itself. However, we firmly believe that this provision of the law is predicated upon a lawful inception of the civil service employee relationship in its very beginning. Now appellant's original employment was admittedly not wrapped in the swaddling clothes of civil service legality in infancy. Accordingly, we can conceive of no way in which appellant's employment could have developed into the full grown maturity of civil service status in its later years. If the employees of a city operating under civil service law could be hired without examination and then permitted to acquire civil service status simply by monetary payments this method would no doubt be widely practiced and the net result would be equivalent to the selling

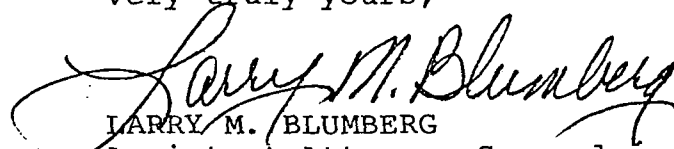
of civil service status for the price of wage deductions. Thus the entire civil service plan would degenerate into a delusion and a mockery, into the selling of a legal birthright for a pecuniary mess of pottage. [Emphasis added].

It was held in State ex rel. Baker v. Wichert, 1953, 159 Ohio St. 50, 110 N.E.2d 771, that a person who has never taken a civil service examination has no standing as a civil service employee, and is not entitled to the benefits and protection of the civil service law. A similar result was reached in State ex rel. King v. Harris, 49 So.2d 803 (Fla. 1951). See also, City of Birmingham v. Lee, 1950, 254 Ala. 237, 48 So.2d 47; Holcomb v. Levy, 301 S.W.2d 519 (C.C.A. Tex. 1957).

In Glenn v. Chambers, 1951, 242 Iowa 760, 765, 48 N.W.2d 275, 277, the Supreme Court of Iowa stated, in dicta, that generally an appointment can be set aside where the appointee has not passed the required civil service examination. In addition to some of the cases cited above, the Court cited to People ex rel. Hannan v. Board of Health, 153 N.W. 513, 47 N.E. 785; People ex rel. Lee v. Gleason, 32 App. Div. 357, 53 N.Y. 7; State ex rel. Buchanan v. City of Seattle, 171 Wash. 113, 18 P.2d 3. The Ohio Court of Appeals has held contrary to this in State ex rel. Dahmen v. City of Youngstown, 1973, 40 Ohio App.2d 166, 318 N.W.2d 433. The Court held there that when an appointment is made to a position in the classified service without an examination, and there is no eligible list available for such position, the failure of the civil service commission to provide the examination within a reasonable time after a written request for one shall result in such appointee acquiring civil service status. The Court distinguished this case from State ex rel. Baker v. Wishert, supra, apparently on the basis that an examination was requested by the employee. We do not find any other facts in this case which would distinguish it from the others.

It appears that the individual in question never attained civil service status. Chapter 411 requires such status in order to receive the benefits of that Chapter. Accordingly, we reaffirm our previous opinion.

Very truly yours,


LARRY M. BLUMBERG
Assistant Attorney General

LMB:pml

COURTS: Judgment Costs -- §§321A.12, 606.15 and 625.14, Code of Iowa, 1977. The Clerk's certified copy fee for sending an unsatisfied judgment to DOT under §321A.12 can be charged to the judgment creditor and taxed to the debtor. (Nolan to Rush, State Senator, 1-31-79) #79-1-2(L)

January 31, 1979

Honorable Bob Rush
State Senator
L O C A L

Dear Senator Rush:

You have requested an opinion on Chapter 321A of the Iowa Code and specifically ask the following:

"Does the Clerk of Court have authority to charge a judgment creditor under Section 321A.12 for certifying an unsatisfied judgment to DOT?"

The language of §321A.12, Code of Iowa, 1977 is as follows:

"1. Whenever any person fails within sixty days to satisfy any judgment, it shall be the duty of the clerk of the court, or of the judge of a court which has no clerk, in which any such judgment is rendered within this state, to forward to the director immediately after the expiration of said sixty days, a certified copy of such judgment."

"2. If the defendant named in any certified copy of a judgment reported to the director is a nonresident, the director shall transmit a certified copy of the judgment to the official in charge of the issuance of licenses and registration certificates of the state of which the defendant is a resident."

Honorable Bob Rush
State Senator

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Copy fees are authorized by §606.15 of the 1977 Code of Iowa which provides:

". . . 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:

* * *

"13. For certificate and seal, two dollars.

* * *

"21. For all copies of records, or papers filed in this office, transcripts, and making complete record, fifty cents for each one hundred words."

Section 625.14 provides that the clerk shall tax "the fees of officers" for the benefit of the party recovering costs.

Thus, in our opinion, the answer to your question is an affirmative one.

Very truly yours,



ELIZABETH A. NOLAN
Assistant Attorney General

EAN:sh

MUNICIPALITIES: Municipal Housing Commission — §§ 403A.2(6) and 403A.5, Code of Iowa, 1977; §5, Ch. 116, Acts of the 67th G.A. (1977). A member of a municipal housing commission must be a resident of the municipality only if the area of operation of the municipality does not extend beyond its corporate limits. If the area of operation includes an area adjacent to, and within one mile of, a municipality, the member can be a resident of the municipality or the adjacent area. (Blumberg to Larsen, State Representative, 2-5-79) #79-2-1(L)

February 5, 1979

The Honorable Sonja Larsen
State Representative
L O C A L

Dear Representative Larsen:

We have your opinion request of January 13, 1979, regarding eligibility requirements for serving on a municipal housing agency. You ask whether a person who lives outside the corporate limits of a municipality can serve on a municipal housing commission.

Section 403A.5, 1977 Code of Iowa, as amended by §5, Ch. 116, Acts of the 67th G.A. (1977), provides, in pertinent part, that "[a]ny persons may be appointed as commissioner if they reside within the area of operation of the agency, which area shall be conterminous with the area of operation of the municipality" Section 403A.2(b) defines "area of operation" to include: (a) all of a municipality and, (b) any area adjacent to and within one mile of a municipality, if permitted by the governing body of that adjacent area. The word "conterminous" is defined in Black's Law Dictionary at page 391 (4th ed. 1951) as "Adjacent; adjoining; having a common boundary", and in Webster's New World Dictionary at page 319 (1959) as "having a common boundary at some point; contiguous. 2. having the same boundaries or limits."


What §403A.5 appears to provide is that a member of the municipal housing commission must be a resident of the area in which the agency operates and that area must be the same as the area of operation of the municipality. Therefore, a member of the commission must be a resident of the municipality only if the area of operation does not extend beyond the corporate limits.

The Honorable Sonja Larsen

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If the area of operation extends to the adjacent area as provided in §403A.2(6), the member can be a resident of the municipality or a resident of the area adjacent to the municipality. A member who resides outside of either of these areas cannot occupy a position on the commission.

Very truly yours,


LARRY M. BLUMBERG
Assistant Attorney General

LMB:pml

MOTOR VEHICLES: Display and Sale of Motor Vehicles at Iowa State Fair. §322.5, Code of Iowa (1977). Motor vehicle dealers may not display, offer for sale or negotiate the sale of motor vehicles at the Iowa State Fair. (Condon to Taylor, Iowa State Fair Board 2/5/79) #79-2-2(L)

February 5, 1979

J. D. Taylor
Secretary/Manager
Iowa State Fair
L O C A L

Dear Mr. Taylor:

This letter is in response to your request for an opinion regarding Section 322.5 of Senate File 2187, Chapter 1113, Acts of the 67th G.A., 1978 Session. You have asked if this prevents motor vehicle dealers from displaying, offering for sale or negotiating sales of new motor vehicles at the Iowa State Fair. The relevant portion of the statute is as follows:

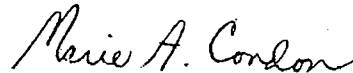
"A motor vehicle dealer may display new motor vehicles at fairs, vehicle shows and vehicle exhibitions. Motor vehicle dealers, in addition to selling vehicles at their principal place of business and car lots, may, upon receipt of a temporary permit approved by the department, display and offer new motor vehicles for sale and negotiate sales of new motor vehicles only at county fairs, as defined in chapter one hundred seventy-four (174) of the Code, vehicle shows and vehicle exhibitions which fairs, shows and exhibitions are approved by the department and are held in the county of the motor vehicle dealer's principal place of business. Application for temporary permits shall be made upon forms provided by

the department and shall be accompanied by a ten dollar permit fee. Permits shall be issued for periods of not to exceed fourteen days. No sale of a motor vehicle by a motor vehicle dealer shall be completed nor any sales agreement signed at any such fair, show or exhibition. All such sales shall be consummated at the motor vehicle dealer's principal place of business."

This provision prohibits a motor vehicle dealer from displaying, offering for sale or negotiating the sale of a new motor vehicle at fairs, shows or exhibitions outside the county in which the motor vehicle dealer's principal place of business is located. Fairs are limited to "county fairs, as defined in chapter one hundred seventy-four (174) of the Code," so even those motor vehicle dealers whose principal place of business is in Polk County cannot perform these activities at the Iowa State Fair.

Therefore, it is the opinion of this office that Section 322.5, Code of Iowa (1977), as amended by Chapter 1113, Acts of the 67th G.A., 1978 Session, completely precludes the display, offer or negotiation of the sale of new motor vehicles by dealers at the Iowa State Fair.

Very truly yours,



MARIE A. CONDON
Assistant Attorney General

MAC:pml

COURTS: Superior courts, preservation and destruction of records. §§ 602.36, 606.20-606.23, Code of Iowa, 1977. The Code abolishes superior courts and orders that all records be deposited with the clerk of court. The clerk of court may dispose of the records of the superior court pursuant to the Code's provisions governing preservation and destruction of court records. (Heintz to Synhorst, Chairman, State Records Commission, 2/5/79) #79-2-3(L)

February 5, 1979

Mr. Melvin D. Synhorst,
Chairman, State Records Commission
State Capitol
L O C A L

Dear Mr. Synhorst:

In your letter dated January 5, 1979, you ask three questions concerning disposition of superior court records presently stored in the City of Perry. You state:

At its December 13, 1978 meeting, the State Records Commission reviewed a letter from the Dallas County Attorney concerning disposition of Superior Court records stored in offices of the City of Perry. A review of Chapter 304 of the Code indicated that the State Records Commission would not have official jurisdiction in this matter, since records of county and municipal political subdivisions do not fall within the responsibilities of the State Records Commission. However, Section 303.12 of the Code states that counties and municipalities may transfer records to the State Archives, subject to the approval of the Director of the Historical Museum and Archives Division. Also, Sections 606.20 - 606.23 of the Code relate to the preservation and destruction of court records, but it is not clear whether these provisions are applicable to old Superior Court records.

As a result of the preliminary review, the State Records Commission voted to request an Attorney General's opinion which would clarify these points:

- a. Are Sections 606.20-.23 applicable to Superior Court records?

Mr. Melvin D. Synhorst

January 31, 1979

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- b. Did the Unified Trial Court Act include reference to disposition of records of the former courts?
- c. Would donation of Superior Court records to the State Archives or a local county museum involve a threat to, or loss of, confidentiality?

The superior courts were established by the Iowa General Assembly in 1876, Chapter 143, Code of Iowa, 1880. Authority to establish such a court was extended to any city in this state containing five thousand inhabitants. The superior court, "when established, shall take the place of the police court of such city," Chapter 143, Section 1, Code of Iowa, 1880. The superior court shared jurisdiction with the district and circuit courts - with certain exceptions - the police courts, and justice of the peace courts and had exclusive jurisdiction to try all actions, civil and criminal, for the violation of city ordinances.

In 1973, the General Assembly enacted the Unified Trial Court Act which established a unified trial court system known as the "Iowa District Court", Section 602.1, Code of Iowa (1977). All mayors' courts, justice of the peace courts, police courts, superior courts, and municipal courts, and their offices were abolished as of July 1, 1973 (Section 602.36, Code of Iowa, 1973, 1977). Section 602.36 provides further that:

Promptly after July 1, 1973, the officials of these courts shall deposit all funds, dockets, and records pertaining to their office with the clerk of the district court of their counties. (emphasis added).

Sections 606.20-606.23, Code of Iowa, 1977, outline the duties and responsibilities of the clerks of the district courts for the preservation and destruction of court records. Generally, the Code provides that the clerk may reproduce copies of certain records and materials, index, and file them and subsequently destroy the original items upon the order of a majority of the judges of the court. Section 606.23 authorizes transmission by the clerk of materials of historical interest to any recognized historical society or association upon compliance with the provisions of §§ 606.20-606.22.

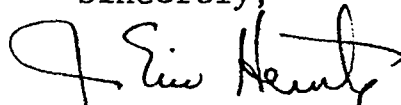
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In summary, the Unified Trial Court Act specifically governs the disposition of all records associated with certain courts abolished by the Act, including superior courts. All such funds, dockets, and records are to be deposited "with the clerk of the district court of their counties," Section 602.36, Code of Iowa, 1977. The records in question should be forwarded to the Dallas County Clerk of Court to be processed in accordance with the following provisions of the Code.

After these records have been placed in the custody of the Dallas County Clerk of Court, the clerk may process them in accordance with Sections 606.20 through 606.23 of the Code. Section 606.23 allows the transmission of certain articles of general historical interest in the custody of the clerk of court to any recognized historical society or association. This is clear statutory authority for forwarding these items to the state archives of the Iowa state historical department, established by Chapter 303 of the Code, or any other "recognized historical society or association."

Finally, in answer to your question whether donation of these records to the state archives or a local museum may result in loss of confidentiality, it is our opinion that the provisions of the Code governing the examination of public records, specifically Chapter 68A, Code of Iowa, 1977, are applicable to the superior court records in question. Generally, Chapter 68A accords every citizen the right to examine and copy all public records "unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential," Section 68A.2, Code of Iowa, 1977. Public records include "all records and documents of or belonging to this state or any county, city . . .," Section 68A.1. The superior court records are public records, as are the records of the Iowa district court designated in the Unified Trial Court Act, and may be made available for public examination unless some other provision of the Code expressly limits such right or requires that a specific document, record, or item among the collection of superior court records be kept secret or confidential.

Sincerely,



J. ERIC HEINTZ
Assistant Attorney General

Motor Vehicles: Display and Sale of Motor Vehicles at Iowa State Fair. §322.5, Code of Iowa (1977). Motor vehicle dealers may display, but may not offer for sale or negotiate the sale of motor vehicles at the Iowa State Fair. (Condon to Taylor, 2-9-79)
#79-2-4(L)

February 9, 1979

J. D. Taylor
Secretary/Manager
Iowa State Fair
L O C A L

Dear Mr. Taylor:

On February 5, 1979, our office issued an opinion to you regarding Section 322.5 Code of Iowa (1977) as amended to you in Chapter 1113, Acts of the 67th G.A., 1978 Session. The relevant portion of the statute is as follows:

"A motor vehicle dealer may display new motor vehicles at fairs, vehicle shows and vehicle exhibitions. Motor vehicle dealers, in addition to selling vehicles at their principal place of business and car lots, may, upon receipt of a temporary permit approved by the department, display and offer new motor vehicles for sale and negotiate sales of new motor vehicles only at county fairs, as defined in chapter one hundred seventy-four (174) of the Code, vehicle shows and vehicle exhibitions are approved by the department and are held in the county of the motor vehicle dealer's principal place of business. Application for temporary permits shall be made upon forms provided by the department and shall be accompanied

by a ten dollar permit fee. Permits shall be issued for periods of not to exceed fourteen days. No sale of a motor vehicle by a motor vehicle dealer shall be completed nor any sales agreement signed at any such fair, show or exhibition. All such sales shall be consummated at the motor vehicle dealer's principal place of business."

In our prior opinion, we concluded that the provision prohibits a motor vehicle dealer from displaying, offering for sale or negotiating the sale of a new motor vehicle at the Iowa State Fair. Upon further consideration, we have modified our opinion. The first sentence of the provision would permit motor vehicle dealers to display new motor vehicles at the Iowa State Fair.

However, 322.5 does prevent the offer for sale and the negotiation of sale of new motor vehicles by motor vehicle dealers at the Iowa State Fair. Upon receipt of a temporary permit, a motor vehicle dealer may offer for sale and negotiate the sale of a new motor vehicle but only at county fairs, vehicle shows and vehicle exhibitions in the county of the motor vehicle dealer's principal place of business.

Very truly yours,



Marie A. Condon
Assistant Attorney General

MAC:jkt

TERRACE HILL: Hours of opening to general public of governor's mansion. §3, Ch. 1012, Acts of the 67th G.A. (1978). Terrace Hill may be open to the public for more than ten hours per week. (Schantz to Willits, 2/ /79) #79-2-5(L)

The Honorable Earl Willits
State Senator
State Capitol

LOCAL

Dear Senator Willits:

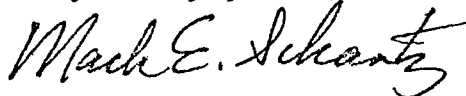
You have requested an opinion of the Attorney General concerning the hours during which Terrace Hill, the Governor's mansion, may be open to the public. Specifically, you ask: "Does the language cited in Senate File 2128 prohibit Terrace Hill from being open to previously scheduled tours at hours other than the regular open house hours?"

Section 3 of S.F. 2128 [enacted as Ch. 1012, Acts of the 67th G.A. (1978)] provides in pertinent part:

"It is a condition of the general assembly in appropriating funds under this subsection that the administration and management of the Terrace Hill governor's mansion be under the control of the governor's office and that no transfers shall be made to or from the funds appropriated under section eight point thirty-nine (8.39) of the Code and funds shall not be expended under section nineteen point twenty-nine (19.29) of the Code, except for emergency repairs necessitated by damage to Terrace Hill from acts of nature, accidents, or vandalism, and no personnel other than personnel funded under paragraphs a and b of this subsection shall be utilized or transferred for permanent maintenance or security of the Terrace Hill governor's mansion and the Terrace Hill governor's mansion shall be open to the general public without prior appointment not less than ten hours during each week beginning July 1, 1978."
(Emphasis supplied).

The language of this section is clear. By providing as a condition of the appropriation that Terrace Hill be open "not less than ten hours during each week," the Legislature established minimum opening hours. No maximum was established. In summary, Terrace Hill must be open to public tours for at least ten hours per week and may be open for such additional periods as the responsible officials determine are appropriate.

Very truly yours,

A handwritten signature in cursive script that reads "Mark E. Schantz". The signature is written in dark ink and is positioned above the typed name.

Mark E. Schantz
Solicitor General

MES:ab

HEALTH FACILITIES: Public Disclosure of Inspection Findings: §135C.19, Code of Iowa, 1977. Citations and fines levied against a health care facility are public information forty-five days after the facility has been notified of the inspection results. Any denial, suspension, or revocation of a facility license is not public information until forty-five days have expired after the facility receives notice of such or until completion of a hearing pursuant to 135C.11, whichever is later. (Bennett to Middleton, Department of Health, 2/16/69) #79-2-6(L)

February 16, 1979

Mr. Rick L. Middleton, Chief
Division of Health Facilities
State Department of Health
Lucas State Office Building
L O C A L

Dear Mr. Middleton:

Reference is made to your letter of September 28, 1978 in which you inquired about the extent of public disclosure mandated by Section 135C.19 of the Code of Iowa, 1977, and the appropriate time of release of that information.

The questions which you presented are:

- "1. At which point in time does the citation (Chapter 56. "Fining and Citations"), which is a report of inspection of a health care facility by the Department of Health become a matter of public information, and further, if at any time the matter of any fine levied in a citation becomes public information?"
- "2. When does the matter of denial, suspension, or revocation of a health care facility license become public information?"

In answer to your first question, 135C.19 "Public Disclosure of Inspection Findings---Posting of Citations" provides that "Following any inspection of a health care facility by the department, the findings of the inspection by the facility with require-

Rick L. Middleton Letter

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ments for licensing under this chapter shall be made public in a readily available form and place forty-five days after the findings are made available to the applicant or licensee."

Compliance with the rules promulgated under 135C is a necessary requirement for a health care facility to maintain its license under 135C.10(4). Therefore, any citations issued pursuant to 135C.19 shall be made public forty-five days after they are available to the licensee.

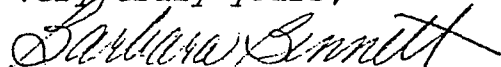
The fine levied is to be specified in the citation in order for the facility to respond to the citation by contesting it within the time allowed or remitting to the department the amount specified by the department in the citation. Rule 56.14(135C). There is no provision in Chapter 135C which suggests a legislative intent to keep the amount of any fine levied undisclosed. Rather the purpose of 135C is "to promote and encourage adequate and safe care and housing for individuals who are aged or who, regardless of age, are infirm, convalescent, or mentally or physically dependent, by both public and private agencies." 135C.2(1).

Furthermore, under the same section, rules which are prescribed, which would include the setting of amount of the fine assessed for a particular violation, are prohibited from being arbitrary, unreasonable, or confiscatory. 135C.2(2).

Disclosing the amount of the fine assessed would be in keeping with the purpose of the law in that it would give notice to health care facilities that noncompliance with the rules and standards will subject them to penalties. Secondly, disclosure would serve as a check on the department so that it may be determined whether fines assessed are arbitrary, unreasonable, or confiscatory.

In answer to your second question, after notice is given to a health care facility regarding the denial, suspension, or revocation of its license following an inspection of the facility for compliance with the requirements for licensing, the applicant or licensee may request a hearing pursuant to section 135C.11. If this hearing is requested within the thirty-day period after the notice is received, then under section 135C.19 "the findings of the inspection shall not be made public until the hearing has been completed." The forty-five day rule does not apply when a hearing has been requested. The date which the information is to be released is the same as the completion date of the hearing. Whether or not judicial review is sought after the hearing is immaterial to the disclosure of the inspection findings. 135C.19.

Very truly yours,



Barbara Bennett
Assistant Attorney General

ENVIRONMENTAL PROTECTION: Additional fees for issuance of licenses - chapters 110 and 110B, Code of Iowa, 1977 and §§8, 9, 10 and 14, Chapter 1064, Laws of the 67th G.A., 1978 Session. County recorders and depositaries may charge twenty-five cents in addition to the stated license fee for each license so designated and sold pursuant to the provisions of chapter 110, the Code, and for each state migratory waterfowl stamp issued or sold pursuant to chapter 110B, the Code. (Peterson to Priewert, Director, State Conservation Commission, 2/21/79) #79-2-8(L)

February 21, 1979

Mr. Fred A. Priewert, Director
State Conservation Commission
Wallace State Office Building
L O C A L

Dear Mr. Priewert:

You have requested the opinion of the Attorney General in the following terms:

"Section 9 of Chapter 1064, Laws of the 67th G.A., 1978 Session, amended Section 110.4 to allow a charge of 25 cents for issuing hunting and fishing licenses by either the county recorder or depositaries.

Included in Section 110.1, licenses, are the following items:

'Special Trout License Stamp'
'Nonresident Raccoon Stamp and Tags'
'Nonresident Pheasant Stamp'
'Special Wildlife Habitat Stamp'

Section 110B.2 provides for a state 'Duck Stamp'. This stamp is for sale in 'the same manner as hunting licenses are issued or sold under Chapter 110'.

Are these 'stamps' licenses as envisioned under

Section 110.4, as amended, and, if so, may county recorders and depositaries charge a 25-cent fee for each stamp issued in addition to charging a 25-cent fee for each license issued?"

Section 8 of Chapter 1064, Laws of the 67th General Assembly, 1978 Session, amended Section 110.1, the Code, to read, in pertinent part, as follows:

"110.1 LICENSES. Except as otherwise provided in this chapter, no person shall fish, trap, hunt . . . any wild animal, bird, game or fish . . . without first procuring a license or certificate so to do and the payment of a fee as follows:

1. Fishing licenses:

- a. Legal residents . . .

* * *

- f. Special trout license stamp . . .

2. Hunting licenses:

- a. Legal residents . . .

* * *

- g. Nonresidents raccoon stamp and tags . . .

- h. Nonresidents pheasant stamp . . .

* * *

7. Other licenses:

* * *

- m. Special wildlife habitat stamp . . ."

Section 9 of said chapter 1064 authorizes depositaries designated by the county recorder or the director of the State Conservation Commission to charge an additional twenty-five cents for each license to be retained for the service rendered in issuing the license.

Section 10 of chapter 1064 also amended Section 110.5 of the Code to authorize the county recorder to ". . . require that a writing fee of twenty-five cents be charged for each license sold by the county recorder's office."

The legislature thus has designated as licenses the "special trout license stamp", the "nonresidents raccoon stamp and tags", the "nonresidents pheasant stamp", and the "special wildlife habitat stamp", and has authorized depositories and the county recorder to charge an additional twenty-five cents for each license sold.

The doctrine is well settled in this state that the legislature may be its own lexicographer. State, ex rel. Turner v. Koscot Interplanetary, Inc., Iowa 1971, 191 N.W.2d 624. See also State v. Steenhoek, Iowa 1970, 182 N.W.2d 377, appeal dismissed 92 S. Ct. 195, 404 U.S. 878, 30 L. Ed. 2d 159, wherein the court stated that ". . . where the legislature defines its own terms and meanings in a statute, the common law and dictionary definitions which may not coincide with the legislative definition must yield to the language of the legislature".

Section 14 of Chapter 1064 amended Section 110B.2 of the Code to read, in part, as follows:

"110B.2 Stamp Required. No person sixteen years of age or older shall hunt or take any migratory waterfowl in this state without first procuring a state migratory waterfowl stamp . . . The commission shall . . . furnish the stamps to the county recorders and their designated depositories for issuance or sale in the same manner as hunting licenses are issued or sold under chapter 110." (Emphasis supplied.)

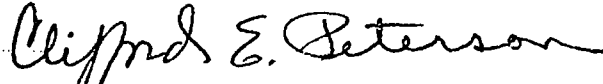
As discussed above, §§8 and 9 of chapter 1064 authorize county recorders and depositories to charge an additional twenty-five cents for each license issued or sold under chapter 110 of the Code, including hunting licenses. Section 110B.2, as amended, extends that authority to include the issuance or sale of state migratory waterfowl stamps by reference therein to sale, or issuance of hunting licenses.

Mr. Fred A. Priedwert

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We conclude, therefore, that county recorders and depositaries may charge twenty-five cents in addition to the stated license fee for each license so designated and sold pursuant to the provisions of chapter 110, the Code, and for each state migratory waterfowl stamp issued or sold pursuant to chapter 110B of the Code.

Very truly yours,

A handwritten signature in cursive script that reads "Clifford E. Peterson".

CLIFFORD E. PETERSON
Assistant Attorney General

CEP/mr

STATE OFFICERS AND DEPARTMENTS: Board of Regents, §262.9 (12), Code of Iowa, 1977. Term "leaves of absence" in §262.9 (12) refers to traditional year-long sabbatical leaves. Obligation to repay institution where service commitment not completed is proportionate to extent of unperformed service. No authority for waiver of statutory obligation, but some changes in duty assignments may be outside scope of statute. (Appel to Richey, Executive Secretary, Board of Regents, 2/26/79) #79-2-10(L)

February 26, 1979

Mr. R. Wayne Richey
Executive Secretary
Board of Regents
L O C A L

Dear Mr. Richey:

In your letter of January 24, 1979, you requested an opinion of the Attorney General with respect to the interpretation of Iowa Code Section 262.9 (12) relating to leaves of absence. The first question you ask is:

Must a staff member of a Board of Regents institution who is granted a leave of absence pursuant to Iowa Code Section 262.9 (12) (1977) return to the institution for two academic years thereafter, regardless of the length of the leave granted (one day, one week, one month, one quarter, one semester, one year, two years, or four years), or else repay the compensation received while on leave; or does the term "leave of absence" in Section 262.9 (12) (1977) refer only to one-year leaves, leaving the length of time staff members must return when granted leaves for longer or shorter periods to the regulatory authority of the Board of Regents, as long as the Board exercises its authority consistently with an implied 2-for-1 principle embodied in Section 262.9 (12)?

Section 262.9 (12) vests power in the Board of Regents to:

"12. Grant leaves of absence with full or partial compensation to staff members to undertake approved programs of study, research, or other professional activity which in the judgment of the board will contribute to the improvement of the institutions. Any staff member granted such leave shall agree either to return to the institution granting such leave for a period of not less than two years or to repay to the state of Iowa such compensation as he shall have received during such leave."

This section is difficult to interpret because of ambiguity in the phrase "leaves of absence." However, we think the statute is best construed when the term "leaves of absence" is interpreted as referring only to the traditional one-year long sabbatical leaves and not to leaves of shorter duration. This approach is supported by the legislative history of the statute and by the principle that a statute should not be interpreted in a manner which yields unreasonable results.

Legislative History

The original bill to vest in the Board of Regents power to grant leaves of absence, Senate File 42, 61st G. A. 1965, did not contain the second sentence of the final Act now codified in §262.9 (12). Shortly after the bill was introduced, however, Senator Joseph Flatt filed an amendment which would have made the provision applicable only to staff members "who have completed six (6) years of service." See Senate Journal, 61st G. A. 1965 at 181. This amendment suggests that, at least as construed by Senator Flatt, the subject matter of the original bill was year-long sabbatical leaves which traditionally are available to faculty members only after six or seven years of service to an institution. Rather than allow the Board of Regents discretion in determining when to grant the sabbatical years, however, Senator Flatt sought to mandate the traditional prior service requirement.

Senator Flatt's amendment was not moved on the floor and was therefore never brought to a vote. Senator J. Henry Lucken, however, proposed an amendment from the floor while the Senate was considering final action on the bill which added the second sentence of §262.9 (12) to the measure. See Senate Journal, *id.*, at 209. By not moving his own amendment and voting for the Lucken addition, Senator Flatt demonstrated that he was willing to drop his rigid six-year prior service requirement in exchange for the more flexible requirement of the present statute. While not entirely conclusive, this

background suggests that the legislature intended to establish a principle that staff members at Board of Regents institutions who take a year of sabbatical leave should return to the institution for two years or repay compensation received during their absence.

Reasonable Results

It is an accepted canon of construction that statutes are to be construed so as to obtain reasonable results. See Sutherland, Statutes and Statutory Construction, 4th ed. (1973), §45.12, §4.4 (4), Code of Iowa, 1977. If "leaves of absence" in §262.9 (12) were interpreted to mean any leave regardless of duration, however, serious inequities would result. Under such a wooden interpretation of the statute, a faculty member on leave for only one academic quarter would be required to serve the same amount of time as a person on leave for a full year. We doubt that the legislature intended such an awkward result.

At the same time, nothing in this opinion is meant to suggest that the Board of Regents may not grant sabbatical type leaves of absence of less than a year's duration. This is a lesser included power within the statute that does not require express legislative sanction. While §262.9 (12) does not expressly indicate whether a service requirement attaches on shorter leaves of absence, we think that is the fair implication of the statute. Without such a requirement, the strictures of §262.9 (12) could easily be evaded by frequent granting of leaves of less than a year. In order to avoid this giant loophole and avoid the inequities mentioned above, we think the statute should be construed as requiring persons on sabbatical leave for less than an academic year to serve the institution afterwards for a period twice as long as their leave or repay the compensation received during the leave. See §4.2, Code of Iowa, 1977 ("its provisions [the Code] . . . shall be liberally construed to promote its objects and assist the parties in obtaining justice.")

The second question you pose is as follows:

Whatever the response to question one, under Iowa Code Section 262.9 (12) (1977) may the obligation to repay compensation received while on such leave be prorated if the faculty member returns to the institution for a shorter period of time than required, e.g., would a staff member obligated to return for four academic semesters be able to satisfy the statutory obligation by returning for one academic semester and repaying 3/4 of the compensation received while on leave?

Section 262.9 (12) establishes a contractual obligation on the part of the staff member who is granted a leave of absence, and if such person does not fulfill the service obligation or repay money received, an action for breach of contract will lie. Generally, in actions to recover damages for breach of contract, the breaching party is entitled to an offset for performance rendered assuming that part performance confers a valuable benefit on the promisee. This contract principle should be considered by the Board whether it chooses to pursue breaches of §262.9 (12) agreements through litigation or by settlement. Contract principles aside, we doubt that the legislature intended to impose a potentially heavy financial penalty on staff members who substantially complete the statutory service commitment after a period of sabbatical leave. We therefore conclude that any obligation to repay the institution should be in proportion to extent of unperformed service.

Finally, you ask the following question:

Under Iowa Code Section 262.9 (12) (1977), is an institution free to waive prepayment or return obligation set forth in the section? If so, under what circumstances may the requirements of the section be waived?

We see no authority for waiver of the service or repayment obligation set forth in Section 262.9 (12), and it is doubtful that a statutorily mandated contractual term may be waived by the Board. We note, however, that staff members may on occasion be assigned duties outside the normal scope of their employment which are not tantamount to sabbatical leave and are thus outside the scope of §262.9 (12). Where a change in the duty assignment of a staff member is characterized by retention of the control over the employee by the Board and where the employee continues to perform work of benefit to the institution, §262.9 (12) has no application.

Sincerely,



BRENT R. APPEL

First Assistant Attorney General

BA:s

STATE OFFICERS AND EMPLOYEES: Individual bonds for state auditors are not required by §11.7, Code of Iowa, 1977, if each individual officer is covered by a group bond in the requisite statutory amount. (Appel to Johnson, State Auditor, 2/26/79) #79-2-12(L)

February 26, 1979

Richard D. Johnson
State Auditor
L O C A L


Dear Mr. Johnson:

You have requested an opinion of the Attorney General on the question of whether a group bond covering auditors employed by the State Auditor's Office satisfies the provisions of section 11.7 of the Code of Iowa, 1977. This section states, in relevant part, that "each auditor shall give bond in the sum of two thousand dollars, which bonds shall be approved and filed as bonds of state officers." The critical question is whether the statute requires that each auditor file an individual bond.

We believe that individual bonds are not required. Under a group bond, each auditor has in fact posted the statutorily mandated obligation. Moreover, the purpose of the statute is to insure that the state is protected in the statutory amount against malfeasance of state officers. This purpose is equally served whether the officers are covered individually or under a group bond.

In sum, it is our opinion that a group bond satisfies the requirements of §11.7 of the Code.

Sincerely,



BRENT R. APPEL
First Assistant Attorney General

BA:s

TAXATION: SALES TAX: Sales of chicks for Resale. \$422.47, Code of Iowa, 1977, as amended by §2 of Chapter 1142, Acts of the 67th General Assembly, Second Session. Iowa hatcheries and other chick dealers can sell chicks to purchasers tax free pursuant to a valid exemption certificate taken in good faith regarding those chicks which are purchased for resale and, further, the purchaser will be solely liable for sales tax on those chicks which could later be disposed of or used by the purchaser in a non-exempt manner. (Kuehn to Pellett, 3/12/79) #79-3-5 (L)

March 12, 1979

The Honorable Wendell C. Pellett
State Representative
State House
L O C A L

Dear Representative Pellett:

We acknowledge receipt of your letter in which you have requested an opinion of the Attorney General as follows:

"Iowa hatcheries, feed and seed stores, and other chick dealers sell chicks of various kinds to farmer-producers in various sizes. . . . With regard to chicks not intended for production purposes. . . Iowa law specifies that the sale is to be taxed if not for the purpose of processing or for resale. Almost all of these types of chick sales are for the purpose of resale. However, during the course of raising these chicks, some are frequently 'taken from inventory' for consumption by the farmer-producer. I am informed that these birds actually eaten by the farmer-producer should be subject to the sales tax. . .

"Herein arises a problem. At the time these chicks are sold, it is impossible to know exactly how many will be eaten by the farmer-producer himself. Therefore, the seller cannot determine how many of these chicks should be subjected to the sales tax. . . .

". . . it's true that the exemption certificates soon to be issued by the Department of Revenue (S.F. 2173, 67th G.A.) may be used to resolve this problem. . . ." (underscoring added)

Section 2 of Chapter 1142, Acts of the 67th General Assembly, Second Session, effective on January 1, 1979, states:

"Sec.2 Section four hundred twenty-two point forty-seven (422.47), Code 1977, is amended by adding the following new subsection:

"NEW SUBSECTION. The department shall issue exemption certificates in such form as the director may require to assist retailers in properly accounting for non-taxable sales of tangible personal property or services to buyers for purposes of resale or for processing.

"The sales tax liability for all sales of tangible personal property and all sales of services shall be upon the seller unless the seller takes in good faith from the purchaser a valid exemption certificate stating under penalties for perjury that the purchase is for resale or for processing and is not a retail sale as defined in section four hundred twenty-two point forty-two (422.42), subsection three (3), of the Code. Where the tangible personal property or services are purchased tax free pursuant to a valid exemption certificate which is taken in good faith by the seller, and the tangible personal property or services are used or disposed of by the purchaser in a nonexempt manner, the purchaser shall be solely liable for the taxes and shall remit said taxes directly to the department and sections four hundred twenty-two point fifty (422.50), four hundred twenty-two point fifty-one (422.51), four hundred twenty-two point fifty-two (422.52), four hundred twenty-two point fifty-four (422.54), four hundred twenty-two point fifty-five (422.55), four hundred twenty-two point fifty-six (422.56), four hundred twenty-two point fifty-seven (422.57), four hundred twenty-two point fifty-eight (422.58), and four hundred twenty-two point fifty-nine (422.59) of the Code shall apply to such purchaser.

"a. A valid exemption certificate is an exemption certificate as required and supplied by the department, which is complete and correct according to the requirements of the director.

"b. A valid exemption certificate is taken in good faith by the seller when the seller has exercised that caution and diligence which honest persons of ordinary prudence would exercise in handling their own business affairs, and includes an honesty of intention and freedom from knowledge of circumstances which ought to put one upon inquiry as to the facts. In order for a seller to take a valid exemption certificate in good faith, he or she must exercise reasonable prudence to determine the facts supporting the valid exemption certificate, and if any facts upon such certificate would lead a reasonable person to further inquiry, then such inquiry must be made with an honest intent to discover the facts.

"c. The certificate shall state that there is no penalty for perjury if the purchaser has completed the certificate in good faith based upon the facts known at the time of its completion. If the circumstances should change and the tangible personal property or services are used or disposed of by the purchaser in a nonexempt manner, the purchaser shall be liable solely for the taxes and shall remit said taxes directly to the department in accordance with this subsection." (underscoring added)

Section 2 of Chapter 1142 clearly accomplishes the purpose of resolving the problem set forth in your opinion request. A farmer who purchases several thousand chicks of which he or she may, later, consume 25 to 50 can purchase tax free, pursuant to a valid exemption certificate, those chicks which the farmer, in good faith, believes will be resold. If, later, the farmer underestimated the number of chicks which were to be consumed by himself or herself, then, the farmer (purchaser) shall be solely liable for the sales taxes and shall remit said taxes directly to the Department of Revenue.

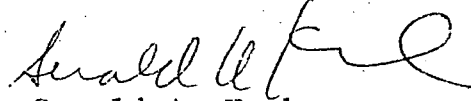
In conclusion, based upon the foregoing, it is the opinion of the Attorney General that Iowa hatcheries, feed and seed stores, and other chick dealers can take in good faith from the farmer (purchaser) a valid exemption certificate stating that the purchase of the chicks is for resale thereby allowing said chicks to be purchased tax free, but, tax

Representative Pellett

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must be collected by the seller on the sale of those chicks which the farmer represents to the seller that he or she will consume and, if more chicks should later be used or disposed of by the farmer (purchaser) in a non-exempt manner, the farmer (purchaser) shall be solely liable for the taxes and shall remit said taxes directly to the Department of Revenue.

Very truly yours,



Gerald A. Kuehn
Assistant Attorney General

GAK/sd

CIVIL SERVICE; ATTORNEYS AND COUNSELORS; Sections 400.26; 68.8; 279.37; 327C.21; 455.163; 455.166; 475.1; Iowa R. App. P. 14(f)(13); Iowa Court Rule 120. Use of the term 'counsel' in civil service trials comprehends only attorneys at law. (Salmons to Walter, State Representative, District 100, 3/23/79) #79-3-8(L)

Honorable Craig D. Walter
State Representative
District 100
House of Representatives
L O C A L

March 23, 1979

Dear Representative Walter:

This office is in receipt of your opinion request regarding Section 400.26 Code of Iowa 1979 concerning Civil Service Appeals. That Section provides:

Public Trial. The trial of all appeals shall be public, and the parties may be represented by counsel.

You ask: "Does the term counsel mean this individual must be an attorney or can counsel refer to any individual wishing to intervene for said party?"

In determining whether 'counsel' was meant to refer to those other than attorneys the legislature's intended use of this term must dictate the answer you seek. Iowa R. App. P. 14(f)(13). Since the term 'counsel' is defined nowhere in Chapter 400, that term must be construed as it is ordinarily used. State ex. rel. Turner v. Drake, 242 N.W.2d 207 (Iowa 1977).

The ordinary use of the term 'counsel' connotes representation by a lawyer. Webster's Seventh New Collegiate Dictionary defines 'counsel' in this way:

. . . a lawyer engaged in the trial or management of a case in court; a lawyer appointed to advise and represent in legal matters an individual client or a corporate and especially a public body.


Aside from the commonly accepted usage of 'counsel' as denoting a lawyer, other provisions in the Code indicate the

legislature uses the term 'counsel' synonymously with 'lawyer'. By Section 327C.21 state's counsel is entitled to "attorney's fees" against a railroad in an injunctive action. Similarly, in Section 455.166 a board of supervisors or a board of trustees of a drainage district is empowered to employ counsel and payment to counsel is noted as "attorney's fees and expenses." Drainage districts themselves are authorized by Section 455.163 to "employ legal . . . counsel". In Section 475.1 'attorney' and 'counsel' are used interchangeably: ". . . the state commerce commission shall appoint a competent attorney to the office of commerce counsel. . . ." The Supreme Court itself uses the term 'counsel' to signify licensed practitioners of the law. In Court Rule 120 (1) and (2) permitting law students to practice law in Iowa Courts under certain circumstances, no appearance by a student may be made unless the student is "under direct supervision of licensed Iowa counsel" or "under the general supervision of licensed Iowa counsel" depending upon the type of case. See also, Iowa Code Section 68.8 and 279.37.

Other states and forums have also held that the word 'counsel' means 'lawyer' and not some other lay representative. See Turner v. American Bar Association, 407 F.Supp. 451, 472-478 (N.D. Tex. etc 1975); Higgins v. Parker, 191 S.W.2d 668, 670 (Mo. 1946); People v. Cox, 146 N.E.2d 19, 22 (Ill. 1957).

It is the opinion of this office that the use of the word 'counsel' in Section 400.26 comprehends only duly licensed practitioners of the law and no others.

Sincerely,



Carlton G. Salmons
Assistant Attorney General

CGS:jkt

INSURANCE. Mutual hospital service; physical therapists. §§ 514.1, 514.5, 514.8, Chs. 147, 148A, Code of Iowa, 1977. Physical therapists cannot be directly reimbursed for their services by either hospital or medical and surgical service corporations created under Chapter 514 of the Code. (Foudree to Rush, State Senator, 3/26/79) #79-3-10(L)

The Honorable Robert Rush
Iowa State Senate
Statehouse, Des Moines, Iowa 50319

March 26, 1979

Dear Senator Rush:

You ask whether physical therapists can be reimbursed directly by hospital service or medical and surgical service corporations for services rendered by physical therapists in hospitals. In our opinion they cannot.

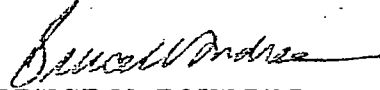
As you note, physical therapists are professionals licensed under Chapter 147, Code of Iowa, 1977. Chapter 148A defines physical therapy and also sets forth licensing requirements. Your question pertains to situations where physical therapists render services while under contract with hospitals.

You also cite Section 514.5 of the Code. Chapter 514, and Section 514.1 in particular, provide for hospital service corporations and medical and surgical service corporations. The most common examples of these are Blue Cross (for hospitals) and Blue Shield (for physicians). Under Section 514.5, these corporations, depending on their type, may purchase the services of hospitals and physicians, i.e. may contract for hospital services or medical and surgical services to be provided to subscribers to hospital service and medical service plans provided for under Section 514.1.

An examination of Section 514.1 indicates that only three categories of service corporations and corresponding service plans are permitted or mandated by statute: those for hospital service, medical and surgical service (physicians), and optometric or pharmaceutical services. Being creatures of statute, service corporations under Section 514.1 can contract for these services only and only with those persons or entities listed in Chapter 514: hospitals or corporations, associations, or individuals providing hospital service; physicians and surgeons; dentists; podiatrists; osteopathic physicians and surgeons; pharmacies; and optometrists. Physical therapists are not listed in Chapter 514 among those individuals or entities with which the above service corporations may contract. Further, they cannot be considered individuals providing "hospital service" which, as defined in Section 514.5, includes all of the services listed there. Therefore, such service corporations cannot contract with physical therapists for their services, and physical therapists cannot belong to or participate in their plans. See Iowa Code §§ 514.1, 514.8 (1977).

Normally, physicians who participate in a service plan (e.g., Blue Shield) bill a patient and are paid or reimbursed directly by Blue Shield (when the patient is a subscriber). (Non-participating physicians are paid by their patients who then are reimbursed by Blue Shield.) Likewise, hospitals bill patients and are reimbursed by Blue Cross directly when the patient is a subscriber. Since physical therapists cannot participate in a service plan under Section 514.1, there is no mandate for such service plans to reimburse them directly when they provide services in a hospital under a contract with the hospital. Chapter 514 permits only the hospital to be reimbursed.

Sincerely,



BRUCE W. FOUDDREE
Assistant Attorney General

BWF/bk

STATE OFFICERS AND DEPARTMENTS; RULES AND REGULATIONS: The Commission for the Blind -- §§17A.3, 17A.9, 17A.11, 17A.19. Commission's rules describing organization do not comport with §17A.3 of IAPA. Commission may elect to make decisions outside scope of §17A.3 on ad hoc basis, but must promulgate as rules, with full notice and comment procedures, any statements of general applicability that affect the rights of the public. Commission's declaratory ruling policy unduly isolates agency and is unreasonable under §17A.19. In any proceeding where an evidentiary hearing is required by Constitution or statute, hearing must be by hearing officer or member or members of Commission, §17A.11. (Appel to Redmond, 3-26-79) #79-3-11(L)

March 26, 1979

James M. Redmond*
420 Paramount Building
Cedar Rapids, IA 52401

Dear Mr. Redmond:

We are in receipt of your opinion request concerning compliance of the Commission for the Blind with the Iowa Administrative Procedure Act. (IAPA), §17A et. seq., Code of Iowa, 1979. In that letter, you ask:

- 1) whether the Commission's rules adequately describe the organization and its general course and method of its operations as required by §17A.2 of the IAPA;
- 2) whether IAPA affirmatively requires the Commission to promulgate rules describing:
 - a) the method by which it gives notice of Commission meetings and informs the public of tentative agendas as required by the Open Meetings Law, §28A.4, Code of Iowa, 1979;
 - b) when minutes of Commission meetings are available for public inspection;
 - c) the qualifications of and method of selecting a director;
 - d) the circumstances under which out-of-state residents may be admitted to the Commission's adjustment centers for the blind pursuant to §601.B.6(12), Code of Iowa, 1977;

*The policy of the Department of Justice will be to respond to proper opinion requests of state legislators who leave office while their requests are pending unless it is doubtful that the questions posed are of current public importance. In close cases, opinion requests will be returned to successors in office for resubmission. Those requests not refiled will be considered withdrawn.

- e) operations of the adjustment centers generally;
 - f) types of services generally available;
 - g) the location, hours and services available at the Commission's library;
- 3) whether the Commission's standing rule for declaratory rulings, which requires that petitioners demonstrate that lack of such ruling would "jeopardize petitioner's business, place the petitioner in imminent peril, or have a substantially detrimental effect on the public interest" is consistent with the IAPA;
- 4) whether the IAPA allows the director of the Commission to sit as a hearing officer in contested cases before the Commission.

I.

You first ask whether Rule 1.4 of the Commission, and, by implication, whether any other rule of the Commission, complies with §17A.3(1).(a) and (b) of the Iowa Administrative Procedure Act. In our opinion, the Commission's rules do not comply with this statutory mandate.

A. Description of Organization

Section 17A.3(1) of the Iowa Administrative Procedure Act requires that each agency "adopt as a rule a general description of the organization of the agency which states the general course and method of its operation...." The Iowa provision is identical to §2 of the Revised Model State Administrative Procedure Act. Under the original Model Act, descriptions of the general course and method of operations was required only "so far as practicable." The Revised Act, however, is more stringent in that it allows no such elastic escape from its mandatory requirements. See Uniform Laws Ann., Vol. 13 at 366-67 (1979 Supp.)

While over 25 states have enacted the Revised Act since its adoption in 1961, many have not incorporated §2 as proposed. Hawaii, for instance, does not require a description of organization but only "methods whereby the public may obtain information or make submittals or requests." Haw. Rev. Stat. §91-2(a)(1). Nebraska requires only that "each agency shall, so far as deemed practicable, supplement its rules with descriptive statements of its procedures." Neb. Rev. Stat., 1943, §83-909. A number of other states have dropped the express requirement of general description rulemaking altogether. See, e.g., Idaho Code §67-5202, Mo. Ann. Stat. §536.010 et. seq. (Vernon), N.C. Gen. Stat., §150.A-11. In Iowa, however, the legislature elected to embrace fully the expansive mandatory rulemaking requirements of the Revised Act.

While we have been unable to discover authoritative case law in any jurisdiction construing the scope of §2 of the Revised Act, its purposes are relatively clear. As is noted in an authoritative treatise on state administrative law, §2 is designed to allow the public to ascertain the respective functions and powers of each division and officer within an agency. The treatise writer illustrates the purpose of §2 with the following example:

Within a state department of conservation, for example, there may be one official whose particular concern is to effect a workable accommodation between the necessities of manufacturing concerns whose operations require the discharge of toxic wastes into rivers, and the desires of outdoorsmen that fishing should be protected. Once a manufacturer with a problem establishes contact with this official he is on the way toward working out a solution to his problem.....The publication of a description of the agency's organization affords a practicable means of making it easier for the manufacturer to find the official who can help him discover a solution to his problem. F. Cooper, State Administrative Law at 165 (1965).

A similar gloss has been placed on §2 of the Revised Act as adopted in Iowa by Professor Arthur Bonfield. According to Bonfield, the purpose of the provision is to enable the public to ascertain the functions, powers and responsibilities of each major officer within the agency. When responsibilities are clearly identified, members of the public at least have a starting point in trying to resolve any difficulties they may have with an agency. A. Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process, 60 Ia. L. Rev., 731, 783 (1975).

Support for Professor's Bonfield's interpretation may be found in the unusually broad statement of purpose section of the IAPA. There it is declared that, among other things, the purpose of the Act is to "increase public accountability" and "increase public access to governmental information," §17A.1(2). In effectuating these goals, the Act explicitly directs that its provisions be given a broad construction, §17A.23.

Professor Bonfield's approach is also consistent with the legislative history of Public Information Section of the Federal Administrative Procedure Act, which closely parallels §2 of the Revised Act by requiring publication of "descriptions of [each agency's] central and field organization," and "statements of the general course and method by which [each agency's] functions are channeled and determined." 5 U.S.C. §502. Referring to these provisions, the Senate Committee noted that "the purpose of inclusion of material in the Federal Register is to guide the public in determining where and by whom decisions are made...." S. Rep. No. 813, 89th Cong., 1st Sess.

at 6 (1965). Similarly, the House Report observed that the public "would be able to find out where and by whom decisions are made in each Federal agency....." H.R. Rep. No. 1497, 89th Cong. 2d Session, p. 7 (1965). See also B. Mezines, J. Stein, and I. Greiff, Administrative Law, v. 11, (1977), §8.02; K. Davis, Administrative Law Treatise, (1978), §5.10.

In addition to facilitating public access to administrative agencies, the public information section of the IAPA is also designed "to provide legislative oversight of powers and duties delegated to administrative agencies," §17A.1(2). By requiring published statements describing the general course and method of agency operation, the Act helps legislators determine whether the authority delegated to the agency is being exercised in a manner consistent with expressed or unexpressed legislative intent. The increased administrative openness that results from identification of major decisionmakers within an agency also can help the legislature ferret out information relevant to the budgetary process.

The administrative practice of many state agencies in Iowa comports with Professor Bonfield's gloss on §2. For instance, the Department of Agriculture has published a rule which describes the responsibilities of three major regulatory divisions and the subdivisions within each division. See 30 - 1.1 (159) I.A.C. Smaller state agencies, like the Arts Council, may not have massive divisions, but the duties and responsibilities of the Council and its director and other major employees are described in some detail. See 100-1.2 (304A) I.A.C. A quick examination of the administrative rules of these state agencies informs a citizen of "where and by whom" important decisions are made.

The only Rule that deals directly with the organization of the Commission for the Blind is contained in Rule 1.5, 160 - 1.5 (601B) I.A.C. This rule states in its entirety:

The Commission elects its own officers and employs a director and such assistants as are necessary to carry out its statutory function.

As is obvious, this rule contains no description of who is doing what in the organization. Yet it is clear from the Commission's rules that somebody is making decisions. Eligibility for services "will be determined" upon the presence of enumerated conditions. 160 - 2.5 (601B,C). I.A.C. Consideration "is given" to similar benefits available to a blind person in determining what facilities will be provided, 160 -4.1(1)(601B,C) I.A.C. Operators of vending facilities "will be assigned" various locations for an indefinite period of time, 160-4.1(1)(601B,C) I.A.C. But the rules do not indicate who makes the key decisions.

The naked organizational description and the uninformative use of the passive tense to describe agency functions do not comport with the requirements of §17A.3 of the Iowa Administrative Procedure Act. The rules simply do not give the public or the Legislature enough information to deal effectively with the agency. See Bonfield, supra at 783. In order to comply with the public information section of the IAPA, the Commission must promulgate rules which a) outline the division of responsibility between it and the director; b) generally describe major organizational divisions within the agency; and c) outlines the duties and responsibilities of each major decisionmaker within the agency. See e.g. 30-1.1(159) I.A.C. (Department of Agriculture), 100-1.2(304A) I.A.C. (Arts Council), 370-1.6(96) I.A.C. (Employment Security - Job Service).

As can be seen by the rules of other state agencies, the requirement of §17A.3 are not impossible to meet. Indeed, they are not particularly onerous as, in most cases, all that is required is that the agency publish a clear and succinct public statement of common organizational knowledge. But for citizens or members of the legislature without personal knowledge of the way an agency is run, compliance with §17A.3 can mean the difference between relatively quick access to the agency or a frustrating escapade in what may seem to be a bureaucratic labyrinth.

B. Description of Procedures

Other than not clearly describing decisionmakers, the rules outlining the procedures available to persons dealing with the Commission generally appear adequate. It is reasonably clear how a person applies for services (contact specified offices and complete application form, opportunity for administrative review and hearing), see 160.2.3 (601B) I.A.C.; seeks administrative review of a decision with respect to services provided (written application to department head), see 160-3.3 (601B) I.A.C.; and obtains review of revocations of certificates to operate vending facilities owned by the Commission (written request to Commission for review by supervisor of business program, opportunity for evidentiary hearing, and appeal to HEW for arbitration, see 160-4(601B,C) I.A.C.

While the above cited procedures are not highly detailed, the promulgation of such general rules is within the Commission's discretion. By not publishing more detailed rules, however, the Commission forecloses the possibility of requiring highly structured participation in the administrative process by an uninformed party.

A question could be raised concerning the lack of forms published in the Commission's rules. Section 17A.3(1)(b) of the IAPA requires that the agency promulgate rules "including a description of all forms and instructions that are to be used in dealing

with the agency." Like so many parts of the IAPA, this section has not been authoritatively construed by the courts.

The legislative history of the federal counterpart of §17A.3(1)(b) provides some guidance. Originally, §3(a)(2) of the federal APA required publication in the Federal Register of "the nature and requirements of forms." In order to meet the problem of "too much publication," this provision was amended in 1965 to require publication of either "description of forms available or the places at which forms may be obtained." According to the report of the Senate Committee, the purpose of the change was "to eliminate the need of publishing lengthy forms." Sen. Rep. No. 813, 89th Cong., 1st Sess., at 6 (1965).

The IAPA is somewhat more restrictive in that it does not allow agencies to simply indicate the place at which forms are available, but we think the use of words "description of forms" instead of "the nature and requirements" of forms used in the early federal act is significant. The choice of the more narrow language suggests a similar concern about "overpublication." And, identification of a form by number or name adequately serves the apparent purpose of the provision. As Professor Bonfield notes, the section is designed to eliminate "the time, bother, and aggravation created when, after carefully preparing and submitting Form A, the applicant is told he must resubmit on Form B because the agency requires the use of Form B in the factual context outlined in his original application." Bonfield *supra* at 783. Identification by number, letter, or other designation eliminates any such problems. See also B. Mezines et. al., *supra*, §8.02(3).

The Commission has promulgated one rule which specifically mentions a form. Rule 2.3 of the Commission states that "application forms calling for data necessary to determine eligibility for services may be obtained from the Commission for the Blind, 4th and Keosauqua Way, Des Moines, Iowa 50309." 160-2.3(601B) I.A.C. Such a description, though terse, adequately informs the public of how to proceed with the agency when dealing with an eligibility problem. By calling the agency and asking for a service application form, an interested party has found the proper door to enter the administrative process.

There is no mention in the Commission's rules of forms to be used in seeking administrative review of a decision of the Commission with regard to the furnishing of services, nor is there any mention of forms in connection with administrative review of action arising from the administration of the Commission's vending facility program. The relevant rules simply state that interested parties may file written requests for review of agency action.

The IAPA does not require that agencies use forms in various administrative processes. What it does require is that if forms are

used, they must be identified in their rules so that a member of the public does not find that his or her request for agency consideration is defeated because of failure to file the proper form with the agency. In other words, if the Commission for the Blind in fact has forms that are to be used in various proceedings, it must identify them and describe their purposes.

II.

You also ask whether the IAPA requires the Commission to promulgate rules covering a variety of subjects. While each subject you raise is individually analyzed below, some prefatory remarks may help clarify the requirements of the IAPA. The only situations where the IAPA mandates that an agency promulgate rules rather than proceed on an ad hoc, case by case basis are described in §17(3)(1)(a) and (b). In the absence of express direction in the agency's enabling act or in another statute, proceeding by rule rather than ad hoc decisionmaking is permissive, not mandatory. But, whenever the agency in its discretion elects to adopt a statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of the agency, the procedural rulemaking requirements of the IAPA must be followed. Thus, except in very narrow classes of cases not relevant here, §17A.5(b), the IAPA guarantees that interested citizens will be afforded an opportunity to have their views known and considered by an agency before any proposed generally applicable policy that affects the public hardens into final agency action.

Neither the enabling statute of the Commission for the Blind, Chapter 601B, Code of Iowa, 1977, nor any other Code Provision outside the IAPA, directs the Commission to promulgate rules in any subject area. Therefore, unless the subjects you mention are either within the scope of mandatory rulemaking provisions of the APA or have in fact been dealt with by the agency through policy statements of general applicability, the rulemaking provisions of the IAPA have no application.

A. Notice, Agenda, and Minutes

The Iowa Open Meetings Law expressly provides that governmental bodies "shall give notice of the time, date, and place of each meeting, its tentative agenda, in a manner reasonably calculated to apprise the public of that information." §28A.4, Code of Iowa, 1979. The statute further specifies that reasonable notice shall include advising the news media who have filed a request for notice and posting the notice on a bulletin board or other prominent place easily accessible to the public and the principal office, or, if no

office exists, at the building in which the meeting is held. In addition, the Open Meetings Law requires that each government body keep minutes of all meetings and make the minutes available for public inspection.

As a government body, see §28A.2(1)(a), the Commission for the Blind must comply with the letter and spirit of the statute. Agency decisionmaking with respect to implementation of the Open Meetings Law, however, is not within the scope of the mandatory provisions of the IAPA since the method of implementation does not describe the organization or set forth procedures available to the public. If it chooses, the Commission may regard the statute as its only rule, Weiner v. State Real Estate Comm., 171 N.W. 2nd, 783 (Neb., 1969), and give reasonable notice on an ad hoc basis consistent with the statutory requirements.

The IAPA, however, does require that each agency describe by rule "the methods by which and location where the public may obtain information or make submissions or requests." §17A.3, Code of Iowa, 1979. This statutory requirement is satisfied by Rule 1.2 of the Commission which states that the public "may obtain information by writing, visiting or telephoning the Office of the Commission for the Blind, 4th and Keosauqua Way, Des Moines, Iowa 50309 (515-283-2601), 160-1.2 (601B) I.A.C. By representing that "information" may be obtained from the offices of the Commission, we assume that office staff is fully advised of the public posting of notice and agenda matters and the location of minutes and that the public can obtain such information by simply calling the Commission's Office.

B. Qualifications and Methods of Selection of Director

The Commission's Rules state that it employs a director but does not indicate the qualifications or methods of selecting the officer. Personnel decisionmaking does not arguably fall within the mandatory rule-making provisions of the IAPA which are exclusively concerned with general organization, information gathering and formal and informal public procedures. Thus, in the absence of other express statutory direction, the Commission for the Blind may, in its discretion, fill any vacancy which may occur for the directorship on an entirely ad hoc basis in the total absence of preordained rules governing the qualifications of applicants or the method by which applications are processed. Whether the increased flexibility by proceeding in an ad hoc fashion is worth the risk of irrational results that sometime accompany unstructured decisionmaking is a question for the Commission to decide. If the legislature becomes dissatisfied with the approach of the Commission, it may pass legislation either establishing qualifications and procedures for director selection or mandate the Commission to promulgate rules governing the process.

C. Policy Toward Out-of-State Students

Chapter 601B.12, Code of Iowa, 1977, provides that non-residents may be admitted to Iowa centers for the blind if their presence would not be prejudicial to the interests of residents and upon such terms as "may" be fixed by the Commission, §601B.5(12), Code of Iowa, 1977. This statute does not mandate rulemaking ("may" implies a power, not a statutory direction, §4.1(36)(c), the Code), and the subject is not within the mandatory organizational description requirements of §17A.3. The Commission can, in its discretion, decide to admit out-of-state students on an entirely ad hoc, case by case basis, varying the terms of such admittance as deemed necessary by the facts and circumstances of each individual case, See Hicks v. Physical Therapist Examining Board, 221 A. 2nd 712 (D.C.), Aff'd sub. nom., Schramm v. Physical Therapist Examining Board, 394 F.2d 972 (1967), cent. denied, 390 U.S. 987 (1968) (physical therapist board may consider waiver of approved school requirements on a case by case basis rather than through rule).

A word of caution, however, is appropriate here. As stated above, the choice of whether to proceed by general rule or ad hoc decisionmaking is generally vested in the discretion of the agency. It is possible, however, that an agency's decision to proceed on a case by case basis could be found to be an abuse of discretion. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974). For instance, if many persons sought entry to Iowa facilities and only limited places were available, proceeding on an entirely ad hoc basis might be subject to attack. We do not, however, have sufficient information to express an opinion as to whether the Commission's ad hoc policy approaches the boundaries of reasonableness.

D. Rules Governing Operation of Adjustment Centers

You ask whether the Commission must promulgate detailed rules governing the operation of its adjustment center. Section 17A.2(k) of the IAPA expressly exempts from rulemaking procedures statements concerning "students enrolled in an educational institution." While we do not engage in factfinding in writing official opinions, we think it likely that the environment of the adjustment centers approaches that of an educational institution. If so, rules governing such institutions are not within the scope of the rulemaking provisions of the IAPA provided they face inward to students and do not affect the rights of the public. Any rules affecting the rights of the public such as those describing visiting hours or admissions policies are not exempt from rulemaking, see Bonfield, supra, at 843-44. The public is therefore entitled to an opportunity to comment upon them before their adoption, §17A.4(1).

E. Description of Services

You query whether the IAPA requires the Commission to promulgate comprehensive and detailed rules describing services available. In particular, you ask whether the Commission must promulgate a rule describing its library, its location, its hours, loan policies, and

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and availability of materials.

Again, beyond what would be contained in a rule describing the organization which states its general course and methods of operations, the IAPA does not mandate rule-making outlining the substance of what an agency does. But, while the Commission may operate its library on an ad hoc basis, administrative convenience strongly suggests the existence of generally applicable policies, See, i.e. 560-1, I.A.C. (Library Department). Such statements, even though not crafted to comply with §17A.3(1)(a) and (b), but only to further rational administration, must be promulgated pursuant to the rule-making procedures of the IAPA, §17A.4. Any agency statement of general applicability that "implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency," must run the gauntlet of the notice and comment procedures for rule-making, outlined in the IAPA. Thus, if the Commission has cast its imprimatur on general statements of policy in any bulletins, manuals or interpretive documents relating to the public's use of library facilities or any of the subjects raised in your opinion request, these statements must be promulgated as rules, see Bonfield, supra, at 827. We are confident that upon the release of this opinion, the Commission will examine its files to determine whether any such statements exist, and will proceed to properly promulgate them as rules according to the IAPA notice and comment procedures, §17A.1.

III.

You ask whether the Commission's standing requirements for declaratory rulings violate the IAPA. Rule 3.2 of the Commission states, in relevant part:

Any person may petition the director for a declaratory ruling when it is demonstrated that the lack of such ruling would substantially jeopardize the petitioner's business, place the petitioner in imminent peril, or have substantial detrimental effect on the public interest.

The IAPA does not contain a standing requirement for declaratory rulings. Section 17A(9) simply states that each agency "shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provisions, rule or other written statement of law or policy decision of the agency. The question remains, however, whether the Commission's rule is "unreasonable, arbitrary, capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion." §17A.19(g).

Declaratory rulings from an administrative agency are useful for a variety of reasons. The cost of declaratory ruling, of course,

can make final decisions in contested cases on behalf of the agency. A contested case is a proceeding "in which the legal rights, duties, or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing." §17A.2(2). Since no provision of state law requires the Commission to hold evidentiary hearings, you are primarily referring to decisions where such a hearing is constitutionally required in order to comport with due process. This would include, for instance, an action to suspend or revoke a license where constitutionally protected property or liberty interests are at stake, or a decision to withdraw important government benefits where, by statute, rule, or practice the recipient had more than a "mere expectancy" that the government would continue to provide the benefits. See generally, In re Buffalo, 380 U.S. 544 (1968) (occupational licenses), Goldberg v. Kelley, 397 U.S. 254 (1970), Perry v. Sinderman, 408 U.S. 593 (1972) (employment), Bishop v. Wood, 426 U.S. 341 (1976) (employment). If any action of the Commission impinges on qualified interests, the IAPA requires that the presiding officer at the evidentiary hearing be the agency, or one or more members of a multi-member agency, or an administrative hearing officer covered by the merit employment system. §17A.11(1). In such cases, if they exist, the director of the Commission, or his designee, cannot properly sit as trial examiner.

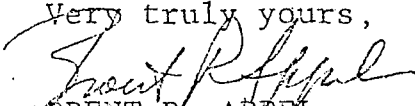
V.

In conclusion, we find that the rules of the Commission of the Blind do not comport with the Iowa Administrative Procedure Act in at least two respects. In order to bring its rules into compliance, the Commission should:

- 1) promulgate a rule which adequately describes the organization and its general course and method of operation;
- 2) promulgate an amended rule which relaxes its unduly stringent standing requirement for declaratory rulings.

Beyond this, the Commission should search its files and initiate notice and comment rulemaking proceedings for every statement of general applicability it has adopted that affect the rights of the public. We also recommend that the Commission for the Blind, like all agencies in state government, keep abreast of rapidly developing due process doctrine to insure that the agency's rules comply with the dictates of §17A.11 of the IAPA.

Very truly yours,


BRENT R. APPEL

First Assistant Attorney General

MUNICIPALITIES: Incompatibility -- 16 U.S.C. §§1701, 1704; §362.5, the Code, 1979. Based upon the facts of this case, a city park commissioner cannot also occupy the position of a Youth Conservation Corps camp director for that city where the Park Commission has supervisory power over the YCC project. (Blumberg to Nystrom, State Senator, 3/29/79) #79-3-12(L)

The Honorable John Nystrom
State Senator
L O C A L

March 29, 1979

Dear Senator Nystrom:

You requested an opinion from this office regarding the Youth Conservation Corps. Under your facts, a municipality has established a Youth Conservation Corps (YCC) program through the State and Federal Governments. The City Park Commission administers the program for the city. State and Federal funding covers 70% of the program, with municipal funds amounting to 30%. A member of the Park Commission wishes to be the director of the YCC Camp for a salary. The question is whether he could be the YCC director and retain his position on the Park Commission.

The Youth Conservation Corps Act, 16 U.S.C. §§1701-1706 (1976), was established on a temporary basis in 1970, and became permanent by amendments in 1974. The purpose of the Act is to have youths from all backgrounds be gainfully employed during the summer for training in conservation of national park and forest systems. This training is to prepare them for the "ultimate responsibility of maintaining and managing these resources for the American people." 16 U.S.C. §1701. Section 1704 of the Act establishes a program of grants to the various states for the employment of these youths to perform the same functions on non-federal public lands and waters.

The Office for Planning and Programming for the State of Iowa administers the YCC program for the State. It has established regulations and guidelines for the Federal and State grants. Under Section B of Part 1 of the Supplementary Regulations and Procedures, the sub-grantees, which are defined to include municipalities, shall designate a permanent employee of the sub-grantee to serve as the project manager. The manager's duties include the coordination and implementation of the YCC program, and the

selection of the YCC staff. One member of the staff selected by the manager is the YCC camp director. Under Section C(3)(b) of Part 1 of the Supplementary Regulations and Procedures, the camp director is responsible for administrative services, financial management controls, contracts and the like. The camp director is also responsible for carrying out work projects which have been approved by "higher organizational levels".

Section 362.5, the Code, 1979, provides that a city officer or employee shall not have any interest, direct or indirect, in any contract or job of work or the profits thereof or services to be furnished or performed for the city. A contract in violation of this section is void. Subsection one (1) provides for an exception, it reads:

The payment of lawful compensation of a city officer or employee holding more than one city office or position, the holding of which is not incompatible with another public office or is not prohibited by law.

In other words, compensation to a city officer when that officer holds more than one position with the city is not prohibited unless the offices are incompatible or prohibited by law.

We are not aware of any section which specifically prohibits this fact situation. Therefore, if the holding of both positions is prohibited, it would be so on the basis of incompatibility.

The leading case on incompatibility is State ex rel. Crawford v. Anderson, 155 Iowa 271, 136 N.W. 128 (1912). There, it was held (155 Iowa at 273):

The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard to the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Catell, supra.

But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other "and subject in some degree to its revisory power," or where the duties of the two offices "are inherently inconsistent and repugnant." State v. Bus, 135 Mo. 338, 36 S.W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra. [112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211]; State v. Goff, 15 R.I. 505, 9 A. 226, 2 Am.St.Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility of office exists "where the nature and duties of the two offices are such as to render it improper from considerations of public policy, for an incumbent to retain both."

See also, State ex rel. LeBuhn v. White, 257 Iowa 660, 133 N.W.2d 903 (1965).

The City Park Commissioners in question are elected. Their duties are, in general, to establish parks, to provide maintenance for them, and to hire personnel. The City Council budgets the money to be expended by the Park Commission. Included in this budget is an amount to cover the total cost of the YCC camp. The city is then reimbursed by the State and Federal grants for 70% of the project costs. The Park Commission controls the disbursement of the budget by approving all bills, including those bills for the YCC Camp, and has warrants drawn for payment. It also sets the salaries for the YCC staff, including that of the camp director. The camp director orders material and the like through the Park Supervisor, who, in turn, is supervised by the Park Commission. In short, the Park Commission has supervisory power over the YCC Camp. Each Park Commissioner receives an annual salary of \$240.00 for twelve meetings. The camp director is a city employee, and is covered by certain city benefits.

Applying these facts to the several criteria set forth in Anderson, we believe that the YCC director is subordinate to the Park Commission, and subject, in some degree, to its revisory

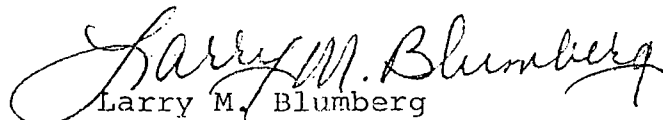
power. We also feel that it would be against public policy for the same person to hold both positions. Although the issue of conflict of interest is not dispositive of the central issue, the following language from Wilson v. Iowa City, 165 N.W.2d 813, 822 (Iowa 1969) is applicable:

These rules, [conflict of interest] whether common law or statutory, are based on moral principals and public policy. They demand complete loyalty to the public and seek to avoid subjecting a public servant to the difficult and often insoluble, task of deciding between public duty and private advantage.

It is not necessary that the advantage be a financial one. Neither is it required that there be a showing the official sought or gained such a result. It is the potential for conflict of interest which the law desires to avoid. [Emphasis added]

Accordingly, we are of the opinion that the above facts could fall within the prescriptions of the law on incompatibility. If so, by accepting the latter position the former is ipso facto vacated. See State ex rel. LeBuhn v. White, supra.

Very truly yours,


Larry M. Blumberg
Assistant Attorney General

LMB:jkt

SCHOOLS: Art. III, §31, Constitution of Iowa. §§274.1, 274.7, 279.8, Code of Iowa (1979). Commercial photographers on school grounds. The school board of directors may permit commercial photographers to photograph students on school property. (Condon to Menke, State Representative, 4/27/79) #79-4-32(CL)

Honorable Lester D. Menke
State Representative
State Capitol
L O C A L

April 27, 1979

Dear Representative Menke:

This letter is in response to your request for an opinion regarding commercial photographs which are taken and sold in Iowa public schools. You expressed the following concern:

The schools do use many of the pictures for a year book. I have concern with the use of the building as a studio, having pupils take pictures home for purchase by their parents and disrupting the schools operations by taking the pictures during school hours.

Section 274.1, Code of Iowa, (1979), gives to the school district the following power:

Each school district shall continue a body politic as a school corporation, unless changed as provided by law, and as such may sue and be sued, hold property, and exercise all the powers granted by law, and shall have exclusive jurisdiction in all school matters over the territory therein contained.

The board of directors conducts the affairs of the school district pursuant to Section 274.7. The board's powers and duties are set forth in Chapter 279, including the following

language of Section 279.8:

The board shall make rules for its own government and that of the directors, officers, teachers and pupils, and for the care of the schoolhouse, grounds, and property of the school corporation, and aid in the enforcement of the same, and require the performance of duties by said persons imposed by law and the rules.

The Iowa Supreme Court has ruled that a school board of directors has broad discretion in the management of school affairs. In Kinzer v. Directors of Independent School District of Marion, 129 Iowa 441, 105 N.W. 686, 687 (1906), the Supreme Court concluded as follows:

. . . that the court should hesitate to interfere with the regularly constituted school authorities and their management of the scholars which are placed under their charge. The Legislature is expressly authorized to provide for the educational interests of the state, in such manner as seem best and proper. See article 9 of section 15 of the state Constitution. And in the exercise of this power school districts have been created, authorized to have exclusive jurisdiction in all school matters over their respective territories. Code, Section 2743. It is further provided that the affairs of each school corporation shall be conducted by a board of directors. . . . And the directors are, . . . expressly authorized to make and enforce rules. It was plainly intended, therefore, that the management of school affairs should be left to the discretion of the board of directors, and not to the courts, and we ought not to interfere with the exercise of discretion on the part of a school board as to what is a reasonable and necessary rule, except in a plain case of exceeding the power conferred.

Another Iowa case involved an attempt to enjoin a school board from conducting a savings program. The Iowa Supreme Court refused to enjoin an activity that the school board had decided would benefit the students, stating:

Under our statutes, school districts are corporate bodies and have "exclusive jurisdiction in all school matters" in the territory covered by them, and are authorized to "exercise all the powers granted by law." . . . [I]f the action of the board is within the power conferred upon it by the legislature and pertains to a matter in which the board is vested with authority to act, then the courts cannot review the action of the board and call in question the manner of the exercising of the discretion of the board in regard to a subject-matter over which it has jurisdiction.

Security National Bank of Mason City v. Bagley, 202 Iowa 701, 210 N.W. 947, 949 (1926).

In a more recent case, Board of Dir. of Ind. School District of Waterloo v. Green, 147 N.W.2d 854, 857 (Iowa 1967), the Iowa Supreme Court described the authority of the school board as follows:

The operation of the public schools of this state under and in accord with applicable statutes is clearly vested in the duly elected directors of the various local school boards. This includes authority to adopt rules for its own government and that of all its pupils. School boards are charged by law with the important and at times difficult task of operating our public schools. In so doing they are permitted to formulate rules for their own government and that of all pupils.

The school board of directors is entrusted by the legislature with the responsibility of conducting the school's affairs. This grant places within the power and jurisdiction of the school board the determination of whether or not to engage a commercial photographer to take pictures of students at the school. Of course, the school board could not so contract with the photographer if the activity was prohibited.

Article III (Section 31) of the Iowa Constitution prohibits the use of public property for a private purpose. The Iowa Supreme Court has said that the term "public purpose" cannot be defined precisely, but in Dickinson v. Porter, 240 Iowa 393, 35 N.W.2d 66 (1948), the Court did rule that the term was not to be construed narrowly.

In Love v. City of Des Moines, 210 Iowa 90, 230 N.W. 373, 376 (1930), a claim by a contractor against the city council was denied. The contractor sought payment for the loss he incurred when his work for the city was interrupted by the federal government's request for use of his equipment in the construction of Camp Dodge. The city had paid in full the contractor for the work he did for the city. The Court rejected his claim, concluding that payment would be "a private gift without public benefit in any sense."

Therefore, if allowing the commercial photographer to take pictures at the school is solely for the photographer's benefit, without any public benefit, it would be contrary to the constitutional provision. As observed in Dickinson v. Porter, *supra*, courts do not construe narrowly "public purpose". The courts have found a public purpose in such activities as the appropriation of public funds for a university president's inauguration ceremony in Board of Regents of University, Etc. v. Frohmiller, 208 P.2d 833 (Ariz. 1949), and for artificial flowers to decorate legislative chambers in Schwartz v. Jordan, 311 P.2d 845 (Ariz. 1957). Although these appropriations may not be those which would be accepted without question as a public purpose, as would be funds for public schools, airports, public highways, etc., the courts have found that the activities benefit the public.

Similarly, public benefit can be found in the situation you have posed regarding photographers taking pictures of students on school property. As you have pointed out, these pictures are used for school yearbooks. These pictures are exchanged by students to become keepsakes of school days. And, the activity provides parents with an opportunity to have their children's picture taken without having to make arrangements and transport the children to a photographer's studio.

Moreover, courts look at the overall use of the property to determine if it is being used for public, rather than private, purpose. In Bazell v. City of Cincinnati, 233 N.E.2d 864 (Ohio 1968), an injunction was sought to prevent the city from erecting and maintaining a stadium because the stadium allegedly was "designed to peculiarly benefit a few individuals rather than the public in general." The Ohio Constitution requires public property to be used exclusively for a public purpose. The Ohio Supreme Court ruled that the construction of the stadium, the provision of parking space adjacent to the stadium, and the sale of advertising space on the scoreboard were all for public purpose. Regarding the advertising, the Court stated at p. 870:

As to the sale of advertising space on the scoreboard, this obviously will be incidental to the to the operation of the stadium and would not prevent the proposed operation of the stadium by Cincinnati from being authorized as involving generally a public purpose. See, Carney v. Ohio Commission (1958), 167 Ohio St. 273, 147 N.E.2d 857 (holding "all . . . property . . . comprising . . . Ohio Turnpike . . . and all concomitants connected with its . . . operation . . . including the parts of plazas leased or rented to private persons and where food or drink are supplied and gasoline, oil and motor accessories are furnished . . . although at a profit . . . used exclusively for a public purpose.") (Emphasis added.) See also City of Toledo v. Jenkins (1944), 143 Ohio St. 141, 54 N.E.2d 656.

The Florida Supreme Court reached a similar result in Dade County v. Pan American World Airways, Inc., 257 So.2d 505 (Florida 1973). The county sought to collect taxes from the defendant on the portion of the public airport it leased. Public property used exclusively for a public purpose was exempt from the tax. The Court held that the public property leased by the airline was tax-exempt because it was an incidental part of the overall airport which was used for a public purpose. The Court stated at p. 512:

Under our decisions "public purposes" are projects primarily and predominantly for the public benefit even though there

may be some incidental private purpose, too. In this connection, it must be kept in mind that upon concluding that the project meets the test of a "public purpose," such an incidental private purpose as here necessarily loses its identity as a private matter and is merged within the term "public purpose." In other words, "public purpose" is a legal concept encompassing inconsequential private purposes.

Applying this doctrine, use of school property by a photographer is not inconsistent with the Iowa Constitution because use of public property for a public school is a public purpose and the photography sessions would be merely a use for a private purpose incidental to the use for a public purpose. Of course, the photographing of the school children may be a public purpose in itself. Either way, the requirement of Article III (Section 31) of the Iowa Constitution is met. Therefore, we conclude that it is within the power of the school board to permit a commercial photographer to take pictures of students on school property.

Very truly yours,

Marie A. Condon
ab

Marie A. Condon
Assistant Attorney General

MAC:jkt

COURTS: Witness Fees for Police Officers — \$622.71, the Code, 1979. Where a police officer is paid by the city for testifying during off duty hours, the officer is not entitled to witness fees. (Blumberg to Miller, State Senator, 4/26/79) #79-4-30 (L)

The Honorable Charles Miller
State Senator
LOCAL

April 26, 1979

Dear Senator Miller:

You have requested an opinion on witness fees for police officers. The collective bargaining agreement between the police officers and the city in question requires the city to pay the officers for testifying during off-duty hours. You ask whether the officers can also receive witness fees.

Section 622.71, the Code, 1979, provides:

No peace officer who receives a regular salary, or any other public official shall, in any case, receive fees as a witness for testifying in regard to any matter coming to his knowledge in the discharge of his official duties in such case in a court in the county of his residence, except police officers who are called as witnesses when not on duty.

We can find no court decisions on this section. Previous opinions from this office concerned only "other public officials," not police officers, who are precluded from receiving witness fees in all circumstances concerning their official duties. See 1936 OAG 419; 1942 OAG 43, 1942 OAG 135, and 1964 OAG 109. We, however, are now concerned with the last part of that section:

"except police officers who are called as witnesses when not on duty."

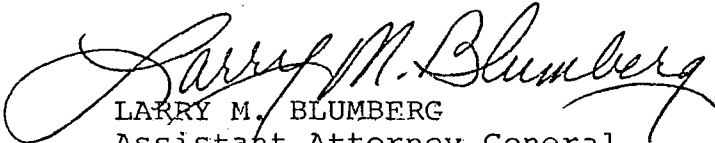
The key is what is meant by "on duty". There are many cases which concern that phrase and either concern the Hours of Service of Railway Employees Act, under Federal law, or interpretations of insurance policies. The questions in both dealt with meal and rest times and the physical or bodily presence in addition to a certain amount of freedom for the performance of duties. See, Missouri, K. & T. Ry. Co. v. United States, 231 U.S. 112, 58 L.Ed. 144, 34 S.Ct. 26 (1913); United States v. Mississippi Export Railroad Company, 321 F.2d 583 (5th Cir. 1963); United States v. Detroit, T. & I. R. Co., 315 F.2d 802 (1963); United States v. New York N.H. & H.R. Co., 274 F. 321 (1st Cir. 1921); United States v. Chicago & N.W. Ry. Co., 219 F. 342 (W.D. Mich. 1914); United States v. Denver & R. G. R. Co., 197 F. 629 (D.N.M. 1912); United States v. Chicago, M. & P.S. Ry. Co., 195 F. 783 (W.D. Wash. 1912); United States v. Illinois Cent. R. Co., 180 F. 630 (N.D. Iowa 1910); Boesky Bros. Twelfth St. Corp. v. United States F. & G. Co., 267 Mich. 628, 255 N.W. 307 (1934); and, Brown v. Pere Marquette Ry. Co., 237 Mich. 530, 213 N.W. 179 (1927). With the exception of the Illinois Central case, there was no discussion regarding payment of wages. In that case, the court held that the employee in question was on duty during a 30-minute period before his normal working hours when he was performing tasks. The court stated that it made no difference whether he was paid for that time. We do not believe, however, that such a statement about pay can be used to indicate that payment is not a criterion for determining when a person is on duty.

The obvious purpose of the exception for police officers not on duty within \$622.71 was to provide them compensation for testimony and court time on their days off. Police officers, as part of their official duties, testify in court on matters of which they have personal knowledge. These include criminal investigations, the evidence of which is necessary, and also traffic investigations, among other things. Since testimony is so often given during their normal working days, the collection of witness fees would result in the police officers being paid twice for the duty. It is not the same when the officers are not on duty.

The collective bargaining agreement in question changes this. It provides that an officer required to testify during off-duty hours shall be paid a minimum of one hour's pay at the overtime rate. In other words, such testimony is considered overtime. The fact that the officer is paid a wage for a duty (testimony) is an indication that the officer is considered to be on duty during that time period. Therefore, witness fees would not be available. To hold otherwise would permit the officer to be paid twice for the same duty.

Accordingly, we are of the opinion that where a police officer is paid by the city for testifying during off-duty hours at an overtime rate, the officer is not entitled to witness fees. We need not reach your second question.

Very truly yours,


LARRY M. BLUMBERG
Assistant Attorney General

LMB:pml

ADMINISTRATIVE LAW: Practice of Chiropractic. §§17A.4, 17A.8, 17A.19, 151.1, Code of Iowa (1979). Proposed rules 141.1(6) and 141.1(17), published in 1 Iowa Administrative Bulletin, No. 19 (21 Feb. 1979), exceed the rule-making authority of the Board of Chiropractic Examiners (Schantz to Iowa Administrative Rules Review Committee, 4/26/79) #79-4-29(L)

April 26, 1979

Iowa Administrative Rules Review Committee
State Capitol

LOCAL

Dear Senators and Representatives:

You have requested an opinion of the Attorney General concerning the legality of certain administrative rules proposed by the Board of Chiropractic Examiners which relate to the practice of chiropractic.¹

1 You should be advised that this office is currently representing the State of Iowa in actions brought by the Department of Health against two chiropractors which involve issues related in a broad sense to the issues presented by this opinion. Ordinarily, it will be our policy to refrain from issuing opinions on particular questions pending in litigation, especially if this office is a party. Here, however, the precise issues being litigated are not presented by your request and, of course, they arise in a quite different context. Nonetheless, we feel you should be made aware of our other involvement.

These proposed rules appear under notice in 1 Iowa Administrative Bulletin, No. 19 (21 Feb. 1979), and provide in pertinent part:

141.1(6) "the practice of chiropractic" shall mean holding oneself out as being able to diagnose, treat or prescribe for human disease, pain, injury, deformity or physical or mental condition, and who shall either offer or undertake, by means or methods founded on a scientific chiropractic basis, diagnose, treat or prescribe for human disease, pain, injury or deformity or physical or mental condition.

141.1(17) "Chiropractic practice Acts" shall mean chapters 135, 148, 148A, 147, 150, 150A, 151, Code of Iowa.

Your question is whether these provisions exceed the statutory rule-making authority granted the agency. Under the judicial review provisions of the Iowa Administrative Procedure Act, agency action may be challenged on the ground that it is "in excess of the statutory authority of the agency." Section 17A.19(8)(b), Code of Iowa (1979). This section reflects the general principle that administrative rules must be reasonable and cannot conflict with statutory provisions. If a rule is inconsistent with a legislative enactment, the rule is "in excess of the statutory authority of the agency." Schmitt v. Iowa Dept. of Social Services, 263 N.W.2d 737, 744-46 (Iowa 1978); Iowa Dept. of Revenue v. Iowa Merit Employment Comm'n., 243 N.W.2d 610, 615-16 (Iowa 1976).

Rule-making authority with respect to the examining boards is provided by §147.76, Code of Iowa (1979):

"The examining boards of the various professions shall promulgate all necessary and proper rules to implement and interpret the provisions of this chapter and chapters 148, 148A, 148B, 149, 150, 151, 152, 153, 154, 154A, 154B, 155 and 156."

What is conferred is the authority to "interpret" and to "implement" various statutory provisions. "Interpret" is defined in Webster's Third New International Dictionary (1961), as follows: "to explain or tell the meaning of: to translate into intelligible or familiar language or terms." "Implement" is defined in the same work as follows: "to carry out: accomplish, fulfill . . . ; esp. to give practical effect to and ensure of actual fulfillment by concrete measures. . . . Ordinarily, an "interpretative rule" would consist

of definitions of statutory terms designed to make them more specific or precise. In our judgment, it would be an unusual practice for an agency to issue an interpretative rule defining terms that are already defined by statute, except insofar as the terms of the statutory definitions themselves require additional explication. Thus, the specific rule-making authority granted the Board of Chiropractic Examiners is not at all extraordinary and is subject to the general principle that rules must be consistent and not in conflict with relevant statutory provisions.

Proposed rule 141.1(6) is a definition of "the practice of chiropractic." Section 151.1, Code of Iowa (1979), also defines the practice of chiropractic, in the following terms:

"Chiropractic" defined. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of chiropractic:

1. Persons publicly professing to be chiropractors or public professing to assume the duties incident to the practice of chiropractic.
2. Persons who treat human ailments by the adjustment of the musculo-skeletal structures, primarily spinal adjustments by hand, or by other procedures incidental to said adjustments limited to heat, cold, exercise and supports, the principles of which chiropractors are subject to examination under the provisions of section 151.3, but not as independent therapeutic means."

Your first question, then, becomes whether the rule definition is consistent with the statutory definition of "the practice of chiropractic."

Subsection (1) of §151.1 fulfills only a formal requirement and has no substantive meaning for this purpose. It is included in the definition to permit invocation of the provisions of §147.2, forbidding the practice of a licensed profession without a license. Thus, the issue is whether proposed rule 141.1(6) is consistent with §151.1(2).

A brief recitation of the history of §151.1(2) will provide context for our analysis. For many years, "chiropractic" was defined

in §151.1 simply as "Persons who treat human ailments by the adjustment by hand of the articulations of the spine or by other incidental adjustment." This provision was interpreted in the leading case of State v. Boston, 226 Iowa 429, 278 N.W. 291 (1939). Dr. Boston was licensed to practice chiropractic but not medicine. The State of Iowa sought an injunction against certain practices he employed which were claimed to be beyond the treatments he was authorized to administer. The trial court enjoined Dr. Boston from using mechanical or electrical means or modalities in the practice of chiropractic. The Supreme Court affirmed and, in addition, forbade Dr. Boston advising his patients with respect to diet. In support of its conclusion, the Court articulated its basic approach to construction of the statute:

"In this statute is found the only source of defendant's authority to treat human ailments. Likewise therein is a legislative definition of what such treating of human ailments consists, i.e., adjustment by hand of the articulations of the spine or other incidental adjustments. When defendant professed to use and used modalities other than those defined in §[151.1], as curative means or methods, the conclusion seems avoidable that he was attempting to function outside the restricted field of endeavor to which the Legislature has limited the practice of chiropractic."

278 N.W. at 292.

On rehearing, the Court elaborated:

"The practice of medicine and surgery is the practice of the healing art, and, unless some restriction be placed thereon by the Legislature, the whole field of medicine and surgery is open to the practitioner. On the other hand, the practice of chiropractic, although recognized as a branch of the healing art, is throughout held and considered to be only one form of the practice, within well-defined limits, of the science of healing, as such practice is defined by Code, §2555. . . . We believe that medicine and surgery comprehend the whole field of medicine and materia medica; and that it was the intent of the legislature that chiropractic should be merely a form of treatment, and that it must be laid down by law. Whether or not the limitations are proper or too restrictive is not for this court to say."

284 N.W. 243, 244.

In 1974, the General Assembly amended Chapter 151, broadening the definition of chiropractic. The Supreme Court of Iowa explained its understanding of the purpose and reach of the new definition in Dain v. Pawlewski, 253 N.W.2d 582, 583 (Iowa 1977):

"Two schools of thought appear to exist in Iowa as to the scope of chiropractic, represented respectively by the Chiropractic Society of Iowa and the Iowa Chiropractic Society. The former society holds the traditional view that chiropractic is limited to the location and correction, by spinal or other incidental adjustments by hand, of subluxated vertebrae which may be impinging upon the normal transmission of nerves and affecting the normal functions of tissues. The latter society would add the use of certain 'other modalities' -- heat, cold, exercise, and supports -- not as independent therapy but as procedures incidental to the adjustments. As the Iowa law stood at the beginning of 1974, the practice of chiropractic was limited to the more restricted view espoused by the former society, Chiropractic Society of Iowa: Code 1973, §161.1(2). The other modalities constituted part of physical therapy, licensed under chapter 148A of the Code.

More and more Iowa Practitioners of chiropractic, however, began to use the other modalities incidental to the adjustments. A survey answered by 50% to 60% of the practitioners disclosed that 90% of them did so. Practitioners using the other modalities feared prosecution for infringing upon physical therapy.

In 1974 the legislature passed an act allowing chiropractic practitioners to use the other modalities under certain circumstances."

By way of additional background, we note that proposed Rule 141.1(6) is quite similar to a definition of the practice of medicine and surgery adopted by the Board of Medical Examiners:

"135.1(6) 'The practice of medicine and surgery' shall mean holding one's self out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical or mental condition and who shall either offer or undertake, by any means or methods, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical or mental condition."

This rule was upheld in a previous opinion of this office. Blumberg to Monroe, State Representative, #78-12-32. Although characterized as "unnecessary and mere surplusage," the definition of the "practice of medicine and surgery" was viewed as consistent with judicial interpretations of the statutory definition (§148.1, 1977 Code of Iowa) and merely somewhat more specific. If the same can be said of proposed rule 141.1(6), it should also be upheld.

We conclude that it cannot be upheld. In general, by borrowing from an approach to the definition of "medicine and surgery," the Board is transplanting from a practice that in view of the Supreme Court of Iowa, "encompasses all the healing arts," subject to specific limitations, to a practice that historically has been more narrowly limited by the legislature.

The definition essentially gives to the chiropractor the entire healing art -- diagnose, treat or prescribe for human disease, pain, injury, deformity or physical or mental condition -- modified only by reference to "means or methods founded on a scientific chiropractic basis." That reference is a less rather than more specific limitation than is contained in §161.1(2). If it is intended to mean the same thing it is merely surplusage. However, the notion of a "scientific chiropractic basis" suggests an evolving technology and thus a definition of the practice of chiropractic which would expand as the scientific basis expands, with the individual practitioner, or, perhaps, the Board of Chiropractic Examiners, determining whether a scientific basis now exists for a mode of diagnosis or treatment. Such an evolutionary definition in effect exists for the practice of medicine. One might well argue that a similar approach should be adopted for the practice of chiropractic. But that argument must be addressed to the legislature. As previously noted, chapter 151 continues to reflect the traditional approach of limiting the practice of chiropractic to expressly authorized treatment modalities and those other practices necessarily implied by the express authorization.

That approach cannot be modified by rule. In our opinion, because proposed rule 141.1(6) may be interpreted as reflecting an evolutionary or elastic approach to the definition of the practice of chiropractic, it is quite likely that the courts would hold it "in excess of statutory authority."

In holding this proposed definition beyond the statutory authority of the Board, we do not wish to be understood as suggesting there is no room for legitimate interpretative rule-making here. We acknowledge that the statutory definition of chiropractic is in certain respects imprecise and incomplete.

Within the outer limits set by the statutory approach to chiropractic and the Boston decision, the Board could by rule provide useful guidance to practitioners.

Your second question relates to proposed rule 141.1(17), which provides that "'chiropractic practice acts' shall mean chapters 135, 148, 148A, 147, 150, 150A, 151, Code of Iowa.'" The reason for including this definition is somewhat obscure; the terms "chiropractic practice acts," in the plural, do not appear elsewhere in the proposed rules. Apparently, the Board included in its definition of "chiropractic practice acts," every chapter in which the terms "chiropractor" or "chiropractic" is employed. Chapter 135 establishes the State Department of Health. Subsection 13 of §135.11, Powers and Duties, obligates the Commissioner of Health to enforce the law relative to the "Practice of Certain Professions Affecting the Public Health," Title VIII. Chapter 147, General Provisions Regulating Practice Professions, forbids practicing a profession without an appropriate license (§147.2) and establishes the various examining boards (§§147.12, 147.13, 147.14.8). Chapters 148, 148A, 150 and 150A, relate to the practice of medicine, physical therapy, osteopathy and osteopathic medicine and surgery respectively. In each case, a provision of those chapters mentions chiropractors simply to make clear that, despite some overlap in treatment modalities, a chiropractor need not acquire an additional license so long as the modalities are also included within the practice of chiropractic.

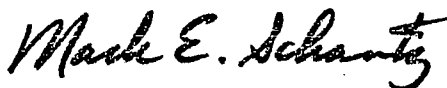
At this point we see only a potential problem with the definition of "chiropractic practice acts." That problem relates to the scope of the rule-making authority of the Board of Chiropractic Examiners. Section 147.76 plainly does not authorize any examining board to issue rules interpreting or implementing Chapter 135. Any such rules should be issued under the imprimatur of the Commissioner of Public Health. Section 135.11(15). Moreover, we believe the rule-making authority granted by §147.76 should not be interpreted to afford general rule-making authority, say, to the board of physical therapy examiners over the practice of osteopathy. The legislature could not have intended to create a situation in which a member of a profession is potentially subject to conflicting rules. Thus, although under present circumstances it may appear hyper-technical, we conclude that proposed rule 146.1(17) is in excess of statutory authority. If a definition of "chiropractic practice acts," is needed at all, it should not refer to Chapter 135 and should qualify any reference to chapters other than 151 by language such as "and those provisions of chapters 147, 148, 148A, 150 and 150A which incorporate by explicit or implicit reference the provisions of chapter 151."

We assume this opinion request is made in aid of action contemplated under §17A.8 of the Iowa Administrative Procedures Act. Based upon this opinion, or otherwise on grounds provided by law, the Administrative Rules Review Committee may file a written objection to the rule pursuant to §17A.4(4)(a), prior to the effective date of the rule. The effect of such an objection is to cast upon the agency, in any proceeding for judicial review or enforcement of the rule, the burden of proving that the rule is not beyond the authority delegated to the agency. The Supreme Court has required that such objections must be sufficiently specific to apprise the agency of the nature and scope of the objection. Schmitt v. Iowa Dept. of Social Services, 263 N.W.2d 739, 743-44 (Iowa 1978). In this instance, the objection would be sufficiently specific if it stated that the rule was beyond the statutory authority of the agency and incorporated this opinion by reference.

In addition, or in the alternative, the Committee may refer a rule to the Speaker of the House and the President of the Senate, with or without a recommendation that the rule be overcome by statute. §§17A.8(7) and 17A.8(8). Upon a two-thirds vote of its members, the Committee may delay the effective date for 45 days while the General Assembly is in session, or, if the rule is delayed within 21 days preceding the adoption of a resolution of sine die adjournment of a regular session, for a 45-day period which shall begin to run upon the convening of the next regular session of the General Assembly. §17A.8(9), Code of Iowa (1979). A rule whose effective date has been delayed must be referred to the Speaker of the House and the President of the Senate, who must, in turn, refer the rule to the appropriate standing committees. If, at the expiration of the period of delay, the rule has not been disapproved by a joint resolution of the General Assembly approved by the Governor, the rule shall become effective. Id.

In summary, it is our opinion that proposed rules 141.1(6) and 141.1(17), published in 1 Iowa Administrative Bulletin, No. 19 (21 Feb. 1979), are subject to challenge on the ground that they exceed the rule-making authority of the Board of Chiropractic Examiners. The Committee may, if it chooses, invoke the procedures of §§17A.4 or 17A.8.

Sincerely,



Mark E. Schantz
Solicitor General

COST OF TREATMENT OF SUBSTANCE ABUSER: §§ 125.2(11), 125.47
125.33, 204.409(2); 321.281, Code of Iowa, 1979. A county
is not obligated to pay for treatment of a substance abuser
who has not established residence within the county even
though a court ordered the substance abuse treatment as part
of a sentence in a criminal case. The Department of Sub-
stance Abuse should pay for the cost of care in this event.
(Robinson to Robbins, 4/24/79) #79-4-24(L)

Mr. Jim P. Robbins
Boone County Attorney
Boone County Courthouse
Boone, Iowa 50036

April 24, 1979

Dear Mr. Robbins:

This is written in response to your request for an
Attorney General's Opinion with respect to the following
questions concerning the obligation of Boone County for the
cost of care and treatment of an individual at an alcoholic
treatment center:

1. Is Boone County obligated for treatment of
the defendant at Powell III Center in Des
Moines under Chapter 125 of the Code, and if
so, can the money be paid from the county
mental health and institution fund?
2. If the county is not obligated under Chapter
125, is the county obligated under provi-
sions of the Court Order, and if so, does the
money come from the county mental health and
institutions fund, the general fund, or the
court expense fund?

In our opinion, the county is not obligated to pay for
treatment of a substance abuser who has not established
residence within the county even though a court ordered the
substance abuse treatment as part of the sentence in a
criminal case.

The pertinent facts that you have set out for us are as
follows:

The individual involved was charged in Boone County
with forgery, in violation of § 718.1 of the Code, and on
September 26, 1977, the individual was sentenced to a term
of 120 days in the Story County Jail. The Court Order
sentencing the individual contained the following:

On the 90th day of his incarceration, the defendant shall be released to the Powell III Center in Des Moines, Iowa, for alcoholic treatment and that if defendant successfully completes the Powell III program, the remaining thirty days of his sentence shall be suspended.

At the expiration of the 90th day, the individual did go to Powell III Center in Des Moines as outlined in the above-quoted court order. It further appears in the information that you have furnished us that this individual has not resided in Iowa for over one year but has for at least part of this time been a resident of the State of Minnesota. In any event, in the information you have furnished us, it appears that this individual's last Iowa address was not in Boone County, Iowa, but in Story County from approximately 1974 until sometime in 1976.

We have considered § 321.281, Code of Iowa, second unnumbered paragraph pertaining to operating a vehicle while intoxicated or drugged, and § 204.409(2) Code of Iowa, pertaining to the uniform controlled substance (Drugs) act. These sections provide for court ordered commitments to the same or similar facilities but under conditions directly related to those programs. The facts you presented fall within the broader area of Chapter 125.

The provisions of Chapter 125, Code of Iowa, 1977, were extensively amended by Chapter 74, Acts of the Sixty-seventh General Assembly, first session. These amendments were in effect at all times material to your questions. For clarity, we shall refer to the 1979 Code which reflects these amendments. Section 125.33 provides that an individual may apply for voluntary treatment for substantive abuse at a facility providing this care and treatment. We recognize that §§ 125.33(1) and (2) do not provide for court commitments. This does not, however, in our opinion, preclude the application of Chapter 125 to the facts you present. Pursuant to the information which you have provided us, it appears that this individual was not, at the time of his admittance to Powell III, a resident of the state of Iowa.

Section 125.2(11) provides in part:

11. "Residence" means the place where a person resides. For the purpose of determining which Iowa county, if any, is liable pursuant to this chapter for payments of costs attributable to its residents, the following rules shall apply:

a. If a person claims an Iowa homestead, then the person's residence shall be in the county where that homestead is claimed, irrespective of any other factors.

b. If paragraph "a" does not apply, and the person continuously has been provided or has maintained living quarters within any county of this state for a period of not less than one year, whether or not at the same location within that county, then the person's residence shall be in that county, irrespective of other factors. However, this paragraph shall not apply to unemancipated persons under eighteen years of age who are wards of this state.

c. If paragraphs "a" and "b" do not apply, ...then the person shall be unclassified with respect to county of residence, and payment of all costs shall be made by the department as provided in this chapter. ***

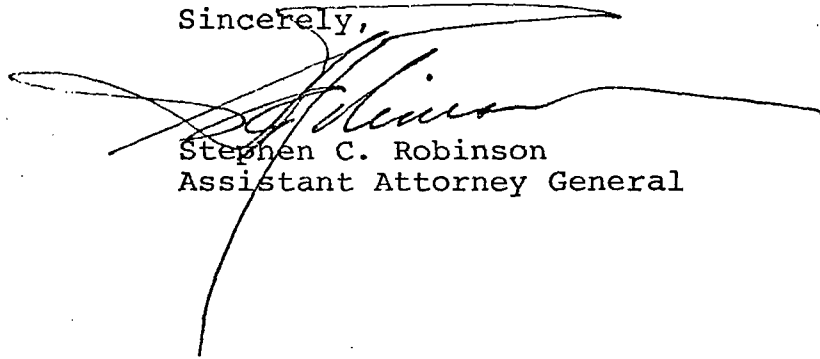
We assume that paragraph "a" pertaining to homesteads does not apply. Similarly paragraph "b" does not apply because the person did not provide or maintain living quarters within the county for a period of not less than a year prior to admission to Powell III. Thus, paragraph "c" applies with the payment of all costs by the Department of Substance Abuse as provided in the last two sentences of § 125.47, Code of Iowa, 1979, as follows:

...If the director finds that the residence of a substance abuser at the time of admission was in another state or country or that the person is unclassified with respect to residence, then the department shall pay for that portion of the patient's care, maintenance, and treatment that the patient's county of residence would have been liable to pay. For purposes of this section, a "facility" does not include a mental health institute under the control of the department of social services.

Mr. Jim Robbins
Page 4

Thus, if the substance abuser is not a resident of the county at the time of admission, the Department of Substance Abuse should pay for the cost of care.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen C. Robinson", is written over the typed name and title. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Stephen C. Robinson
Assistant Attorney General

SCR/tjb

STATE OFFICERS AND DEPARTMENTS: Board of Nursing — Advanced Education Programs — §152.5, the Code, 1979. The Board only has authority to approve programs granting the initial nursing degree and advanced programs designed for nurses or which grant an advanced nursing degree. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 4/20/79) #79-4-22(L)

April 20, 1979

Mrs. Lynne M. Illes, R.N.
Executive Director
Iowa Board of Nursing
L O C A L

Dear Mrs. Illes:

You requested an opinion from this office regarding the Board's power to approve nursing education programs pursuant to §152.5, the Code, 1979. The College of St. Francis in Joliet, Illinois, has set up a curriculum resulting in a Health Art's Major. Currently, the college is advertising that the curriculum is designed to provide additional education for nurses, as well as others. The advertisements and brochures indicate that the degree is a Bachelor of Science Degree, and is not an equivalent to any nursing degree. In other words, the program appears to be one of general education, not one that confers a nursing degree. You ask whether the Board, pursuant to §152.5, has the authority to approve or pass upon the program.

Section 152.5 provides:

1. All programs preparing a person to be a registered nurse or a licensed practical nurse shall be approved by the board. The board shall not recognize a program unless it:
 - a. Is of recognized standing.
 - b. Has provisions for adequate physical and clinical facilities and other resources with which to conduct a sound education program.

c. Requires, for graduation of a registered nurse applicant, the completion of at least a two academic year course of study or its equivalent which is integrated in theory and practice as prescribed by the board.

d. Requires, for graduation of a licensed practical nurse applicant, the completion of at least an academic year course of study or its equivalent in theory and practice as prescribed by the board.

2. All advanced formal academic nursing education programs shall also be approved by the board.

Subsection one authorizes the Board to approve all programs preparing a person to be a nurse. Subsection two authorizes the Board to approve all advanced formal academic nursing education programs.

We issued an opinion on this subject matter pursuant to §152.4, the Code, 1973. See, 1974 O.A.G. 25. However, that section, which now is §152.5, was substantially different. In any event, we held that the Board had authority to approve programs granting baccalaureate or master degrees in nursing. The change in wording between §152.4, the Code, 1973, and §152.5, the Code, 1979, does not result in a different interpretation. However, the language now is more specific, in that it refers to, in §152.5(2), to advanced formal nursing education programs. We interpret this wording to mean some type of advanced program that is either designed for nurses or grants an advanced nursing degree.


Under the present facts, such is not apparent. The program in question is not, pursuant to the literature, designed for nursing education. That is, it is designed to provide a general college education, not one of nursing. Nor, will any type of nursing degree be granted. It is not an advanced formal academic nursing education program, and therefore, the Board has no authority to approve it.

Mrs. Lynne M. Illes, R.N.

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Accordingly, we are of the opinion that the Board of Nursing only has authority to approve programs granting the initial nursing degree and advanced programs designed for nurses or which grant an advanced nursing degree.

Very truly yours,


LARRY M. BLUMBERG
Assistant Attorney General

LMB:pml

MUNICIPALITIES: Rural Subdivisions — §§ 306.3(1), 306.21, 409.4, 409.5, 409.14, and 558.65, the Code, 1979. Cities have authority to impose requirements on certain rural subdivisions pursuant to §306.21, Chapter 409 and §558.65, the Code. (Blumberg to Barry, Assistant Muscatine County Attorney, 4/20/79) #79-4-21(L)

April 20, 1979

Mr. Edmund D. Barry
Assistant Muscatine County Attorney
112 East 3rd Street
West Liberty, Iowa 52776

Dear Mr. Barry:

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

"1. Does a city or incorporated town have jurisdiction pursuant to Chapter 306.21 of the Code of Iowa to impose requirements on road plans upon subdivisions located outside the city or town limits when the county has adopted a zoning ordinance and a subdivision ordinance imposing requirements and establishing a mechanism for review and approval of road plans in subdivisions within the county.

"2. Does a city or unincorporated town have jurisdiction pursuant to Chapter 409.14 of the Code of Iowa to impose requirements for plats purporting to layout or subdivide any tract of land located outside the city or town limits when the county has adopted a zoning ordinance and a subdivision ordinance imposing requirements and establishing a mechanism for review and approval of plats purporting to layout or subdivide any tract of land within the county.

"3. Does a city or unincorporated town have jurisdiction pursuant to Chapter 558.65 of the Code of Iowa to impose requirements for conveyances or plats of subdivisions of any land located outside the city or town limits but adjacent to said city or town when the county has adopted a zoning ordinance and a subdivision ordinance imposing requirements and establishing a mechanism for review and approval of conveyances or plats of additions or subdivisions of any land within the county.

Your questions regard the powers and authority of municipalities over subdivisions outside the city limits when the county has adopted zoning and subdivision ordinances.

Chapter 306, the Code, 1979, pertains to the establishment, alteration and vacation of highways. Section 306.21 provides:

All road plans, plats and field notes and true and accurate diagrams of water, sewage and electric power lines for rural subdivisions shall be filed with and recorded by the county auditor and approved by the board of supervisors and the county engineer before the subdivision is laid out and platted, and if any proposed rural subdivision is within one mile of the corporate limits of any city such road plans shall also be approved by the city engineer or council of the adjoining municipality. Such plans shall be clearly designated as "completed", "partially completed" or "proposed" with a statement of the portion completed and the expected date of full completion. In the event such road plans are not approved as herein provided such roads shall not become the part of any road system as defined in this chapter. [Emphasis added]

This statute is quite specific in requiring road plans of subdivisions located within one mile of a city to be submitted to that city for approval, in addition to their submission to the county.

Section 409.14 provides, in pertinent part:

No county recorder shall hereafter file or record, nor permit to be filed or recorded, any plat purporting to lay out or subdivide any tract of land into lots and blocks within any city having a population by the latest federal census of twenty-five thousand or over, or within a city of any size which by ordinance adopts the restrictions of this section or, except as hereinafter provided, within two miles of the limits of such city, unless such plat has been first filed with and approved by the council of such city as provided in section 409.7, after review and recommendation by the city plan commission in cities where such commission exists.

. . .

Said plats shall be examined by such city council, and city plan commission where such exists, with a view to ascertaining whether the same conform to the statutes relating to plats within the city and within the limits prescribed by this section, and whether streets, alleys, boulevards, parks and public places shall conform to the general plat of the city and conduce to an orderly development thereof, and not conflict or interfere with rights of way or extensions of streets or alleys already established, or otherwise interfere with the carrying out of the comprehensive city plan, in case such has been adopted by such city. If such plats shall conform to the statutes of the state and ordinances of such city, and if they shall fall within the general plan for such city and the extensions thereof, regard being had for public streets, alleys, parks, sewer connections, water service, and service of other utilities, then it shall be the duty of said council and commission to endorse their approval upon the plat submitted to it; provided that the city council may require as a condition of approval of such plats that the owner of the land bring all

streets to a grade acceptable to the council,
and comply with such other reasonable require-
ments in regard to installation of public
utilities, or other improvements, as the
council may deem requisite for the protection
of the public interest. [Emphasis added]

This section and sections 409.4 and 409.5 provide that the subdividers may be required to bring their streets to a grade and width acceptable to the city council. The word "street" is synonymous with "road" in §306.3(1).

Section 306.21 concerns the approval of road plans in rural subdivisions by the counties, and in some cases municipalities, before those roads become a part of any road system. Chapter 409 mainly concerns the platting of subdivisions in general. Although section 306.21 does not specifically give municipalities the authority to impose requirements on road plans of rural subdivisions, such authority is implied since approval is required. Chapter 409 does specifically contain such authority. Again, sections 409.4, 409.5 and 409.14, authorize a city to require streets in subdivisions to be brought to an acceptable grade. This is applicable in subdivisions adjacent to cities and in subdivisions within two miles of cities of at least 25,000 population or cities which have adopted the provisions of §409.14. Thus, in rural subdivisions within one mile of a city, the city does have authority to impose requirements for roads in rural subdivisions. For rural subdivisions between one and two miles of a city, approval of the city is not required in order for the roads to become a part of a road system. However, the owners of such subdivisions within two miles of cities with at least 25,000 population or cities that have adopted the provisions of §409.14, may still have to build streets to the specifications of those cities.

Section 409.14 is quite specific in its requirements. For those cities in which this section is applicable, the county recorder is precluded from filing and recording a plat of a subdivision unless the plat has been approved by the city. Under this section, approval of the county is not required, nor is it contemplated. The city's approval is all that is needed. One of the purposes of Chapter 409 is to provide for an orderly system of subdividing property that is consistent with a city's existing plans. Because cities expand and annex property, such a system insures continuity in a city.

Chapter 558 of the Code concerns conveyances. Section 558.65 provides:

No conveyances or plats of additions to any city or subdivision of any lands lying within or adjacent to any city in which streets and alleys and other public grounds are sought to be dedicated to public use, or other conveyances in which streets and alleys are sought to be conveyed to such city, shall be so entered, unless such conveyances, plats, or other instruments have endorsed thereon the approval of the council of such city, the certificates of such approval to be made by the city clerk.

This section is further evidence of an intent that orderly and consistent plats, streets and the like be had for continuity with a city's plans. In this, as well as the other two sections we have considered, there is no mention of a county's zoning or subdivision requirements. It can thus be said that such requirements play no part. In fact, zoning requirements traditionally have not dealt with the grade of streets, plats, subdivisions, and the like. Chapter 358A, the county zoning chapter, does not differ from tradition. Section 358A.3 provides in pertinent part:

Subject to the provisions of sections 358A.1 and 358A.2, the board of supervisors of any county is hereby empowered to regulate and restrict the height, number of structures, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence or other purposes, and to regulate, restrict and prohibit the use for residential purposes of tents, trailers and portable or potentially portable structures;
[Emphasis added]

In summary, then:

1. Streets and roads in rural subdivisions within one mile of a city must have city approval before they can become a part of any road system. This requirement is not necessary for rural subdivisions beyond the one mile limit. However, streets and roads in such subdivisions within two miles of a city of at least 25,000 population or a city having adopted the applicability of §409.14 may still have to meet that city's street specifications before the plat can be recorded.

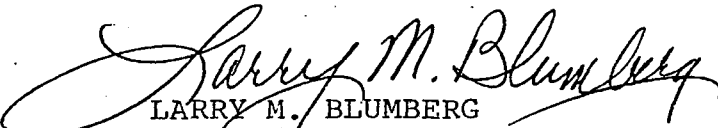
2. Pursuant to §409.14, cities of at least 25,000 population or cities which have adopted the application of that section must approve the subdivision plats within two miles of such cities before such plats can be recorded. Pursuant to other sections of Chapter 409, the city can impose requirements upon these subdivisions as a condition of approval.

3. Pursuant to §558.65, along with §409.14, a city may impose requirements on rural subdivisions adjacent to a city.

This authority of a city to impose requirements upon certain rural subdivisions is, with the exception of 306.21, to the exclusion of a county's authority and requirements. The statutes are constructed in such a manner that everything speaks only to city requirements and approvals.

It should be emphasized that this opinion speaks only to subdivision requirements and approvals. It has nothing to do with zoning regulations of either cities or counties.

Very truly yours,


LARRY M. BLUMBERG
Assistant Attorney General

LMB:pml

COUNTIES: Compensation of county engineer pursuant to Chapter 28E agreement between county and cities. Article III, Section 31, Iowa Constitution; Chapter 28E and §309.18, Code of Iowa (1979). Pursuant to the Chapter 28E agreement between Kossuth County and several cities in Kossuth County, the money which is reimbursed to the Kossuth County Secondary Road Fund by the cities is a portion of the Kossuth County Engineer's total salary set by the Kossuth County Board of Supervisors, not in addition thereto. The overpayment to the county engineer could be legalized by the legislature. (Condon to Soldat, Kossuth County Attorney, 4/17/79) #79-4-17(L)

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

April 17, 1979

Dear Mr. Soldat:

This letter is in response to your request for an opinion regarding the salary paid the Kossuth County Engineer from 1974 through 1979. You posed the following question:

Inasmuch as the specific salary was set by the board of supervisors pursuant to the provisions of section 309.18, Iowa Code, is the county engineer entitled to receive amounts in excess of that salary set by the board of supervisors for the years 1974 through 1978?

Section 309.18, Code of Iowa (1979), authorizes the county board of supervisors to hire and to establish compensation for a county engineer. You indicate that from 1974 to 1979 the Kossuth Board of Supervisors did set the salary of the Kossuth County Engineer.

During the same span of years, a Chapter 28E agreement for the sharing of engineer services has been in effect between Kossuth County and various cities in Kossuth County. In this agreement, the Kossuth County-Urban Engineering Department was created. The cities agreed to reimburse the Kossuth County Secondary Road Fund quarterly at a set rate. Paragraph three of the agreement states that this reimbursement constitutes the urban portion of the county engineer's salary.

Your county attorney's opinion issued on this question indicates that the issue was thoroughly researched. We can add little to that opinion, and we are very reluctant to second guess a county attorney, particularly regarding a local matter such as this. Section 336.2(7), Code of Iowa (1979), places upon the county attorney the responsibility for providing legal advice to county officials on local matters.

From the language of the agreement between the county and the cities, we conclude, as you did, that the money reimbursed to the county by the cities is a portion of the salary set for the county engineer by the board of supervisors.

Payments to the county engineer in excess of that amount established by the board of supervisors are not permitted by Article III, Section 31 of the Iowa Constitution. This action can be legalized by the legislature as provided in Article III, Section 31. Iowa Elect. Light & Power Co. v. Town of Grand Junction, 221 Iowa 441, 264 N.W. 84; 1966, O.A.G. 89. The board of supervisors does not have the power to legalize their action under this set of circumstances.

In your opinion request, you ask if the county attorney must seek repayment of the excess compensation if it is not legalized. Section 336.2(6), Code of Iowa (1979), provides:

"It shall be the duty of the county attorney to:...

6. Commence, prosecute, and defend all actions and proceedings in which any county officer, in his official capacity, or the county, is interested, or a party."

This subsection is analogous to Section 336.2(1), Code of Iowa (1979), which imposes upon the county attorney the duty to bring criminal actions.

Although Section 336.2(1) does not have language granting the county attorney discretion in regard to the commencing of criminal prosecutions, Iowa and federal courts have long held that county attorneys do have wide discretion in regard to bringing criminal actions. See State v. Uebberheim, 263 N.W. 2nd 710 (Iowa 1978). It is the opinion of this office that Section 336.2(6) would be construed to give county attorneys similar discretion in the civil area. Commencement of a civil suit in regard to payments in previous years to the Kossuth County Engineer would, therefore, rest in the discretion of the Kossuth County Attorney.

Mark S. Soldat
Kossuth County Attorney

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Sincerely,

A handwritten signature in cursive script that reads "Marie Condon".

Marie Condon
Assistant Attorney General

ANTITRUST: MUNICIPALITIES. Chapter 73, Code of Iowa, 1979. The holding of the United States Supreme Court in the case of City of Lafayette v. Louisiana Power and Light Company, 435 U.S. 387, 55 L.Ed.2d 364, 98 S.Ct. 1123 (1978), does not prevent compliance by municipalities with the preference for Iowa products, produce, coal and labor statutorily required by Chapter 73. (Heintz to Rush, State Senator, 4/17/79) #79-4-16 (L)

April 17, 1979

The Honorable Bob Rush, State Senator
State Capitol

L O C A L

Dear Senator Rush:

In your letter dated February 12, 1979, you request an Opinion of the Attorney General concerning the following matter.

In accordance with the provisions of Section 13.2(4) of the Code, I request your opinion regarding the effect of a recent United States Supreme Court case, City of Lafayette v. Louisiana Power and Light, 435 U.S. 389, 98 S.Ct. 1123 (1978) on the "Preference for Iowa Products and Labor" in Chapter 73 of the Code.

It is my understanding that in this case the Supreme Court held that municipal governmental units were not ipso facto immune from federal anti-trust laws. Some language in the case seems to indicate that a city may rely on state statutes mandating anti-competitive activity but there is also some indication that the state itself may not be totally immune from federal antitrust laws.

My question is whether a municipal corporation may now continue to rely on Chapter 73 of the Iowa Code regarding a preference for Iowa products and labor or whether that preference must be disregarded in light of the above-cited case.

The case to which you refer, Lafayette v. Louisiana Power and Light Company, 435 U.S. 389, 55 L.Ed.2d 364, 98 S.Ct. 1123, (1978), involved a suit by the cities of Lafayette and Plaquemine, Louisiana, against the Louisiana Power and Light Company, among other utilities. The petitioner cities alleged that Louisiana Power and Light committed various antitrust offenses which injured the cities in the operation

of their municipally-owned electric utility systems. The municipal utilities compete with the investor-owned utilities in the areas beyond the cities' limits. Louisiana Power and Light counterclaimed, seeking damages and injunctive relief for various antitrust offenses which the petitioner cities had allegedly committed.

Petitioners moved to dismiss the counterclaim on the premise that, as cities and subdivisions of the State of Louisiana, the "state action" doctrine of Parker v. Brown, 317 U.S. 341, 87 L.Ed. 315, 63 S.Ct. 307 (1943), rendered federal antitrust laws inapplicable to them. The District Court granted the motion. On appeal, the Court of Appeals for the Fifth Circuit reversed and remanded for further proceedings. The Supreme Court granted certiorari and affirmed the decision of the Fifth Circuit Court of Appeals.

Justice Brennan delivered the opinion of the Court (Part I) together with an opinion (Parts II and III), in which Justices Marshall, Powell, and Stevens joined. Chief Justice Burger concurred in the judgment for remand to the District Court and in Part I of the Opinion. Justices Stewart, White, Rehnquist and Blackmun dissented.

The opinion of the Court initially commented upon the comprehensive nature of the antitrust laws and "subsequent cases reviewing the legislative history of the Sherman Act [which] have concluded that Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country." 435 U.S. 389, 398.

For this reason, our cases have held that even when Congress by subsequent legislation establishes a regulatory regime over an area of commercial activity, the antitrust laws will not be displaced unless it appears that the antitrust and regulatory provisions are plainly repugnant. [citations omitted]. The presumption against repeal by implication reflects the understanding that the antitrust laws establish overarching and fundamental policies, a principle which argues with equal force against implied exclusion. 435 U.S. 389, 398-399.

Two exceptions to the presumptive rule against implied exclusion from the antitrust laws have been judicially developed. The first exception, the Noerr-Pennington line of cases, holds harmless from prosecution under the Sherman Act concerted effort by persons to influence lawmakers to enact legislation beneficial to themselves or detrimental to competitors, regardless of the anticompetitive purpose or intent of those lobbying the legislators.

Honorable Bob Rush

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The second exception, delineated in Parker v. Brown and its progeny, is based upon the premise that "in a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. 341, 351.

Parker v. Brown, 317 U.S. 341, 87 L.Ed. 315, 63 S.Ct. 307 (1943) held that the federal antitrust laws do not prohibit a State "as sovereign" from imposing certain anti-competitive restraints "as an act of government." The question presented in Lafayette is the extent to which the antitrust laws prohibit a State's cities from imposing such anticompetitive restraints.

The petitioner cities in Lafayette advanced certain rationale to the Supreme Court in behalf of their argument that, independent of the question of their exemption as agents of the State under the Parker doctrine, they should be exempt from the antitrust laws of the United States.

First, it would be anomalous to subject municipalities to the criminal and civil liabilities imposed upon violators of the antitrust laws. Second, the antitrust laws are intended to protect the public only from abuses of private power and not from actions of municipalities that exist to serve the public weal. Third, enforcement of federal antitrust law against municipalites is unnecessary because government is subject to political control by its citizens who may remedy the anticompetitive conduct of a city through the political process.

The Court rejected these arguments as unpersuasive and succinctly outlined the vast destructive impact upon national antitrust law enforcement should the Court agree with the arguments of the municipalities.

In 1972, there were 62,437 different units of local government in this country. Of this number 23,885 are special districts which have a defined goal or goals for the provision of one or several services, while the remaining 38,552 represent the number of counties, municipalites, and townships, most of which have broad authority for general governance subject to limitations in one way or another imposed by the State. These units may, and do, participate in and affect the economic life of this nation in a great number and variety of ways. When these bodies act as

owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender. If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established. We conclude that these . . . arguments . . . must be rejected. 435 U.S. 389, 407, 408.

Turning to the question of the Parker exemption for municipalities, the Court declared that the "petitioners are in error in arguing that Parker held that all governmental entities, whether state agencies or subdivisions of a state, are, simply by reason of their status as such, exempt from the antitrust laws. 435 U.S. 389, 408.

Parker v. Brown involved the California Agricultural Prorate Act, which was enacted by the California legislature and administered by state officials for the purposes of restricting competition among raisin growers and maintaining prices in the raisin industry. The Supreme Court held that the program was not prohibited by the federal antitrust laws since "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature . . . and the state . . . as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." 317 U.S. 341, 350-352.

Two recent cases, delivered by the Supreme Court prior to Lafayette, provide additional insight to the Court's construction of the application of the Parker exemption.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 44 L.Ed.2d 572, 95 S.Ct. 2004 (1975), involved the question of whether a minimum fee schedule for lawyers published by the Fairfax County Bar Association and enforced by the Virginia State Bar violated the Sherman Act. Even though the State Bar is a state agency for some limited purposes, the Supreme Court held that it did not enjoy protection from liability for its anticompetitive conduct unless the activity in question is "required by the State acting as sovereign." "It is not enough that, as the County Bar puts it, anticompetitive

conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." 421 U.S. 773, 791. The activity in question in Goldfarb was neither required by the sovereign nor protected by the Parker exemption. "Goldfarb therefore made it clear that, for purposes of the Parker doctrine, not every act of a state agency is that of the State as sovereign." 435 U.S. 389, 410.

Bates v. State Bar of Arizona, 433 U.S. 350, 53 L.Ed.2d 810, 97 S.Ct. 2691 (1977), addressed the question of the applicability of the Parker exemption to the ban on attorney advertising directly imposed by the Arizona Supreme Court. The United States Supreme Court concluded that the Arizona Supreme Court "is the ultimate body wielding the State's power over the practice of law " . . . and "thus the restraint is 'compelled by direction of the State acting as sovereign.'" 433 U.S. 350, 360. Of the Bates decision, the Supreme Court remarked in Lafayette that ". . . we emphasized . . . the significance of our conclusion of the fact that the state policy requiring the anticompetitive restraint as part of a comprehensive regulatory system, was one clearly articulated and affirmatively expressed as state policy, and that the State's policy was actively supervised by the State Supreme Court as the policymaker." 435 U.S. 389, 410.

Thus, continued the Court in the plurality opinion of the Lafayette case, the decisions in Goldfarb and Bates required that the Court reject the proposition that the cities' status as such automatically affords them the "state action" exemption.

Parker's limitation of the exemption, as applied by Goldfarb and Bates, to "official action directed by [the] State," arises from the basis for the "state action" doctrine - that given our "dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority," 317 U.S., at 351, 87 L.Ed. 315, 63 S.Ct. 307, a congressional purpose to subject to antitrust control the States' acts of government will not be lightly inferred. To extend that doctrine to municipalities would be inconsistent with that limitation. Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. 435 U.S. 389, 411-412.

. . . the fact that municipalities, simply by their status as such, are not within the Parker

doctrine, does not necessarily mean that all of their anticompetitive activities are subject to antitrust restraints. Since "municipal corporations are instrumentalities of the State for the convenient administration of government within their limits," . . . [citations omitted] . . . the actions of municipalities may reflect state policy. We therefore conclude that the Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service. 435 U.S. 389, 413.

The Court concluded that this case should be remanded to the District Court for a factual inquiry to determine whether the allegedly anticompetitive actions of the cities occurred and, if the Court should so find, whether those actions were directed by the State.

Chapter 73, Code of Iowa, 1979, authorizes a preference for Iowa products, produce, labor and coal. Section 73.1, Code of Iowa, 1979, directs that

every commission, board, committee, officer or other governing body of the state, or any county, township, school district or city . . . shall use only those products and provisions grown and coal produced within the State of Iowa, when they are found in marketable quantities in the state and are of a quality reasonably suited to the purpose intended, and can be secured without additional cost over foreign products or products of other states.

Section 73.2 provides that bids for materials, products, and supplies to be purchased at public expense shall be specified generally without reference to trade name or brand and that each bid proposal indicate the preference for Iowa products and coal.

Section 73.3 provides that every governmental unit within the state utilize the labor of Iowa domestic workers in constructing or improving public buildings or works within the State.

Section 73.4 defines domestic labor and Section 73.5 designates a misdemeanor offense for "failure to give preference to Iowa labor as required by Sections 73.3 and 73.4."

Section 73.6 provides as follows:

It shall be unlawful for any commission, board, county officer or other governing body of the state, or of any county, township, school district or city, to purchase or use any coal, except that mined or produced within the state by producers who are, at the time such coal is purchased and produced, complying with all the workers' compensation and mining laws of the state. The provisions of this section shall not be applicable if coal produced within the state cannot be procured of a quantity or quality reasonably suited to the needs of such purchaser, nor if the equipment now installed is not reasonably adapted to the use of coal produced within the state, nor if the use of coal produced within the state would materially lessen the efficiency or increase the cost of operating such purchaser's heating or power plant, nor to mines employing miners not now under the provisions of the workers' compensation Act or who permit the miners to work in individual units in their own rooms.

Sections 73.7 and 73.8 outline the bidding procedure for users of coal designated in Section 73.6. Section 73.9 provides that any contract entered into or carried out in violation of Sections 73.6 to 73.8 "shall be void and such contract or any claim growing out of the sale, delivery or use of the coal . . . shall be unenforceable in any court." Any unsuccessful bidder, according to Section 73.9, also has standing to maintain an action in equity to prevent the violation of the terms of Sections 73.6 through 73.8.

Section 73.10 provides that Sections 73.6 to 73.9 shall not apply to municipally owned and operated public utilities.

Section 73.11 states as follows:

If it is determined by the attorney general that any provision of this chapter would cause denial of funds or services from the United States government which would otherwise be available, or would otherwise be inconsistent with requirements of federal law, such provision shall be suspended, but only to the extent necessary to prevent denial of such funds or services or to eliminate the inconsistency with federal requirements.

Assuming, for the sake of argument, that Chapter 73 of the Code authorizes "every commission, board, committee, officer or other governing body of . . . [a] city . . . and

every person acting as [a] contracting or purchasing agent [therefor] . . . "to engage in anticompetitive conduct in purchasing produce, products, or coal for use by that municipality, the actions of the city appear to fall within the Parker exemption. The purchasing conduct of cities authorized by the legislature of the State of Iowa in Chapter 73 represents state policy and is therefore "compelled by direction of the State acting as sovereign."

Since municipal corporations are instrumentalities of the State for the convenient administration of government within their limits . . . [citations omitted] . . . the actions of municipalities may reflect state policy. We therefore conclude that the Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service. 435 U.S. 389, 413.

As the plurality opinion in Lafayette succinctly set forth the rationale of the Parker doctrine, the states may use their municipalities to administer state regulatory policies "free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free market goals." 435 U.S. 389, 415-416.

. . . Parker and its progeny make clear that a State properly may, as States did in Parker and Bates, direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws. 435 U.S. 389, 417.

In closing, we wish to make it clear that while some "state action" remains exempt from federal antitrust laws under the Parker doctrine, not all state action is exempt. The plurality opinion in Lafayette makes clear that "compulsion by the sovereign" is a necessary condition for an exemption; it does not make completely clear that compulsion is a sufficient condition for the exemption. Indeed, leading commentators and language in some court decisions suggest that compulsion may be only one of several factors that should be weighed in determining the existence of a Parker exemption. See Areeda and Turner, Antitrust Law, Vol. I at 66 et seq. (1978). Moreover, at least one commentator suggests specifically that state preference laws, similar to Chapter 73 of the Iowa Code, arguably violate at least


Honorable Bob Rush

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the spirit of federal antitrust laws. Slater, "Antitrust and Governmental Action: A Formula for Narrowing Parker v. Brown," 69 N.W.U.L. Rev. 71, 75 (1974).

To summarize, we have assumed for purposes of analysis that Chapter 73 is anti-competitive without asserting it is. In answer to your specific question, we opine that the holding in the Lafayette case is not an obstacle to compliance with Chapter 73 of the Code by municipalities because the preferences there provided are "compelled by the sovereign." However, we cannot state without additional analysis and the awaiting of future developments whether Chapter 73 definitely is and will continue to be consistent with the antitrust laws of the United States.

Sincerely,



J. ERIC HEINTZ

Assistant Attorney General

JEH:bje

State Fair Board: Leasing of Fairgrounds -- Chapter 173, Code of Iowa (1979). The Fair Board may lease the fairgrounds to private interests although a small part of the land was acquired by condemnation. (Condon to Connors, State Representative, 4/17/79) #79-4-15(L)

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

April 17, 1979

Dear Representative Connors:

This letter is in response to your request for an opinion regarding the legality of certain uses of state property obtained by condemnation. The request was phrased by the Fairgrounds Community Council in your letter as follows:

"1. The largest portion of the Fairgrounds was bought by condemnation for the permanent home of the Iowa State Fair. We question the legality of using land, obtained by condemnation for state use, being used by full time business, such as G&B Racing, Inc., and Music Circuit, Inc. The State of Iowa is providing the means to make these private businessmen rich." (Emphasis added).

A previous opinion by this office concluded that the Iowa State Fair Board could rent or lease a state fair building or facility to a private person or commercial interest. Our office stated in 1974 O.A.G. 535, 536:

The fair board's authority over the custody and control of the fairgrounds and buildings implies the power to lease or rent any fair building or facility to a private person or commercial interest for the purpose of making sales to the general public. This power is reasonable in the light of the economic waste that would ensue if fair facilities could not be utilized during the greater part of the year when the fair is not being held. Of course, the buildings or facilities can be leased or rented only if they are not needed for a state fair purpose.

In 1940 O.A.G. 272, 273, our office stated:

"We are of the opinion that authority to 'have custody and control of the state fair grounds' carries with it the authority to rent parts of same when not needed for state purposes. We found no law forbidding such leasing."

Moreover, the authorization given in §173.14(6) to grant a written permit to persons to sell articles not prohibited by law grants power to the fair board to permit private persons or commercial interests to hold a public auction or to make sales to the public from a building or other facility leased or rented from the fair board. No qualification is expressed in §173.14(6) that the authorization to grant written permits exists only while the fair is being held. Accordingly, we do not believe that any such qualification exists. Written permits to sell articles can be granted any time of the year. The granting of such permits must, of course, be in accordance with regulations of the fair board promulgated pursuant to Ch. 17A, 1973 Code of Iowa. The requirement that the granting of permits must be in accordance with regulations is mandated by the language of §173.14(6).

Likewise, we believe that the fair board has discretion to refuse to permit private persons or commercial interests to hold a public auction or to make sales from a building or other facility leased or rented from the fair board. §173.14(6) states that the fair board "may" grant a written permit to sell articles "to such persons as it deems proper." The use of the word "may" and the language "to such persons as it deems proper" clearly confers discretion. It makes no difference that

the persons or commercial interests seeking to lease facilities offer a reasonable fee. The fair board may simply decide that it will placed [sic] a limit on the amount of selling that may go on fair property. This is its prerogative under the statute.

In conclusion, the Iowa State Fair Board may lease or rent any fair building or facility to a private person or commercial interest for the purpose of making sales to the general public, either through the medium of an auction, or by any other accepted business sales method so long as the building or facility is not needed for a state fair purpose. The Iowa State Fair may also grant written permits to private persons or commercial interests to hold a public auction or to make sales to the public from a building or other facility leased or rented from the fair board if the granting of permits is in accordance with regulations of the fair board. And the fair board can refuse to grant such permits to private persons or commercial interests even if a reasonable fee is offered.

Since the opinion did not address the condemnation matter, we shall discuss it now.

Apparently, the Fairgrounds Community Council has been misinformed regarding the acquisition of the fairgrounds. An examination of the conveyances to the state of the land which forms the fairgrounds reveals only one lot was acquired by condemnation. That piece of land was condemned in March, 1920, and is described as follows:

Lot 2 of Partition Plot of L.D. Sims
Est. in N 1/2 except a parcel desc. by
Metes and Bounds.

Lot 2 is occupied now by approximately 9 1/2 acres of the parking lot in the northwest corner of the fairgrounds. This land is not used for the activities to which the Council objects. Nevertheless, we shall address the issue raised by your request as to whether it is legal for the land acquired by condemnation

to be rented to a private person or commercial interest.

Section 471.1, Code of Iowa (1979) permits the State to condemn private property "as may be necessary for any public improvement which the general assembly has authorized to be undertaken by the state." Article I, Section 18 of the Iowa Constitution has imposed the requirement that private property condemned for a public improvement be put to "public use."

"Public use" was defined by the Iowa Supreme Court in Sisson v. Supervisors, 104 N.W. 454, 128 Iowa 442, (1905):

In holding a use to be public, it has never been deemed essential that the entire community, or any considerable portion of it, should directly enjoy or participate in the improvement or enterprise. This is made necessary because in the very nature of things the benefits to be derived from improvements local in character or peculiar in adaptation must be subject to the restrictions of locality, the necessities of individual and community life, etc. (Cites omitted.) So, also, a moment's consideration will serve to make it clear that controlling effect cannot be given the fact, however apparent it may become, that the construction of a particular improvement will result incidentally in benefit to private rights and interests. If the contrary were true, it is doubtful if there could be prosecuted any public work requiring an exercise of the power of eminent domain. Not a milldam, canal, or railway intended to be operated by private corporations for private gain could be built, however necessary to the public convenience or welfare, not even a schoolhouse site or ground for cemetery, park, market house, street, or highway could be acquired, although intended to remain under control of public authority, and for the undoubted use and benefit of the public, without making disclosure of influence, more or less marked, upon private rights and property interests. (Cites omitted.) Perhaps no nearer

approach to accuracy in the way of a general statement can be had than to say that the mandate of the Constitution will be satisfied if it shall be made reasonably to appear that to some appreciable extent the proposed improvement will inure to the use and benefit of parties concerned, considered as members of the community or of the state, and not solely as individuals. While, however, the benefit must be common in respect of the right of use and participation, it cannot be material that each user shall not be affected in precisely the same manner or in the same degree. (Cites omitted.) 104 N.W. at p. 459.

Holding the annual state fair on the property is a public use of the fairgrounds. The legislature decided long ago that an annual state fair would be in the interest of the public when it authorized acquisition of the fairgrounds. The Iowa Supreme Court has ruled that the Court will not interfere with the legislative determination of public use as long as the use is not clearly, plainly and palpably private. Abolt v. City of Fort Madison, 252 Iowa 626, 108 N.W.2d 263 (1961).

The modern trend in eminent domain case law is to expand somewhat the definition of public use. The test for public use in recent decisions is "the right of the public to receive and enjoy its (the land's) benefits." State ex rel. Taft v. Campanella, 364 N.E.2d 21, 23 (Ohio 1977). Although the Iowa courts are said to employ a narrow definition of the public use, the quoted definition approximates the language used by the Iowa Supreme Court in Sisson v. Supervisors, supra. (The Iowa Supreme Court has not faced a public use issue recently, so we cannot predict if it will adopt the modern definition.)

Perhaps under Iowa's definition of public use and clearly under the modern definition, the leasing of public property to private parties is a public use of the property. A situation which parallels the one we are discussing was presented to the Arizona Supreme Court in City of Phoenix v. Phoenix Civic Auditorium & Convention Center Association, Inc. 408 P.2d 818 (Arizona 1965). The City of Phoenix condemned land for the site of a convention center. The center would be leased to private parties. The only difference is that the City of Phoenix did not retain control of the land as does the fair board, but rather

leased it to a non-profit corporation who leased it back to the City pursuant to a long-term lease agreement. The arrangement was declared invalid because the long-term lease violated the constitutional debt limitation and the statutory budgeting limitation.

However, for purposes of a comparison with the fair board's leasing policy, it is important to note that the Arizona Supreme Court ruled that the purchase of land by the City as a site for a convention center was a public use. Thus, even if the Iowa fairgrounds had been condemned for the purpose of leasing it out in the manner of a convention center, it would be for a public use.

If on the other hand, the leasing activity by the fair board is a private use, it is still a proper use of property acquired by condemnation. As we have said before in this opinion, holding an annual state fair is a public use of the fairgrounds. The fair was the primary purpose for acquiring the fairgrounds, and the leasing activity is incidental to that purpose. The Iowa Supreme Court decided in Sisson v. Supervisors, *supra*, that incidental use does not defeat a primary public use. A federal district court has held that construction and operation of a public parking lot is a public use for eminent domain purposes although the city may lease space in the facility to private interests. Washington - Summers, Inc. v. City of Charleston, 430 F. Supp. 1013 (W.Va.D.C. 1977).

This doctrine that excess may be distributed to private interests after the public need is satisfied is based upon a United States Supreme Court case, Hendersonville Light & Power Co. v. Blue Ridge Interurban R. Co., 243 U.S. 563, 37 S.Ct. 440, 61 L.Ed. 900 (1917). In that case the federal government condemned water rights for the purpose of powering a state chartered railroad and sold the excess power to private mills. The fair board is in an analogous position, leasing the fairgrounds to private parties during the time it is not used by the state.

In conclusion, it is the opinion of this office that the fair board is not precluded from leasing the fairgrounds' facilities to private parties because the land was acquired by condemnation. Only a part of a parking lot was acquired by condemnation, but even if all the land had been so acquired the leasing activity is permissible. The fair board has the

The Honorable John H. Connors
State Representative

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power to lease the land to private parties. The leasing of the grounds may constitute a public use. If the leasing is considered a private use of the property, it is merely an incidental private use which does not defeat the primary public use of the fairgrounds as the site of the annual state fair.

Very truly yours,



Marie A. Condon
Assistant Attorney General

MAC:jkt

IOWA STATE ASSOCIATION OF COUNTIES: STATUTORY RESTRICTIONS ON COLLECTION OF "REGULAR MEMBERSHIP DUES" AND "SERVICE FEE". §332.3 (27), Code of Iowa (1979). A collection once each year of "regular membership dues" and "service fees" in a membership fees statement for 1979", by the Iowa State Association of Counties is in violation of §332.3 (27) of the 1979 Code of Iowa if the total assessment collected from all member counties is in excess of \$75,000 per annum. (Hagen to Richard Johnson, Auditor of State. 4/11/79) #79-4-13(L)

April 11, 1979

Richard Johnson, Auditor
State of Iowa
L O C A L

Dear Mr. Johnson:

You have requested an opinion of the Attorney General concerning the lawfulness of membership assessment by the Iowa State Association of Counties and the payment of or appropriation of monies to the Iowa State Association of Counties under Chapter 332.3 (27) of the Code of Iowa. In your letter of February 12, 1979, you enclose a copy of "membership fees statement for 1979" issued by the Iowa State Association of Counties and pose the following question:

Is the second part of this assessment outside the limit of the \$75,000 limitation set by the Code?

In the letter, the Iowa Association of Counties stated that the "membership fees statement for 1979" includes a "new feature" of a "service fee" in addition to the "regular membership dues". The letter also declared that the Iowa law provided for a limitation of \$75,000 on the state-wide annual dues which could be assessed by the Association for membership. The apparent intent of the dues statement for "regular membership dues" and "service fees" is to avoid violation of the \$75,000 limitation on annual dues which are collectable under Chapter 332.3 (27). Chapter 332.3 (27) is explicit in that it states that:

The total assessment collected from all member counties shall not exceed \$75,000 per annum . . . [Emphasis Supplied]

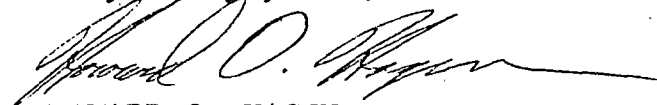
We believe that the intent of this legislation was express in that the Iowa Legislature sought to restrict the total amounts appropriated by the counties and/or collected by the Iowa State Association of Counties. Together, "regular membership dues" and "service fees" collected once each year produce a "total assessment" or appropriation from the county general fund in excess of the \$75,000 limitation.

Section 332.3 (27), 1979 Code of Iowa also states, in part, that:

The Board of Supervisors may appropriate from the county general fund necessary funds to provide membership in the Iowa State Association of Counties . . .

In other words, the total appropriation from the general fund is to be sufficient to provide for membership. Such a bifurcated system of "membership dues" and "service fees" would be contrary to the unilateral or singular system of assessment created by Chapter 332.3 (27), 1979 Code of Iowa. If the cumulative effect of the "regular membership dues" and "service fees" is to exceed the amount of \$75,000 as set by Chapter 332.3 (27) then the assessment, whatever it is called, is in violation of the \$75,000 limitation.

Very truly yours,



HOWARD O. HAGEN
Assistant Attorney General

HOH:sh

MUNICIPALITIES: Pensions -- §410.6, the Code, 1979. When a pension, pursuant to Chapter 410 of the Code, is recomputed and there is an increase in benefits, the increase is equal to one-half the difference between the old pension and the recomputed pension. (Blumberg to Priebe, State Senator, 4/11/79) #79-4-11(L)

The Honorable Berle E. Priebe
State Senator
L O C A L

April 11, 1979

Dear Senator Priebe:

You requested an official opinion regarding Chapter 410 of the Code, 1979. Specifically, you ask what the amount of increase in an adjusted pension will be.

Section 410.6 provides in pertinent part that members who retire (policemen and firemen)

shall be paid out of the pension fund of such department a monthly pension equal to one-half the amount of salary received by him monthly at the date he actually retires from said department. If any member shall have served twenty-two years in said department, but shall not have reached the age of fifty years, he shall be entitled to retirement, but no pension shall be paid while he lives until he reaches the age of fifty years.

. . .

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 fifty percent of any increase in the pension benefits for the rank at which the member retired.

Pensions payable under this chapter shall be adjusted as follows:

1. As of the first of July each year, the monthly pension authorized in this chapter payable to each retired member and to each beneficiary, except children, of a deceased member shall be recomputed. The applicable formulas authorized in this chapter which were used to compute the retired member's or beneficiary's pension at the time of retirement or death shall be used in the recomputation except 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 or deceased member at the time of retirement or death, shall be used in lieu of the final compensation which the retired or deceased member was receiving at the time of retirement or death. At no time shall the monthly pension or payment to the beneficiary be less than the amount which was paid at the time of such member's retirement or death.

2. All monthly pensions adjusted as provided in this section shall be payable beginning on July 1 of the year which the adjustment is made and shall continue in effect until the next following July 1 at which time the monthly pension shall again be recomputed and all monthly pensions adjusted in accordance with the computations.


Pursuant to this section, a member's monthly pension is equal to one-half his monthly compensation at the time of retirement. Each July first, the pension is recomputed. The formula is the same, except that the earnable compensation of an active member of the same rank is used in place of the final compensation of the retired member. In the event that the recomputed pension is higher than the current pension, the member receives one-half the difference between the old and recomputed pension. In other words, one-half of that difference is added to the old pension to create the adjusted or recomputed pension which is

The Honorable Berle E. Priebe
State Senator

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then paid to the member. This process occurs every July first.

Very truly yours,


Larry M. Blumberg
Assistant Attorney General

LMB:jkt

COUNTIES: §441.5, 441.8, Code of Iowa, 1979. County assessors whose terms expire prior to December 31, 1979, need not take examination and obtain certification under §441.5 of Code in order to be reappointed for a six year term commencing January 1, 1980, (Hagen to Bair, 4-6-79) #79-4-8. (L)

April 6, 1979

Mr. Gerald D. Bair, Director
Department of Revenue
Hoover Building
L O C A L

Dear Mr. Bair:

You have requested an opinion of the Attorney General as to whether or not county assessors whose terms expire prior to December 31, 1979 must take the examination and obtain certification as set out in Chapter 441.5 in order to be reappointed to a six year term commencing January 1, 1980. It is the opinion of this office that incumbent county assessors whose terms expire prior to December 31, 1979 need not take the examination set out in Chapter 441.5 in order to obtain certification for reappointment to a six year term commencing January 1, 1980.

The Iowa legislature amended Chapter 441.8, Code of Iowa, 1979 (Chapter 1150, Acts of the 67th G.A., 1978) and established a continuing education program whereby incumbent assessors would be certified as eligible for reappointment. Chapter 441.8 provides as follows:

"Upon receiving credit equal to two hundred forty hours of classroom instruction during

Gerald D. Bair, Director
Department of Revenue

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the assessor's current term of office, the commission shall certify to the assessor's conference board that said assessor is eligible to be reappointed to his or her present position. For assessors whose present terms of office expire before six years from January 1, 1979, or who are appointed to complete an unexpired term the number of credits required to be certified as eligible for reappointment shall be prorated according to the amount of time remaining in the present term of said assessor."

However, §441.8 also provides an exemption for those incumbents who are reappointed prior to January 1, 1980. This exemption is contained in the second paragraph of §441.8 which states as follows:

"Effective January 1, 1980, the conference board shall have the power to reappoint the incumbent assessor only if the incumbent assessor has satisfactorily completed the continuing education program provided for in this section."

Prior to January 1, 1979, incumbent assessors were granted a restricted certification if they held office as of January 1, 1976. Any of these incumbents would not have had to take the written examination set out in Chapter 441.5, Code of Iowa, 1977. (See §441.11, Code of Iowa, 1977). The deletion of this exemption provision does not mean that incumbent assessors must necessarily take the examination under §441.5, Code of Iowa, 1979. The intent of the amendments contained in Senate File 221 (enacted as chapter 1150, Acts of the 67th G.A. 1978), was to provide a mechanism and standards for incumbent assessors reappointment by means of eligibility certification through continuing education.

New applicants for assessor must obtain their certification initially through examination under Chapter 441.5, Code of Iowa, 1979, but incumbents are allowed to obtain their certification through a continuing education set out in Chapter 441.8, Code of Iowa, 1979. The legislature established the requisite number of credits to be obtained during each six year period in order to be "certified as eligible for reappointment." The legislature also provided for proration of credit requirement according to the amount of time remaining in the present term of the assessor.

The legislature further provided for an exemption for

Gerald D. Bair, Director
Department of Revenue

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those assessors being appointed during the period of time in which the continuing education program would be established to avoid any possible penalization for not having the opportunity to obtain continuing legal education credit in a system just adopted January 1, 1979. To conclude that an incumbent assessor who happens to reach the end of his term this year must take the examination in order to be certified while those who reach their end of their term subsequent to January 1, 1980 do not would lead to an absurd result and does not appear to be the intent of the legislation.

The conference board for each county has the discretion to set their standards for reappointment under Chapter 441.2 of the 1979 Code of Iowa, but the minimum criteria for reappointment is set out in the second paragraph of Chapter 441.8. The conference board under Chapter 441.8 may or may not appoint an incumbent at their own discretion based on reasonable criteria. However, it is our opinion and conclusion that incumbent assessors need not as a matter of State law take the certification examination under Chapter 441.5 which is designed for individuals who wish to become eligible for consideration as candidate for assessor and are not incumbents to that office.

Very Truly Yours,



Howard Hagen
Assistant Attorney General

STATE OFFICERS AND DEPARTMENTS: Secretary of State and Iowa Search, Inc., Article III, 31; 554.9407(3), §18.8, 68A.3, Code of Iowa, 1979; O.A.G., 1978, #78-10-13 (Haesemeyer to Synhorst). Article III, §31, Constitution of Iowa does not require a two-thirds vote of each branch of the General Assembly for approval of the appropriation for the Secretary of State. The relationship of the office of the Secretary of State and Iowa Search, Inc. is not in violation of Constitution or law. Such relationship serves a public purpose, not a private purpose. (Schantz & McDonald to Miller, State Senator, 4/5/79) #79-4-6(L)

April 4, 1979

The Honorable Charles P. Miller
State Senator
Capitol Building
L O C A L

Dear Senator Miller:

You have requested an opinion of the Attorney General with respect to the relationship between the office of the Secretary of State and Iowa Search, Inc., a private firm for which desk space is allocated within the office of the Secretary of State. Specifically, you have asked:

1. Does Article III, section 31, Constitution of Iowa, require a two-thirds vote of the legislature on the appropriation for the Secretary of State's office?
2. Would a two-thirds vote on a general state appropriations bill fulfill the Constitutional requirement or would a separate vote have to be taken on the Secretary's appropriation or a part thereof?
3. Are there other Constitutional or statutory requirements which need to be met if the relationship is to continue?

I.

The background to the legal questions you pose is somewhat involved. Iowa Search, Inc., is a private corporation to which the Secretary of State has allocated desk space in the office of the Secretary of State for the purpose of facilitating its search of public records. A rental charge of \$25 per month is apparently assessed, and Iowa Search pays for the cost of its telephone service.

Some members of the legislature have believed that the relationship between Iowa Search and the Secretary of State's office was unwise, if not unlawful, and in 1976, the General Assembly passed a bill that would have terminated the relationship and required the Secretary of State to provide similar services. Governor Robert D. Ray, however, vetoed the measure, stating his view that Iowa Search provided effective service at a cost lower than if the Secretary of State supplied similar services.

On September 8, 1978, a complaint was filed with the Citizen Aide/Ombudsman's Office questioning the arrangement and the office began an investigation. On October 26, 1978, the Citizen's Aide/Ombudsman Office sent a draft of a critical report to the Secretary of State, among others, for comment. The Citizen's Aide/Ombudsman report found, among other things, that the relationship violated §18.8 of the Code of Iowa which provides that "official apartments shall be used only for the purpose of conducting the business of state. On October 27, 1978, the Secretary of State requested an Attorney General's opinion on the legality of Iowa Search's relationship with his office. On October 30, 1978, the Attorney General's office issued an opinion upholding the practice, O.A.G. 1978, #78-10-13, and the Secretary of State included a copy of the opinion with his comments in response to the Citizen Aide/Ombudsman report. Shortly thereafter, the Citizen Aide/Ombudsman released its final report, which hewed to its original position notwithstanding the opinion of the Attorney General. The propriety of Iowa Search's position became a campaign issue in the race for Secretary of State in the last week before the November election.

We express no view as to whether the relationship is cost-effective or whether it represents sound public policy. The role of this office in reviewing the matter is strictly limited to the legality of the relationship. Even in this context, our role is further confined by the presence of an existing Attorney General's opinion covering aspects of the controversy. Our policy, announced when this office refused to overrule a previous Attorney General's opinion construing Iowa's bribery laws, is to decline to disturb previous rulings unless they are clearly erroneous.

You ask whether the relationship between Iowa Search and the Secretary of State's office violates Article III, section 31 of the Iowa Constitution or any other constitutional or statutory provision. Because this office, like the courts, will seek to avoid constitutional dispositions when nonconstitutional grounds are available, we first examine relevant statutory provisions.

II.

The most important statute that is arguably contravened by the Iowa Search relationship with the Secretary of State's office

is §18.8, Code of Iowa, 1979. This provision states, in relevant part:

"official apartments shall be used only for the purpose of conducting the business of state."

The Citizen's Aide/Ombudsman report found that "this language clearly prohibits a private corporation from operating in state apartments." The previous Attorney General's opinion, however, found that §18.8 was a general statute preempted by §554.9407 and §68A.3 of the Code. Section 554.9407(3) generally authorizes the allocation of suitable space "for the preparation of written summaries and the provision of telephone service by those persons deemed by the Secretary of State . . . to have a legitimate interest in regular examination of the Secretary of State's public files." §554.9407(3). Section 68A.3 provides that the lawful custodian of records "shall provide a suitable place" for examination and copying of public records. The Attorney General's opinion further noted that even if these provisions were not special statutes preempting the general terms of §18.8, no violation of this statute occurred because "the granting of space to Iowa Search is in furtherance of the business of the state and in the public interest."

We do not find the general/specific analysis convincing. The principle that special statutes preempt general statutes applies only when the special statute is irreconcilable with the general statute. But the present statutory provisions are not irreconcilable. Sections 554.9407(3) and §68A.3 can rationally be interpreted as simply guaranteeing the right of individuals to have access to space as needed to examine records of personal interest to them. These statutes do not necessarily authorize a private corporation to have permanent space provided for its profit-making activities in apparent contradiction to §18.8.

At the same time, however, we think §554.9407(3) and §68A.3 lend credence to the earlier opinion's view that "the granting of space to Iowa Search is in furtherance of the business of state." These open access and space-providing statutes clearly suggest that the state has an interest in making the information involved readily available to the public. The previous Attorney General's opinion concluded that the state's business can be conducted by private business if it fulfills a public purpose. The Citizen's Aide/Ombudsman view seems to be that state business can be conducted only by state employees.

Whatever conclusion we might have originally reached, we do not believe the previous Attorney General's opinion is clearly erroneous. There are no judicial decisions construing §18.8 which undercut the interpretation, and it is not unreasonable to assume that, at least under some circumstances, the business of the public may be performed by private persons. We therefore decline to reverse

the previous position of the Attorney General that §18.8 has not been violated by the relationship.

The only other statutory provision that might be implicated by the Iowa Search/Secretary of State relationship is the Iowa Competition Law, §553, et. seq., Code of Iowa, 1979. We understand, however, that Iowa Search does not have exclusive control of the records or available space in the Secretary of State's Office. Thus, we assume that a hypothetical corporation, wishing to provide a similar service to its clients, could enter the market on the same terms as that of Iowa Search. As long as the policies of the Secretary of State's office do not tip the competitive scales in favor of Iowa Search, no violation of the Competition Law is present.

III.

Article III, section 31, Constitution of Iowa provides:

"...no public money or property shall be appropriated for local, or private purposes, unless such appropriations, compensation, or claim be allowed by two thirds of the members elected to each branch of the General Assembly."

The previous Attorney General's opinion, while not directly considering the applicability of this provision, found no constitutional infirmity in the Iowa Search relationship with the Secretary of State's office. The opinion observed that profit making newspapers, wire services, and television and radio stations have been furnished desks and telephones in the legislative chambers for their exclusive use without charge. In addition, the opinion noted that food services are furnished by private concessionaires utilizing significant amounts of space in "official apartments." These uses of official apartments, according to the prior opinion, were justified because they furthered the business of the state.

We do not find this approach clearly erroneous. Where a public purpose is served by the use of the space, something more than a private gratuity or a charity is involved. See O.A.G. 1936, p. 139 (Senate cannot sell chairs to individual Senators at nominal price). We also believe that in interpreting shadowy areas of constitutional law, past custom, and usage, though now necessarily determinative, are entitled to consideration.

We want to repeat that this office takes no view as to the desirability of the relationship between Iowa Search Inc. and the Secretary of State's office. Indeed, policy questions frequently are raised whenever a company which is making a profit charges the public for services that could be provided by government personnel.

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The determination of whether the policy is sound, however, rests with the Secretary of State, who in his discretion has sanctioned the arrangement, and with the Governor and the members of the General Assembly, who as participants in the legislative process generally have the power to limit the Secretary's range of permissible action.

In sum, we decline to reverse the previous holding of the Attorney General that the Iowa Search/Secretary of State relationship does not violate any statutory or constitutional requirements.

Very truly yours,

Mark E. Schantz

Mark Schantz
Solicitor General

Bruce McDonald

Bruce McDonald ^{SW}
Assistant Attorney General

JUDICIAL MAGISTRATES; IPERS; Iowa Code Sections 97B.41(3)(b)(6); 97B.42; 97B.45; 97B.46; 97B.47; 97B.52; 97B.53(1), (2), (7); 602.50; 602.58; House File 582, 67th G.A., §§5, 6. A judicial magistrate choosing IPERS membership may not voluntarily withdraw from IPERS for personal reasons. (Salmons to Longnecker, Administrator, State Retirement Systems, 4/3/79) #79-4-5 (L)

Mr. Edward R. Longnecker
Administrator
State Retirement Systems
L O C A L

April 3, 1979

Dear Mr. Longnecker:

We are in receipt of your opinion request of March 5, 1979 referring to House File 582, of the 67th G.A., Sections 5 and 6, and asking whether judicial magistrates appointed pursuant to Section 602.50 and 602.58 of the Code may opt out of IPERS once they have chosen to become covered pursuant to House File 582. From a telephone conversation with you I have learned that a judicial magistrate who timely complied with Section 6 of House File 582 in choosing IPERS membership now seeks to withdraw from that retirement system due to a personal tax problem.

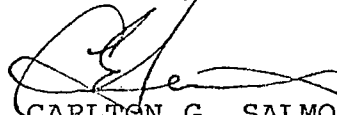
Section 5 of House File 582 allows judicial magistrates the option of becoming IPERS members. Section 6 provides that the department of job service shall have notified such magistrates of their right to such election by February 1, 1978. Those choosing IPERS coverage must have notified both IPERS and the department of job service by written notice prior to March 1, 1978. Aside from allowing a magistrate the choice of electing not to continue IPERS coverage between February 1, and March 1, 1978, House File 582 is otherwise silent concerning rights of termination by those once choosing IPERS coverage.

The general rule of Chapter 97B, The Code, 1979, is that all employees shall be members of IPERS so long as they continue in public employment. Section 97B.42. Indeed, in keeping with House File 582, Section 97B.41(3)(b)(6) (1979) has been added designating judicial magistrates choosing IPERS coverage as "employees" for purposes of Chapter 97B.

A judicial magistrate, as any other public employee, may withdraw from IPERS only in ways allowed by the legislature. A public employee may retire and draw IPERS benefits, at age sixty five, Section 97B.45, or earlier, Section 97B.47, or, at the request of his employer, after age sixty five. Section 97B.46. If a member dies IPERS benefits are left to his beneficiaries. Section 97B.52. Finally, an IPERS member may voluntarily terminate public employment or have his employment terminated and receive back contributions, Section 97B.53(1), receive monthly benefits, Section 97B.53(2), or leave his contributions in the System in hopes of again becoming a covered public employee. Section 97B.53(7). Nothing in Chapter 97B manifests an intent to allow public employees the option of withdrawing from IPERS coverage so long as they remain public employees.

It is the opinion of this office that a judicial magistrate, having once made the timely choice to elect IPERS membership, may not revoke that election and discontinue such membership.

Sincerely,



CARLTON G. SALMONS
Assistant Attorney General

CGS:pml

COUNTIES: Incompatibility -- §§137.4, 137.6, 137.20, 174.13, 174.14, 174.15, 174.17 and 174.19, the Code, 1979. A member of a county board of supervisors cannot simultaneously occupy the position of member of the county board of health or county fair board. (Blumberg to Frisk, Harrison County Attorney, 4/3/79) #79-4-4(L)

Mr. Judson Frisk
Harrison County Attorney
P.O. Box 128
Logan, Iowa 51546

April 3, 1979

Dear Mr. Frisk:

We have your opinion request of March 8, 1979, regarding incompatibility of positions. You ask whether a member of a county board of supervisors can simultaneously occupy the position of member of the county fair board or member of the county health board.

In State ex rel Crawford v. Anderson, 155 Iowa 271, 273, 136 N.W. 128 (1912), the leading case on incompatibility, it was stated:

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

of the two offices "are inherently inconsistent and repugnant." State v. Eus, 135 Mo. 338, 36 S.W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra. [112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211]; State v. Goff, 15 R.I. 505, 9 A. 226, 2 Am.St.Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility of office exists "where the nature and duties of the two offices are such as to render it improper from considerations of public policy, for an incumbent to retain both".

See also, State ex rel. LeBuhn v. White, 257 Iowa 660, 133 N.W.2d 903 (1965).

Chapter 137, the Code 1979, provides for local boards of health. That term includes county boards. Section 137.4 provides that the members of the county board of health are appointed by the board of supervisors. Section 137.6 outlines the powers of the local boards. Subsection 2(a) of that section provides that rules adopted by the county board of health require approval of the board of supervisors. Finally, §137.20 provides for appropriations by the board of supervisors for local boards of health.

Applying these facts to the Crawford case, it is apparent that a member of the board of supervisors who is also a member of the county board of health would be exercising a revisory power over himself. The positions are therefore incompatible.

The same can be said of a member of the board of supervisors who is also a member of the county fair board. Chapter 174, the Code, 1979, provides for County fairs. Section 174.13 permits the County board of supervisors to levy a tax for the County fair. Pursuant to §§174.14 and 174.15, upon a vote of the electorate, the board of supervisors shall make purchases or accept gifts for the fair. Although the title to the property may be in the County, the management of it may rest with the fair board. Again, pursuant to §174.17, the board of supervisors may levy a tax for such fair board for specific purposes. Section 174.19 requires the fair board to make a detailed statement to the board of supervisors of all legal disbursements of such monies received. Finally, the

COUNTIES: Incompatibility -- §§137.4, 137.6, 137.20, 174.13, 174.14, 174.15, 174.17 and 174.19, the Code, 1979. A member of a county board of supervisors cannot simultaneously occupy the position of member of the county board of health or county fair board. (Blumberg to Frisk, Harrison County Attorney, 4/3/79) #79-4-4(L)

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Judson Frisk
Harrison County Attorney

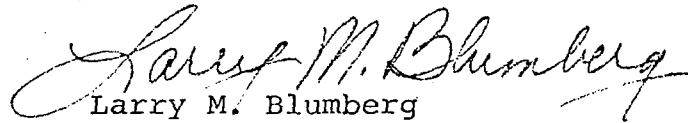
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board of supervisors may permit the use of county maintenance equipment for county fair purposes.

These facts also show a revisory power in addition to being improper for considerations of public policy. See also, Wilson v. Iowa City, 165 N.W.2d 813, 822 (Iowa 1969).

Accordingly, we are of the opinion that a member of a county board of supervisors may not simultaneously occupy the position of member of a county board of health or county fair board.

Very truly yours,


Larry M. Blumberg
Assistant Attorney General

LMB:jkt

STATE OFFICERS AND DEPARTMENTS: Commission on the Aging and Area Agencies on the Aging, their fiscal relationship and rate of reimbursement for mileage and travel. 42 U. S. C. § 3001 et. seq., 42 U. S. C. § 3024; 42 U. S. C. § 3045 et. seq.; 42 U. S. C. § 3045a(c); 45 C. F. R. § 909.42(a)(1); 45 C. F. R. § 909.43; Chapter 249B, 1979 Code of Iowa; §§ 18.117, 25A.2(3), 1979 Code of Iowa; § 20, Iowa Administrative Code; Area Agencies on Aging are subject to the direct supervision and control of the State Commission on Aging. The Commission on the Aging is vested with the authority to receive all funds on behalf of the Area Agencies. Distribution of funds to Area Agencies is solely through the Commission on the Aging, after the approval by the Commission of the Area Agency's area plan. The Area Agencies are bound by the fiscal policy as formulated by the Commission on the Aging. The Area Agencies are further bound by the uniform standards set for state employees with respect to mileage reimbursements. Area Agencies may reimburse clients for mileage for transportation services provided to conduct the "Nutrition Program for the Elderly". Such reimbursements must also conform to the uniform standards set for state employees. (McDonald to Odell McGhee, Legal Services Developer, Commission on the Aging, 4/3/79) #79-4-3(L)

Mr. Odell McGhee
Legal Services Developer
Iowa Commission on the Aging
415 Tenth Street
Des Moines, Iowa 50319

April 3, 1979

Dear Mr. McGhee:

You have requested an opinion of the Attorney General with respect to the relationship of the Iowa Commission on the Aging and the Area Agencies on Aging. Your question has arisen due to a lack of a uniform policy for reimbursement for mileage by Area Agencies on Aging. Specifically, you have requested an answer to each of the following questions:

1. Does the Iowa Commission on the Aging have authority to formulate fiscal policy for grantees and Area Agencies on Aging based on State policy?
2. To what extent are Area Agencies on Aging bound by these policies?
3. What is the legal relationship of the State Comptroller's Office to Area Agencies on Aging?
4. To what extent can the State Agency control the use of Area Agencies and grantees of the following funds:
 - A. Funding from Older American's Act, Titles III, V, VII and IX?
 - B. Funding from all State sources including grants under Senate file 302 passed in 1977?

- C. Project Income received from participants in Social Service programs funded by Older American Act?
 - D. Funding from outside sources required by State and Federal programs for match in funding purposes?
 - E. Other funding from private and local resources which is not used as match?
5. May an Area Agency reimburse volunteers at a higher rate than the State rate?

The Iowa Commission on the Aging is established by Chapter 249B, Code of Iowa (Acts of the 61st G.A., Ch. 225, 1965), to implement the federal Older Americans Act of 1965, 42 U.S.C. § 3001 et. seq. Area Agencies for the Aging are authorized by § 249B.8, Code of Iowa, which reads as follows:

The commission on aging may establish area agencies on aging for the planning and service areas developed by the office for planning and programming pursuant to the "Older Americans Comprehensive Services Amendments of 1973", United States Public Law 93—29, section 304. An area agency may be merged with a contiguous planning and service area but not without the approval of each policy making body which is a party to the merger. Merged planning and service areas forming one area agency shall be governed by only one policy making body. Funds appropriated pursuant to this Act shall be allocated to each planning and service area for which an area agency has been designated by the end of the funding period, and shall be available for both program maintenance of effort and administrative expenditures.

Section 249B.8 incorporates by reference Section 304 of United States Public Law 93—29, which is codified in 42 U.S.C. § 3024. Therefore, to determine the relationship of the state Commission on Aging and the Area Agencies on Aging, we must first consider Section 3024 of the United States Code.

In order for a state to be eligible to participate in the grants programs made available by the federal Older Americans Act, the state must designate a State Agency as the sole agency to be primarily responsible for the coordination of all state activities

Mr. Odell McGhee
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related to the Act. See 42 U.S.C. § 3024(a)(1)(C). The State Agency must divide the state into distinct areas for the purposes of planning and delivery of services. See 42 U.S.C. § 3024(a)(1)(E). For each such area, the State Agency must designate a public or nonprofit private agency or organization as the Area Agency on Aging for such area. See 42 U.S.C. § 3024(a)(2)(A).

An Area Agency must be under the supervision or direction of the State Agency. See 42 U.S.C. § 3024(b)(4). Furthermore, the Area Agency is obligated to promulgate an area plan for delivery of services which must be approved by the State Agency. See 42 U.S.C. § 3024(c).

Therefore, the federal Act requires a scheme of community-based delivery of services that is under the direct supervision and control of a centralized State Agency. Such a scheme is manifested in Chapter 249B, Code of Iowa, and the Administrative Rules promulgated thereunder, in Section 20 of the Iowa Administrative Code.

The Commission on the Aging is the State Agency required by the federal Act, which is made clear by the Commission's duties as set forth in § 249B.4 of the Code of Iowa, and Section 20-1.2(2)(a) of the Iowa Administrative Code, which states:

Specific responsibilities. Specific responsibilities of the commission shall include: a. Serving as the designated sole state unit on aging in Iowa, for all purposes of the Older Americans Act of 1965, as amended to November 28, 1975, and related legislation;

The Commission on the Aging is responsible for coordinating all activities in Iowa related to the programs of the Older Americans Act. See § 249B.4(2), Code of Iowa; § 20-1.2(2)(c), Iowa Administrative Code.

The Iowa program for the aging receives its funding from federal grants, state appropriations, and private grants and gifts. All such funds are received initially by the State Agency for distribution to the Area Agencies. See § 20-1.2(2)(i), Iowa Administrative Code. All federal funds and grants and gifts on behalf of the state are received by the State Agency, and are deposited with the state treasurer. See § 249B.7, Code of Iowa.

Mr. Odell McGhee
Page Four

Appropriations from the Iowa General Assembly are drawn from the treasury of the state. Article III, § 24, Constitution of Iowa. The State Comptroller controls the payment of all monies in the treasury and all payments from the treasury by the preparation of warrants. See § 8.6(2), Code of Iowa. No money is paid out of the state treasury but upon warrants of the comptroller. See § 12.5, Code of Iowa.

Therefore, the legal relationship of the State Comptroller and the Area Agencies is indirect, but significant. All funding for the Area Agencies comes from the state treasury, but only upon a distribution of such funds by the State Agency, the Commission on the Aging. See § 20-1.2(2)(j), Iowa Administrative Code. Such funds may be distributed from the treasury only upon the warrants of the comptroller.

The Commission on the Aging formulates fiscal policy for the Area Agencies through the Commission's approval of the area plan (§§ 20-1.2(2)(i) and 20.18(1), Iowa Administrative Code), and through the Commission's authority as the sole conduit of funds from the state treasury to the Area Agencies on Aging. See 20-1.2(2)(j), Iowa Administrative Code. The Area Agencies are thus bound by the fiscal policy formulated by the Commission on the Aging.

The Iowa Commission on the Aging has chosen to designate private nonprofit agencies as the Area Agencies on Aging, as is authorized in the Federal Act at 42 U.S.C. § 3024(a)(2)(A), and in the Iowa Administrative Code at §§ 20-1.8 and 20-1.2(2)(g). It is pursuant to this scheme that the mileage reimbursement question has arisen. Specifically, because the Area Agencies are private agencies, are they bound by the reimbursement for mileage policy that applies to state and public officers and employees?

The state policy addressing reimbursement for mileage for use of a private automobile by a state employee is found in § 18.117, which reads as follows:

18.117 Private use--rate for the state
business

No state officer or employee shall use any state-owned motor vehicle for his own personal use, nor shall he be compensated for driving his own motor vehicle except if such is done on state business with the approval of the state vehicle dispatcher, and in such case he shall receive fifteen cents per mile. A statutory provision stipulating necessary, mileage, travel, or actual expenses reimburse-

ment to a state officer shall be construed to fall under this fifteen cents limitation unless specifically provided otherwise. Any peace officer as defined in section 748.3 who is required to use his private vehicle in the performance of his official duties shall receive reimbursement for mileage expense at the rate of fifteen cents per mile. However, the state vehicle dispatcher may delegate authority to officials of the state, and department heads, for the use of private vehicles on state business up to a yearly mileage figure established by the director of general services and approved by the executive council. When a state motor vehicle has been assigned to a state officer or employee he shall not collect mileage for the use of his personal vehicle unless the state vehicle assigned to him is not usable.

This section shall not apply to elected officers of the state, judges of the district court, judges of the supreme court, or officials and employees of the state whose mileage is paid by other than state agencies.

The inquiry is whether employees of Area Agencies on Aging are bound by the limitation in § 18.117.

Chapter 18 of the Code of Iowa does not expressly define "state employee". However, "state employee" is defined in § 25A.2(3), 1979 Code of Iowa, as follows:

3. "Employee of the state" includes any one or more officers, agents, or employees of the state or any state agency, including members of the general assembly, and persons acting on behalf of the state or any state agency in any official capacity, temporarily or permanently in the service of the state of Iowa, whether with or without compensation. Professional personnel, including medical doctors, osteopathic physicians and surgeons, osteopathic physicians, optometrists and dentists, who render services to patients and inmates of state institutions under the jurisdiction of the department of social services are to be considered employees of

the state, whether such personnel are employed on a full-time basis or render such services on a part-time basis on a fee schedule or arrangement, but shall not include any contractor doing business with the state.

Reference to the definition in § 25A.2(3) is appropriate in this case because in construing statutes, other acts and statutes relating to closely allied subjects are in pari materia and must be construed together. See Northwestern Bell Telephone Co. v. Hawkeye State Telephone Co., 165 N.W.2d 771 (Iowa 1969); see also State v. Shaw, 28 Iowa 67, 78 (1869), which states: "Statutes are in pari materia which relate to the same person or thing, or to the same class of persons and things." Because § 18.117 addresses reimbursement of state employees for transportation costs while on state business, and § 25A.2(3) defines "state employee", these statutes relate to the same persons, and are closely related in subject matter. Therefore, § 18.117 and § 25A.2(3) should be read in pari materia.

Employees of the Commission on the Aging are "state employees" within the meaning of § 25A.2(3), and are therefore bound by the statutory limitation in § 18.117. Because the Area Agencies are bound by the fiscal policy as formulated by the Commission on the Aging, and because the Commission on the Aging has incorporated the mandate of § 18.117 into its fiscal policy for the Area Agencies, Area Agencies on the Aging are bound by the mileage limitations in § 18.117.

A contrary conclusion would result in absurd and unreasonable results. If employees of Area Agencies on Aging were not bound by the mileage limitation set by the Commission on the Aging, reimbursement of such employees could be made at amounts greater than fifteen cents per mile. Because such reimbursements would come from the state treasury, such a result would be absurd, with regard to the intent of the legislature as expressed in § 18.117. (See also § 79.9, 1979 Code of Iowa, which contains the same limitation on mileage reimbursement for "public officers or employees".) Statutes should be construed so as to avoid absurd results. State v. Berry, 247 N.W.2d 263 (Iowa 1976).

Therefore, an Area Agency on Aging may not reimburse employees for mileage at a higher rate than is prescribed by § 18.117, Code of Iowa.

There is no authorization, in federal or state law, for reimbursement for travel expenses of persons who volunteer services to the Area Agencies. Federal law provides that voluntary social

Mr. Odell McGhee
Page Seven

service groups are to be encouraged and permitted to participate in programs to the maximum extent feasible. See 42 U.S.C. § 3012(b). However, reimbursement of such voluntary groups for travel expenses is not addressed in federal or state law.

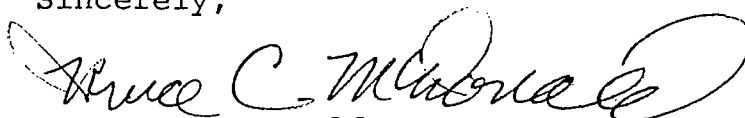
Area Agencies currently reimburse clients for mileage in the "Nutrition Program for the Elderly" in the Older Americans Act. See 42 U. S. C. § 3045 et. seq. Reimbursement is made pursuant to an agreement whereby the client-participant transports other participants to the meal site. Such agreements are legitimate under the Federal Act, which provides that the Commissioner will cooperate with other public and private agencies and instrumentalities in the use of services and personnel, with or without reimbursement. See 42 U. S. C. § 3045a(c). Furthermore, federal regulations dictate that the state plan must provide for transportation of individuals to and from the congregate meal sites [45 C. F. R. § 909.42(a)(1)], and that the state plan will undertake those activities necessary to assure maximum utilization of all other public and private resources in the conduct of the program. (45 C. F. R. § 909.43).

Therefore, reimbursement of individuals for mileage pursuant to such agreements in the "Nutrition Program for the Elderly" is permissible. However, such services should not be classified as "volunteer activities" in the programs under the Older Americans Act.

Area Agencies are bound by fiscal policy as formulated by the Commission on Aging. Area Agencies are therefore bound by the rate for reimbursement of state employees, set in § 18.117, Code of Iowa, in reimbursing clients for transportation services under the "Nutrition Program for the Elderly".

In summary, Area Agencies on Aging are subject to the direct supervision and control of the State Commission on Aging. The Commission on the Aging is vested with the authority to receive all funds on behalf of the Area Agencies. Distribution of funds to Area Agencies is solely through the Commission on the Aging, after the approval by the Commission of the Area Agency's area plan. The Area Agencies are bound by the fiscal policy as formulated by the Commission on the Aging. The Area Agencies are further bound by the uniform standards set for state employees with respect to mileage reimbursement. Area Agencies may reimburse clients for mileage for transportation services provided to conduct the "Nutrition Program for the Elderly". Such reimbursements must also conform to the uniform standards set for state employees.

Sincerely,



Bruce C. McDonald
Assistant Attorney General

POLITICAL SUBDIVISIONS: Funds of Chapter 28E Entities -- §§28E.2, 28E.3, 28E.7, and 453.1, the Code 1979. Funds held by a separate entity established pursuant to Ch. 28E are not generally subject to §453.1. However, if those funds are held by any of the officials listed in §453.1, then that section is applicable. (Blumberg to Menke, State Representative, 4/2/79) #79-4-2(L).

The Honorable Lester D. Menke
State Representative
L O C A L

April 2, 1979

Dear Representative Menke:

We have your opinion request of March 9, 1979, regarding Chapter 453, the Code, 1979. Pursuant to your facts, Sioux, O'Brien and Osceola Counties, along with several municipalities therein, formed a solid waste agency under Chapter 28E. You ask whether this separate entity is subject to the provisions of §453.1.

Section 453.1 provides:

All funds held in the hands of the following officers or institutions shall be deposited in banks as are first approved by the appropriate governing body as indicated: For the treasurer of state, by the executive council; for the county treasurer, recorder, auditor, sheriff, township clerk, clerk of the district court, and judicial magistrate, by the board of supervisors; for the city treasurer, by the city council; for the county public hospital or merged area hospital, by the board of hospital trustees; for a memorial hospital commission; for a school corporation by the board of school directors; provided, however, that the treasurer of state and the treasurer of each political subdivision shall invest all funds not needed for current operating expenses in time certificates of deposit

in banks listed as approved depositories pursuant to this chapter or in investments permitted by section 452.10. The list of public depositories and the amounts severally deposited therein shall be a matter of public record. The term "bank" means a bank or a private bank, as defined in section 524.103.

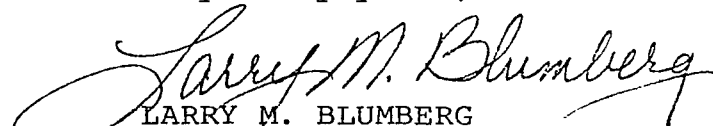
In a previous opinion of this office, 1974 OAG 743, the issue involved whether a Chapter 28E entity, pursuant to Chapter 473A of the Code, was subject to Chapter 453 of the Code. There, we cited to §§28E.3 and 28E.7, which provide that a separate entity can exercise the powers held by any one of its contracting bodies, and that no Chapter 28E agreement shall relieve any public agency of any obligation or responsibility imposed upon it by law. We then cited to §473A.1 which provided that the entity in question was separate and apart from the governmental units creating it. On that basis, and on the basis that §453.1 specifically did not list Chapter 28E entities, we held that the provisions of Chapter 453 were not applicable.

Although there is no statute which provides that a solid waste agency is separate and apart from the governments that created it, as is found in §473A.1, we arrive at the same conclusion. Section 28E.7 provides, in effect, that any obligation or responsibility upon a public agency cannot be waived or circumvented by a Chapter 28E agreement. "Public agency" is defined in §28E.2 as political subdivisions of the state, agencies of the state, any agency of the Federal Government, and the like. It does not include an entity created under the Chapter. Therefore, §28E.7 has no application to the separate entity.

Your question, put another way, is: If an official, who is not one of those listed in §453.1, holds money for a separate entity, is §453.1 applicable? The answer is no. Section 453.1 only applies to those officials listed therein, and only for public money in their hands. See, 1932 OAG 71. Thus, if the money is not in the hands of those officials listed in §453.1, it need not be deposited in banks pursuant to that section. The public agencies, pursuant to §28E.2 are therefore not circumventing §28E.7 or §453.1.

A different result is reached if the money in question is in the hands of one of those listed officials. Section 453.1 speaks of "all funds". The word "all" means the whole, every, the entire number of, and everything. See, Black's Law Dictionary (4th Ed. 1951) at page 98; and, Webster's New World Dictionary (1959) at page 38. That word is broad enough to include the money of the separate entity. Thus, if the money of the separate entity is held by any of the officials listed in §453.1, it must be deposited pursuant to that section.

Very truly yours,


LARRY M. BLUMBERG
Assistant Attorney General

LMB:pml

VETERANS MEMORIAL COMMISSIONS: Method of Appointing Commissions:
§ 37.10, Code of Iowa, 1977. The authority of the commissioners of veterans
memorial buildings and monuments selected pursuant to § 37.10 has been under-
mined by the Iowa Supreme Court in Gamel v. Veterans Memorial Auditorium
Commission. County boards of supervisors or city councils should invoke § 37.14 and
appoint successor commissioners after implementing fair and neutral selection
procedures. (Bennett to Howell, House of Representatives, 4/2/79) #79-4-1(L)

April 2, 1979

Mr. Rollin Howell
House of Representatives
State Capitol
L O C A L

Dear Mr. Howell:

Reference is made to your request of January 16, 1979 for an opinion regarding the
status of the Floyd County Memorial Hospital Commission in light of the Iowa
Supreme Court's recent decision in the case of Gamel v. Veterans Memorial
Auditorium Commission.

The questions which you presented are:

1. "In view of the court's decision in Gamel v. Vet's Auditorium, what is
the legal status of the Floyd County Memorial Hospital Commission?"
2. "Can the Floyd County Memorial Hospital Commission continue to
operate with its present structure pending legislation?"

In answer to your first question, the Iowa Supreme Court determined that the
selection procedure for commissioners for military veterans memorial buildings and
monuments provided for by § 37.10, Code of Iowa 1977, was unconstitutional in
Gamel v. Veterans Memorial Auditorium Commission 272 N.W. 2d 472 (Iowa 1978).
The court allowed the first paragraph of § 37.10 requiring that commissioners be
honorably discharged soldiers, sailors, or marines to remain intact. Gamel at 477.
The selection procedure which was declared invalid gave eight veterans
organizations the right to appoint three delegates whose duty it was to select five
commissioners and submit those names to the board of supervisors or city council.
The board of supervisors or city council was directed to appoint those
commissioners by resolution.

Mr. Rollin Howell
Page 2

In Gamel the Court adopted a strict rule concerning the appointment by private individuals of boardmembers empowered to spend public funds. The Court stated:

"It is sufficient that we here decide that there are special interests involved which prohibit giving private groups control of the appointment of public officials to spend public funds. Those interests require a strict rule against any delegation of sovereign power." Gamel at 476.

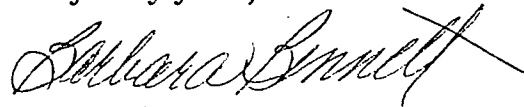
Inasmuch as the commissioners of the Floyd County facility were selected pursuant to § 37.10, it would appear that their authority has been decidedly undermined by the Court's decision.

After noting that there is no constitutional requirement that the members be elected, the Court addressed the alternative means for selecting the commissioners which appears in § 37.14. Section 37.14 provides that if no selection has been made pursuant to § 37.10, the board of supervisors or the city council, as the case may be, shall appoint their successors. The Court went on to say:

"The legislature is free to provide that the positions should be filled by appointment by an appropriate public officer or body." Gamel at 477.

In view of the Court's decision, the Floyd County Board of Supervisors should invoke § 37.14 and proceed to select successor commissioners. Therefore, in answer to your second inquiry, while the Gamel Court does not address the question of the propriety of reappointing all of the current commissioners to the new commission, we would note that a court may view such action with suspicion and would recommend that the supervisors adopt a fair and neutral procedure similar to that employed for other such appointments.

Very truly yours,



Barbara Bennett
Assistant Attorney General

BEB/cm

MUNICIPALITIES: Special Assessments §§384.58, 384.59, 384.60, 384.62 and 384.65, the Code, 1979. Where there is a deferred special assessment pursuant to §384.62 interest accrues on the date of the change in use of the property, withdrawal or discontinuance of the deferment. (Blumberg to Neighbor, Jasper County Attorney, 5/30/79) #79-5-33 (S)

May 30, 1979

Mr. Charles G. Neighbor
Jasper County Attorney
301 Courthouse Building
Newton, Iowa 50208

Dear Mr. Neighbor:

We have your opinion request regarding deferred payments of special assessments of cities pursuant to Chapter 384, the Code, 1979. You ask when interest on the deferred assessments begins to accrue.

Section 384.62, the Code, provides in pertinent part:

A special assessment for a public improvement against a tract of land used and assessed as agricultural property shall not become payable upon the filing of a request by the owner for deferment until that land is not used and assessed as agricultural property. At the time of the change in the use of the property, the special assessment shall become payable in the same manner as the special assessment would have become payable had it not been deferred by this section. (Emphasis added).

The emphasized portion of the above-cited section is of importance in answering your question.

Section 384.65 sets forth the manner of payment of the assessment. If the assessment is fifty dollars or more, it

can be paid in installments. The first installment is due and payable on July 1 following the date of the levy, unless the levy is made after May 31. The succeeding installments are due on each July 1, and must be paid with the September payment of ordinary taxes. Interest on the first installment shall be on the entire unpaid assessment from the date of acceptance of the work by the city until December 1 of that year. Each succeeding installment shall include interest on the unpaid balance to December 1.

Section 384.58 provides that within ten days after accepting the work, the council shall determine the total cost of the project and, by resolution, determine the proportion or amount of the cost to be assessed against private property. Sections 384.59 and 384.60 provide for additional time frames within which the final assessment schedules will be adopted and filed. Thus, there could be a considerable amount of time between the acceptance of the work and December 1 of the year in which the first installment is due upon which interest can be charged.

When the Legislature indicated in §384.62 that the deferred special assessment shall become payable in the same manner as if it had not been deferred, we believe that it was referring to §384.65. If section 384.65 is strictly applied, the interest would accrue on the date that the work is accepted. Since the deferment can be for an indeterminate length of time, the interest would accumulate for a long period of time before the deferred assessment is due and payable, and could in some instances, exceed the amount of the assessment. Such heavy interest costs should land be converted from agricultural to non-agricultural use would seriously impair the free use of land. The burden would be particularly onerous in the context of the present statute that applies only to city special assessments, for it is within urban areas that the economic pressure for conversion of land is particularly intense. Such a strict application would tend to defeat the purpose of the deferment. Constructions which cause such results are to be avoided. See §4.6, The Code, 1979.

A more equitable and logical application would be to equate the date of the change in the use of the property or the date of the withdrawal or discontinuance of the deferment with the date of acceptance of the work. That is, interest would accrue from the date of the change for the entire assessment up

Charles G. Neighbor
Jasper County Attorney

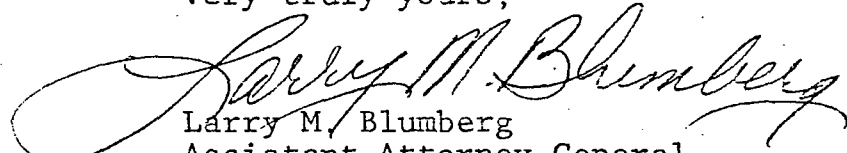
page 3

to December 1, and the first installment would be due and payable on July 1, unless the date of the levy was after May 31. Thereafter, the succeeding installments would become due and payable pursuant to \$384.65.

Accordingly, it is our opinion that where there is a deferred assessment pursuant to \$384.62, the interest accrues on the date of the change in use of the property, withdrawal or discontinuance of the deferment.

You also ask how local officials should technically record the fact that a deferment has been requested by an owner of agricultural property. Since the statute is silent on the question, the manner of implementing the law rests with the sound discretion of city and county officials. Notation by the city clerk and county auditor on appropriate records would appear proper.

Very truly yours,


Larry M. Blumberg
Assistant Attorney General

LMB:ab

COUNTIES: Brucellosis Fund Claims. Sections 164.21, 164.23, 164.27, The Code, 1979, Sections 343.10, 343.11, The Code, 1979, Section 74.1, The Code, 1979. A claimant is entitled to only that portion of his claim against the Brucellosis Fund which can be paid by moneys on hand, and a Board of Supervisors may not bind the Brucellosis Fund through successive fiscal years to make payments to one claimant. (Benton to Tullar, Sac County Attorney, 5/30/79) #79-5-32(L)

May 30, 1979

Mr. Lon R. Tullar
Sac County Attorney
110 South 5th
Sac City, Iowa 50583

Dear Mr. Tullar:

In your opinion request of March 19, 1979, you have raised three questions concerning the Sac County Brucellosis Fund. Before specifically addressing these questions, a description of the factual background giving rise to them is essential. As your letter indicates, you have previously sought the opinion of this office regarding a claim against the Brucellosis Fund for Sac County. Your initial request stated that the cattle of a Sac County farmer had been condemned pursuant to Chapter 164 of the Code. The Iowa Department of Agriculture certified the amount of the claim and filed it with the Sac County Board of Supervisors. A dispute then arose which formed the essence of the current problem. The claim against the Brucellosis Fund was in the amount of \$231,000.00, yet the fund contained less than \$2,500.00 and the annual maximum levy was \$49,000.00.

In response to your initial request concerning this problem, our office in an opinion dated January 27, 1977, stated that under Sections 164.27 and 343.10, Code of Iowa, 1975, the claimant is entitled to approval of his claim against the Brucellosis Fund only if there are funds available in the eradication fund to pay the claim. (OAG 77-1-16). The opinion also concluded that the provisions of Chapter 74 permitting the

issuance of anticipatory warrants was inapplicable to the payment of this claim. After the issuance of this opinion, the claimant brought an action against the Sac County Board of Supervisors to recover its claims against the Brucellosis Fund of \$231,000.00. This action was settled by a written agreement between the claimant and Sac County. Under the terms of the Stipulation of Settlement, the Board of Supervisors agreed to levy the maximum levy pursuant to Section 164.23 of the 1975 Code of Iowa and to levy sufficient funds under Section 165.18 of the 1975 Code of Iowa to be transferred to the Brucellosis Fund to cover administrative and current expenses. The Board agreed to make these levies until all of the claimant's brucellosis claims were paid in full. Moreover, the Board agreed that immediately upon signing the settlement agreement the Board would issue an anticipatory warrant for the balance of anticipated revenues in the brucellosis fund for the current fiscal year and to deliver the anticipatory warrant to the claimant. At the beginning of each fiscal year the Board agreed to issue similar anticipatory warrants until the claimant's claims were paid in full. The State Auditor's Report for the fiscal year ended June 30, 1978, addressed in part the propriety of the settlement agreement between Sac County and the claimant. Citing the January 27, 1977 opinion of this office, the Auditor's Report concludes that the agreement is not legal and binding, and refers the matter to the County Attorney and the Attorney General's office for ruling.

The first question which you raise concerning these facts is:

"1. When a claim on the Brucellosis Fund exceeds the maximum amount in the fund, for any year, is the claimant entitled to only that portion of his claim which can be paid by moneys on hand, with the balance being denied, or can the balance be carried over to the following fiscal year, etc., until paid?"

The provisions of Chapter 164 establish a procedure through which the owner of cattle slaughtered under the Chapter may be indemnified for the loss. Section 164.21, The Code, 1979, indicates that at the outset the Department of Agriculture must certify the claim, as was done in the instant case. This provision goes on to limit the indemnity which may be paid a claimant with the following terms:

"In the case of individual payment, all animals shall be individually appraised and the amount of indemnity shall be equal to the difference between the slaughter value and the appraised price, less the amount of indemnity paid by the United States Department of Agriculture. The total amount of indemnity paid by the county of origin for a grade animal or a purebred animal shall not exceed two hundred dollars. However, if a purebred animal is purchased and owned for at least one year before testing and the owner can verify the actual cost, the board of supervisors of the county of origin may, by resolution award the payment of an additional indemnification not to exceed five hundred fifty dollars or the actual cost of the animal when purchased, whichever is less."

The Brucellosis Fund through which claimants are indemnified is funded through a tax levied by the Board of Supervisors pursuant to Section 164.23, The Code, 1977. The amount of the levy is itself limited by the following terms of Section 164.23:

". . . and such levy shall not exceed in any year thirteen and one-half cents per thousand dollars of assessed value of the taxable value of all the property in the county."

Finally, the amount of the claims themselves are in turn limited by Section 164.27, The Code, 1979 which states:

"Whenever the balance of such fund becomes less than twenty-five hundred dollars, the county auditor shall notify the department in writing of such fact, and no expense shall be incurred on such account in excess of the cash available in such fund."

The statutory mechanism through which the Brucellosis Fund is administered evinces a clear intent to limit both the amount of the Fund and the claims against it. Based on the foregoing statutes, as well as Section 343.10, the January 27, 1977 opinion concluded that a claimant is entitled to approval of his claim only if there are funds available in the eradication fund to pay such claim. This conclusion is inescapable given the language of Chapter 164. It necessarily must follow from this conclusion that a claimant is entitled to only that portion of his claim which can be paid by moneys on hand in the Fund, with the balance being denied.

Further, the provisions of Chapter 343 which bear upon this question buttress our conclusion. Section 343.10, The Code, 1979, provides a general limitation upon the expenditures of all counties with the following terms:

"It shall be unlawful for any county, or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.

Any officer allowing a claim, issuing a warrant or making a contract contrary to the provisions of this section, shall be held personally liable for the payment of the claim or warrant, or the performance of the contract."

However, Section 343.11(4) The Code, 1979 provides a general exception to this prohibition by providing:

"Section 343.10 shall not apply to:
(4) Expenditures for the benefit of any person entitled to receive help from public funds."

Although Section 343.11(4) has never been construed to include claimants against a county Brucellosis Fund, its very terms seem to indicate that claims paid from this fund are, "Expenditures for the benefit of any person entitled to receive help from public funds." As a result, Section 343.11(4) conflicts with the limiting provisions of Chapter 164, particularly Section 164.27. A consideration of these provisions indicates that those in Chapter 164 deal with a particular county fund that is, they are specific in nature. Section 343.11(4) by contrast encompasses expenditures for any persons entitled to aid from public funds, that is, it is general in scope. Section 4.7, The Code, 1979 provides:

"If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision."

See also, Doe v. Ray, 251 N.W.2d 496, 501 (1977). The limiting provisions of Chapter 164 must control in this instance, with the consequence that Section 343.11(4) does not ameliorate our conclusion stated above, that a Brucellosis Fund claimant is entitled to only that portion of his claim which can be paid by moneys on hand in the fund.

This result is supported by an opinion previously issued by this office. Specifically, we have been previously asked:

"If a claim is filed with the County Auditor for a legal indebtedness (as county officials claim for salaries, and expenses) and the county is unable to pay said claim because of lack of funds, can this claim be paid the following year out of the collectible revenues for that year?" OAG 1925-26 p. 200.

In response to this question, this office opined:

If the board of supervisors is without authority to allow any claim or issue any warrant, or to enter into any contract which results in excess of the collectible revenues in a fund for the year, such claims in excess thereof may not be allowed and paid out of the revenues for the next year unless the expenditures come within one of the nine exceptions to section 5258, which are contained in Section 5259 of the Code," OAG 1925-26 p. 201.

This opinion has indicated that the exceptions of Section 343.11 are inapplicable to this problem. We must assert therefore, that the balance of the claimant's claims cannot be carried over through successive fiscal years until paid.

Your second question asks:

"2. If claimant's unpaid portion can be carried over from one fiscal year to the next, can Sac County bind the Brucellosis Fund for a period of time to make payments to one claimant, as done?"

This question refers to paragraph 3 of the Stipulation of Settle-

ment which provides that the Sac County Board of Supervisors issue anticipatory warrants until all of the claimant's claims are paid in full. Given our conclusion that a claimant's unpaid portion cannot be carried over from one fiscal year to the next, we must also conclude that the Brucellosis Fund cannot be bound by Sac County through successive fiscal years until paid.

In an analogous factual situation, our office has ruled that absent specific legislation authorizing the creation of an indebtedness by a Board of Supervisors payable in installments over a period of years, the Board lacked the power to enter contracts which would create such an indebtedness. OAG 1930 p.293. Similarly, we have concluded that a Board of Supervisors may contract for lumber and bridge material in one year to be used and paid for in the following year if the contract does not involve expenditures exceeding the collectible revenue for the following year. Underlying these principles is the express policy in Iowa which provides that elected Boards should be restrained from entering long term contracts which could mortgage the revenues of the county so that succeeding members cannot properly carry on county business and could effectively remove control of county government from the people. Independent School District v. Pennington, 181 Iowa 933, 937, 165 N.W.209 (1917); OAG 1930 p. 293. A consideration of this policy reinforces our conclusion that the Sac County Board of Supervisors cannot bind the Brucellosis Fund for a period of time to make payments to one claimant.

Your third question asks:

"3. If claimant is entitled to a carryover of unpaid claims, can Sac County issue anticipatory warrants for each new fiscal period, after said amounts have been budgeted, stamping them 'unpaid for want of funds' (after they have been discounted for the interest which is required paid pursuant to Chapter 74 of the Code of Iowa)?"

Again, this question alludes to paragraph 3 of the Stipulation of Settlement pertaining to the issuance of anticipatory warrants. In the initial opinion addressing the applicability of Chapter 74 to this situation, we noted:

"For the provisions of Chapter 74 allowing for anticipatory warrants to be applicable,

the warrant must be legally drawn. If a claim in excess of the amount of available funds is not authorized by statute, it would be improper to order such claims to be paid."

Section 74.1 The Code 1979 states in pertinent part:

"This chapter shall apply to all warrants which are legally drawn on a public treasury, including the treasury of a city, and which, when presented for payment, are not paid for want of funds."

As this provision indicates, Section 74.1 applies to warrants which are "legally drawn on a public treasury". Based upon our analysis of your first two questions it is clear that the claims involved here cannot be carried over. Therefore, since these claims are unauthorized by statute, warrants could not be "legally drawn" from the Fund. As a result, Chapter 74 is inapplicable to this situation and Sac County may not issue anticipatory warrants for each new fiscal period after the amounts have been budgeted, stamping them "unpaid for want of funds".

Sincerely yours,

Timothy D. Benton

TIMOTHY D. BENTON
Assistant Attorney General
Environmental Protection Division

TDB/mr

STATE OFFICERS AND DEPARTMENTS -- SUBSTANCE ABUSE -- Licensure of hospitals. Sections 125.13 and 125.21, Iowa Code (1979). Pursuant to § 125.13 and § 125.21, a hospital must obtain a license from the Commission on Substance Abuse to conduct or maintain a substance abuse substitute or antagonist program. (Cook to Riedmann, Director, Iowa Department of Substance Abuse, 5/30/79) #79-5-31(L)

May 30, 1979

Mr. Gary P. Riedmann, Director
Iowa Department of Substance Abuse
Suite 230, Liberty Building
418 Sixth Avenue
Des Moines, Iowa 50319
L O C A L

Dear Mr. Riedmann:

You have requested an opinion of the Attorney General concerning the licensure provisions of §§ 125.13 and 125.21, Iowa Code (1979). Your specific question is whether the Iowa Department of Substance Abuse (IDSA) and the Commission on Substance Abuse (Commission) must license hospitals which have chemical substitute or antagonist programs.

The relevant portions of the statutes involved provide:

"125.13 Programs licensed - exceptions.

"1. Except as provided in subsection 2 of this section, a person may not maintain or conduct any chemical substitutes or antagonists program, residential program or nonresidential outpatient program, the primary purpose of which is the treatment and rehabilitation of substance abusers without having first obtained a written license for the program from the department.

"2. The licensing requirements of this chapter, except the requirements imposed by section 125.21, shall not apply to any of the following:

"a. Hospitals providing any care or treatment to substance abusers required on January 1, 1978, by other provisions of law to be licensed."

"125.21 Chemical substitutes and antagonists programs.

"The commission shall have exclusive power in this state to approve and license chemical substitutes and antagonists programs, and monitor chemical substitutes and antagonists programs in this state to insure that the programs are operating within the rules established pursuant to this chapter and the commission shall be obliged to grant such approval and license if the requirements of the rules are met and no state funding is requested." (Emphasis added).

It is apparent from reading § 125.13(1), that the general licensure requirement applies to all prescribed programs, including substitute and antagonist programs, which are maintained or conducted by a facility other than those specifically enumerated in subsection two. Thus, any facility, other than one expressly described in § 125.13(2), may not conduct or maintain a substance abuse residential, nonresidential, substitute or antagonist program without first obtaining an IDSA license to do so. Hospitals which are otherwise required by law to be licensed on January 1, 1978, are expressly excluded from the § 125.13(1) license requirement; however, the exemption is qualified by the language of § 125.13(2) and does not cover the requirements imposed by § 125.21. 1

Section 125.21 relates solely to chemical substitute and antagonist programs, conferring upon the Commission the "exclusive power" to approve and license such programs. At first blush, the license requirement of § 125.21 appears to duplicate the substitute and antagonist program license imposed by § 125.13(1). However, reading the conditional language of § 125.13(2) and the express regulatory language of § 125.21 together, it appears that the

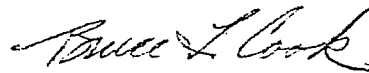
1. We note that Chapter 135B relates in general to the licensure and regulation of hospitals and that § 135B.3 requires all hospitals, as defined in § 135B.1(1), to obtain a license from the Department of Health. As a result, virtually all hospitals operating in Iowa on January 1, 1978 were "required . . . by other provisions of law to be licensed," within the qualified exemption of § 125.13(2).

Mr. Gary P. Riedmann, Director
Page 3

legislature has carved out a license requirement peculiar to substitute and antagonist programs which applies to those facilities otherwise exempted from § 125.13(1). It further appears from the statutory scheme that the Commission and IDSA have been vested with the licensing and regulatory power in relation to such programs in all facilities including those otherwise exempted under § 125.13(2).

Accordingly, a comparative reading of § 125.13(1) and § 125.21 leads to the conclusion that a hospital, otherwise required by law to be licensed on January 1, 1978, need not obtain a license from the Commission or IDSA to conduct a residential or non-residential, outpatient substance abuse treatment program, other than one involving treatment with chemical substitutes or antagonists. However, it is our opinion, that these sections require such facilities to obtain a license from the Commission to conduct or maintain any substance abuse substitute or antagonist program.

Sincerely,



BRUCE L. COOK
Assistant Attorney General

BLC/dlp

COUNTIES: Section 340.8 salary limitation. Section 340.8, Code of Iowa (1979). The salary limitation of Section 340.8 does not include compensation for voluntary overtime services received by deputy sheriffs pursuant to a contract between sheriff's departments and the Corps of Engineers. (Condon to Jay, 5/25/79) #79-5-30(L)

May 25, 1979

Honorable Dan Jay
State Representative
State Capitol
LOCAL

Dear Representative Jay:

This letter is in response to your request for an opinion regarding overtime compensation for deputy sheriffs. Your question is based upon the following fact situation:

FACTS: The Sheriff's Department of Appanoose County, Iowa, wishes to contract with the Corp of Engineers to provide law enforcement services on the federally owned land surrounding Rathbun Lake in Appanoose County. Presently any such services provided are merely incidental to normal patrol duties of the Sheriff and his deputies. Payments for such contractual services would be made to Appanoose County and added to the Sheriff's Department's operating budget.

In order to fulfill the terms of such a contract the Appanoose County Sheriff would place deputies on overtime status on a voluntary basis. Total income of the deputies would exceed the now allowable maximum percentage of the Sheriff's salary as set forth in Iowa Code §340.8. Any income to the deputies beyond these percentages would be attributable to the contractual services.

QUESTION: Does the salary limit imposed by Iowa Code § 340.8 include income attributable to voluntary overtime work in connection with contractual law enforcement services?

Section 340.8(1) sets the salaries of deputy sheriffs as follows:

1. Each deputy sheriff shall receive an annual salary as follows:

a. The first deputy sheriff, and the second deputy sheriff, if a second deputy sheriff is required, shall receive an annual salary of not more than eighty-five percent of the amount of the salary of the sheriff, as fixed by the board of supervisors.

b. In counties over two hundred fifty thousand population where more than two deputies are required, said deputies shall be paid an amount not to exceed seventy-five percent of the annual salary of the sheriff.

c. All other deputy sheriffs shall receive an annual salary as fixed by the board of supervisors, but not to exceed the salaries of the first or second deputies.

The above salary limitation restricts the compensation a deputy sheriff may receive for performing his employment duties. However, in the fact situation you presented, the deputies volunteer for employment by the Corps of Engineers to provide services that are not a part of their usual duties. The courts have determined that officers may receive extra compensation for services performed that were not required duties:

The law does not forbid extra compensation for extra services which have not [sic] affinity or connection with the duties of the office. The general principle prohibiting public officials from charging fees for the performance of their official duties does not

prohibit them from charging for their services for acts that they are under no obligation, under the law, to perform.

63 Am. Jur. Public Officers and Employees, § 383, p. 863; United States v. Mosby, 133 U. S. 273, 10 S. Ct. 327, 33 L. Ed. 625; Converse v. United States, 16 L. Ed. 192; Polk Twp., Sullivan County v. Spencer, 259 S. W. 2d 804 (Mo.).

Therefore, we conclude that the compensation received by the deputy sheriffs for the service performed for the Corps of Engineers would not be included in determining the deputies' annual salaries for purposes of the Section 340.8 limitation since the services are voluntary and outside the scope of the deputies' required duties under state law.

Very truly yours,

Marie A. Condon

MARIE A. CONDON (at)
Assistant Attorney General

MAC/jam

WEAPONS. National Guard Members. Sections 724.4(3) and 29A.1(7), Iowa Code (1979). National Guard members who carry weapons while in connection with their duties are exempt from State Weapons permits requirements. (Bremer to Senator Calhoun, 5/25/79) #79-5-29(L)

May 25, 1979

Senator James Calhoun
Senate District 26
Capitol Building
L O C A L

Dear Senator Calhoun:

You have requested an opinion from our office as to whether employees of the Iowa Department of Public Defense are required by city, state, or federal law to possess civilian gun permits while transporting non-military property. Our office can only respond to the applicability of relevant Iowa Code sections, and not to the applicable city and federal statutes.

The pertinent Iowa Code sections are:

"724.4 CARRYING WEAPONS. A person who goes armed with a dangerous weapon concealed on or about his or her person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor, provided that this section shall not apply to any of the following: . . .

"3. Any member of the armed forces of the United States or of the national guard or person in the service of the United States, when the weapons are carried in connection with his or her duties as such."

This exemption from the weapons permit requirement applies only to national guard members while they are on duty. We refer to Chapter 29A (Military Code) for a definition of "on duty":

"29A.1 DEFINITIONS. The following words, terms, and phrases when used in this chapter shall have the respective meanings herein set forth: . . .

"7. 'On duty' shall mean and include drill periods, all other training, and service which may be required under state or federal law, regulations, or orders, and the necessary travel of an officer or enlisted person to the place of performance of such duty and return home after performance of such duty, but shall not include federal service."

Therefore, if the national guard members are "on duty", they are entitled to the exemption in §724.4(3) Iowa Code (1979).

If the transportation of public property, while not within the bounds of the "Military Reservation" is within the scope of the national guard members' duties, then the exemption to the State weapons permit requirement applies.

Very truly yours,



CELESTE F. BREMER
Assistant Attorney General

CFB:mlh

USURY: SMALL LOANS: Interest: Chapters 535 and 536, 1979 Code of Iowa. Section 535.2, 1979 Code of Iowa, establishes the permissible rate of interest on money due on precomputed small loans that have matured. Under §535.2(1) the rate of interest is five per cent per annum in the absence of a written agreement. Section 535.2(3) permits the parties to agree in writing to a rate not to exceed two percentage points above the monthly average ten-year constant maturity interest rate of United States government notes and bonds. (Ormiston to Kingery, Department of Banking, 5/24/79) #79-5-27(L)

May 24, 1979

Mr. Larry D. Kingery
Banking Department
Liberty Building
418 Sixth Avenue, #530
L O C A L

Dear Mr. Kingery:

You have requested an opinion from the Attorney General answering the following question:

"What is the permissible rate of interest on precomputed small loans that have matured?"

The basic law which controls rates of interest that may be assessed in Iowa is Chapter 535, 1979 Code of Iowa, better known as the Iowa Usury Statute. The rates of interest established by the usury statute are the highest allowed on a transaction unless it is specifically exempted under another chapter of the Iowa Code.

One such exemption is available to small loan licensees under Chapter 536, 1979 Code of Iowa. As a consequence, loans issued pursuant to Chapter 536 are subject to the higher rates of interest provided at §536.13(4). Since the small loans statute is an exemption to the general rule on interest rates in the State of Iowa, it must be narrowly construed. Therefore, the specific terms of the statute from which small loans licensees derive their authority to assess higher interest rates are the sole conditions under which those rates of interest may be levied.

When a precomputed small loan issued pursuant to Chapter 536 has reached maturity, the loan has run its course. As a result, the annual rate of interest permissible under §536.13(4)

is no longer applicable because there is no provision within the statute for the assessment of that rate of interest beyond the term of the loan.

At this point, the general rule of the usury statute establishes the permissible rate of interest that may be levied on the money due after the precomputed small loan has matured. At §535.2(1), the rate of interest on "money after the same becomes due" is set forth.

"1. . . ., the rate of interest shall be five cents on the hundred by the year in the following cases, unless the parties shall agree in writing for the payment of interest at a rate not exceeding the rate permitted by subsection 3:

* * *

"b. Money after the same becomes due."

Consequently, if there is no written agreement for the interest rate at the maturity of a precomputed small loan, then five percent per annum is the highest permissible interest rate that may be assessed on loan contracts that have come due.

However, subsection 3 of §535.2 stipulates that a higher rate of interest may be assessed if there is a written agreement to that effect. At §535.2(3)(a), the higher rate is established.

"The maximum lawful rate of interest which may be provided for in any written agreement for the payment of interest entered into during any calendar quarter commencing on or after July 1, 1978, shall be two percentage points above the monthly average ten-year constant maturity interest rate of United States government notes and bonds as published by the board of governors of the federal reserve system

The present effective rate of interest under the statute as of March 1, 1979, is eleven percent (11%) per annum.

At §535.4, the receiving of any amount above the rate of interest allowed by §535.2 is illegal and a civil penalty, as set forth in §535.5, or a criminal penalty, as set forth in §535.6, may be exacted.

There are, however, additional provisions of Chapter 536, which may, in some instances, be pertinent to your question.

Chapter 536 does make reference to certain provisions of Chapter 537 of the 1979 Code of Iowa, better known as the Iowa Consumer Credit Code. Section 536.13(6) states in part:

"6. * * *

"The provisions of the Iowa consumer credit code shall apply to a consumer loan in which the licensee participates or engages, and any violation of the Iowa consumer credit code shall be in violation of this chapter."

The statute then specifically incorporates various sections of the Iowa Consumer Credit Code, including Article 2, Part 5, which sets forth "other charges and modifications" of consumer credit transactions. Section 537.2502 provides for delinquency charges that may be assessed:

"1. With respect to a precomputed consumer credit transaction, the parties may contract for a delinquency charge on any installment not paid in full within ten days after its due date, as originally scheduled or as deferred, in an amount not exceeding the greater of either of the following:

"a. One and one-half percent of the unpaid amount of the installment, or a maximum of five dollars.

"b. The deferral charge that would be permitted to defer the unpaid amount of the installment for the period that it is delinquent."

According to §537.2502(2), a delinquency charge may occur only once per installment and it may be assessed only if the installment, including the final installment, is ten days overdue.

The law regulating deferral charges is found at §537.2503.

"1. Before or after default in payment of a scheduled installment of a precomputed consumer credit transaction, the parties to

"the transaction may agree in writing to a deferral of all or part of one or more unpaid installments and the creditor may make at the time of deferral and receive at that time or at any time thereafter a deferral charge which is not in excess of one and one-half percent per month for the period of time for which it is deferred, but not to exceed the rate of finance charge which was required to be disclosed in the transaction to the consumer pursuant to section 537.3201 applied to each amount deferred for the period for which it is deferred. In computing a deferral charge for one or more months, any month may be counted as one-twelfth of a year and in computing a deferral charge for part of a month, a day shall be counted as one three hundred sixty-fifth of a year.

* * *

"3. The parties may agree in writing at the time of a precomputed consumer credit transaction that if an installment is not paid within ten days after its due date, the creditor may unilaterally grant a deferral and make charges as provided in this section. No deferral charge may be made for a period after the date that the creditor elects to accelerate the maturity of the transaction."

In other words, after the loan has matured, the creditor, upon agreement with the debtor, may charge delinquency charges or deferral charges. In both instances, the agreement must be written. The agreement for deferral charges may be prior to, or subsequent to, the ten day default period at a missed installment date including the maturity date of the loan.

Therefore, lender and borrower may contract for an interest rate for the loan, an interest rate for money due after the date of maturity, and for specific additional charges as well. These additional charges are in the form of a penalty and not as interest or a finance charge, unless the parties agree that they are finance charges. Section 537.1301(20)(b)(1) states that "finance charge" does not include:

"Charges as a result of default or delinquency if made for actual unanticipated late payment, delinquency, default, or other like occurrence unless the parties agree that these charges are finance charges. . . ."

In summary, the creditor and debtor on a precomputed small loan may reach several agreements in the event of default at maturity of the loan. Under §537.2502(1) the creditor may, by written agreement with the debtor, assess a delinquency penalty in the amount of one and one-half percent per month or a total of \$5.00 per installment. In the alternative, again by written agreement of the parties, the installment or maturity date may be deferred with a deferral charge of up to one and one-half percent per month under §537.2503.

Finally, upon maturity of the note, if the creditor does not wish to defer the loan payments, under Chapter 535 he may assess an interest rate of five percent per year if there is no written agreement with the debtor. With a written agreement, the creditor may charge an interest rate in compliance with §535.2(b) which, as of March 1, 1979, was eleven percent per annum.

Very truly yours,

Tam B. Ormiston

TAM B. ORMISTON
Assistant Attorney General

cf

STATE OFFICERS AND DEPARTMENTS: Open meetings law. Sections 28A.2(1), 179.2, 184A.1(7), 184A.18, 185.3, 185C.3, Iowa Code (1979). The Iowa Crop Improvement Association, Iowa Dairy Association, Iowa Beef Producers Association, Iowa Swine Producers Association, Iowa Poultry Associations, Iowa Soybean Association, Iowa Corn Growers Association and State Horticultural Society are not "expressly created" by statute and thus are not subject to the open meetings law. The Soybean Promotion Board, Corn Growers Promotion Board, Iowa Turkey Marketing Council and the Dairy Industry Commission are subject to the Chapter 28A provisions. (Cook to Lounsberry, Secretary of Agriculture, 5/23/79) #79-5-26 (L)

Mr. R. H. Lounsberry
Secretary of Agriculture
Iowa Department of Agriculture
Henry A. Wallace Building
Des Moines, Iowa 50319
L O C A L

May 23, 1979

Dear Secretary Lounsberry:

You have solicited our opinion on whether the following Iowa agricultural commodity groups fall within the purview of Chapter 28A, Iowa Code (1979):

Iowa Swine Producers
Iowa Poultry Association
Iowa Dairy Association
Iowa Crop Improvement Association
Iowa Soybean Association
Iowa Corn Growers Association
State Horticultural Society
Iowa Beef Producers Association
Iowa Turkey Marketing Council
Soybean Promotion Board
Corn Promotion Board
Dairy Industry Commission

You explain in your letter that these commodity organizations have received formal requests, pursuant to § 28A.4, for notice of meetings. Your specific question is thus one of basic coverage of the law, "are any of these organizations a 'governmental body', as defined in § 28A.2(1)?" If so, then the provisions on Chapter 28A apply and must be followed by these organizations.

The answer to your question turns upon whether any of the organizations fall within subsection (a) of § 28A.2(1) which provides:

"As used in this chapter:

"1. 'Governmental body' means:

"a. A board, council, commission or other governing body expressly created by the statutes of this state or by executive order."

An examination of the remaining subsections of § 28A.2(1) reveal that they are inapplicable.

In our recent opinion to Thomas D. Hanson, issued May 4, 1979, (OAG number 79-5-4), we discuss the meaning of the terms "expressly created" in subsection (a) as follows:

The comparable provisions of the prior law defined 'public agencies' to include 'any board, council, commission, created or authorized by the law of this state.' Section 28A.1(1), Iowa Code (1977). However, the term 'authorized' has been deleted from the new law and the term 'created' has been modified by 'expressly.' Because of prior litigation involving these terms, see Greene v. Athletic Council of Iowa State University, 251 N.W.2d 559 (Iowa 1977), significance must be attached to this change. Webster explains that the term 'created' means 'to cause to be or to produce by fiat or by mental, moral or legal action: as a: to invest with a new form, office or rank: constitute by an act of law or sovereignty.' A statute which does not itself 'constitute' the committee . . . does not 'expressly create' them as those terms are employed in § 28A.2(1)(a).

In the Hanson opinion, we found that a peer review committee of the Board of Engineering Examiners, while authorized by statute to be created, was not a "governmental body" because it is not "expressly created" by statute in the sense contemplated by § 28A.2(1)(a). Similarly, in our opinion to Gary Riedmann, issued May 16, 1979, (OAG number 79-5-15), we decided that a board of directors of a private, nonprofit corporation is not "expressly created" by statute, although § 504A.17 requires generally that such corporations have a board.

With respect to the Iowa Crop Improvement Association (Chapter 177), Iowa Dairy Association (Chapter 178), Iowa Beef Producers Association (Chapter 181), Iowa Swine Producers Association (Chapter 183), Iowa Poultry Associations (Chapter 184), Iowa Soybean Association (Chapter 185A), Iowa Corn Growers Association (Chapter 185B), and the State Horticultural Society (Chapter 186), we have examined the statutes and do not find statutory authority creating them. In general, these commodity organizations appear in the statutes to be organized and created as entities separate from state government. They are "recognized," not created, by the General Assembly, and have been extended various forms of state assistance. Notwithstanding the statutory "recognition" and the receipt of state assistance, the organizations nevertheless do not appear to have been "expressly created by the statutes of this state," and thus do not fall within the definition of "governmental body" in §28A.2(1).

Because of the peculiar statutory arrangement relating to the Soybean and Corn Promotion Boards, it is necessary to address them separately. Both of these boards are authorized by the following statutory language:

If a majority of the producers voting in the referendum election approve the passage of the promotional order . . . a promotion board shall be established.¹ (Emphasis added).

This language presents a close and difficult question with respect to coverage of these boards. On the one hand, they did not spring into being upon the passage of the respective statutes. On the other hand, their creation was obligatory upon the occurrence of a specific, express condition, i.e. a favorable referendum. Unlike the Peer Review Committees discussed in our opinion to Thomas Hanson, which came into being only upon a permissible, discretionary decision by another governmental body, these boards come into being as a ministerial matter upon a favorable referendum. In short, they are considerably more than merely "authorized," but somewhat less than fully constituted by statute. In this circumstance we feel it appropriate to invoke the rule in §28A.1 that ambiguity in the construction or application of this chapter should be resolved in favor of openness and to hold that these boards are governmental bodies within the meaning of §28A.2(1)(a).

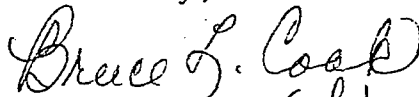
¹See, §185.3 (Soybean Promotion Board) and §185C.3 (Corn Promotion Board).

Mr. R. H. Lounsberry
Page 4

That leaves for our consideration the Iowa Turkey Marketing Council and the Dairy Industry Commission. The Dairy Industry Commission is clearly "expressly created" by statute, see, §179.2, Iowa Code (1979), and is a "governmental body" under §28A.2(1)(a), subject to the open meeting provisions.

Similarly, §184A.1(7) defines and constitutes the Iowa Turkey Marketing Council. You note in your letter that §184A.18 provides that the Council "shall not be a state agency,"² and ask whether that section changes the apparent result. We do not believe that it does. We are constrained to apply the "expressly created" language of §28A.2(1)(a) to this Council in terms of the open meeting law. Thus, while §184A.18 may affect certain operational or procedural aspects of the Council, it will not serve to exempt the Council from the Chapter 28A provisions. The Council falls directly within the §28A.2(1)(a) definition since it was "expressly created" by the General Assembly and thus must follow the open meetings provisions of Chapter 28A.

Sincerely,



BRUCE L. COOK (ak)
Assistant Attorney General

BLC/bje

²Also see, §§185.34 and 185C.34, providing that Soybean and Corn Promotion Boards respectively are "not a state agency."

TAXATION: Property Tax - Assessing Tracts of Real Property - §428.7, Code of Iowa, 1979. Assessors can value tracts of real property, for assessment purposes, as a unit without limitations on the size of the unit being assessed. (Kuehn to Allbee, Asst. Fayette County Attorney) #79-5-22(L)

May 18, 1979

Mr. Alan D. Allbee
Assistant Fayette County Attorney
106 N. Walnut
West Union, IA 52175

Dear Mr. Allbee:

We acknowledge receipt of your letter in which you have requested an opinion of the Attorney General as follows:

"I have received a request from the Deputy County Assessor for Fayette County, Iowa, for an opinion of the Attorney General on the following question:

"May local assessors assess farm land in tracts larger than 40 acres?

"It would seem that Iowa Code Section 428.7 would allow the assessor's office to assess farm land in larger than 40 acre tracts. The Deputy County Assessor of Fayette County however inquired of the Iowa Department of Revenue

on whether this could be done and received conflicting answers depending upon to whom he spoke. It is the feeling of the Deputy County Assessor that any reason for requiring their office to assess farms by 40 acre tracts no longer exists. Iowa Code Section 425.11 prior to its amendment by the 67th General Assembly applied the homestead tax credit against 40 acre parcels, however, since that Section's amendment the credit applies against buildings and contiguous parcels of ground without any apparent 40 acre limitation."

The legislature, by enacting §14 of Chapter 1190, Acts of the 66th General Assembly, Second Session, made it clear that the assessor, for assessment purposes, has the authority to value property as a unit without restrictions on the number of acres included in the particular unit being assessed. Said §14 of Chapter 1190, Acts of the 66th General Assembly, Second Session states:

"Sec. 14. Section four hundred twenty-eight point seven (428.7), Code 1975, is amended to read as follows:

"428.7 Description of tracts-manner.
No one A description shall not comprise more than one city lot, or more than the sixteenth part of a section or other smallest subdivision of the land according to the government surveys, except in cases where the boundaries are so irregular that it cannot be described in the usual manner in accordance therewith. *However, descriptions may be combined for assessment purposes to allow the assessor to value the property as a unit. This section shall apply to known owners and unknown owners, alike.*"

Furthermore, in addition to the above legislative enactment, §§6 and 7 of Chapter 43, Acts of the 67th General Assembly, First Session, eliminated the forty acre limitation regarding the homestead tax credit. Section 425.11, Code of Iowa, 1977, in part, stated:

"425.11 Definitions. For the purpose of this chapter and wherever used in this chapter:
1. The word, 'homestead', shall have the following meaning:

* * *

"c. If within a city, it must not exceed one-half acre in extent; if, however, its assessed valuation is less than nine thousand two hundred sixty dollars, the land area may be enlarged until its assessed valuation reaches that amount.

"d. If outside of a city, 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 has more than one dwelling house situated thereon, the 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 buildings appurtenant thereto situated upon said forty acres." (emphasis added)

Sections 6, 7 and 25 of Chapter 43, Acts of the 67th General Assembly, First Session state:

"Sec. 6. Section four hundred twenty-five point eleven (425.11), subsection one (1), Code 1977, is amended by striking paragraphs c and d.

"Sec. 7. Section four hundred twenty-five point eleven (425.11), subsection one (1), paragraph e, Code 1977, is amended to read as follows:

"e. It must not embrace more than one dwelling house, but where a homestead outside of a city has more than one dwelling house situated thereon, the 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 buildings appurtenant thereto situated upon said forty acres.

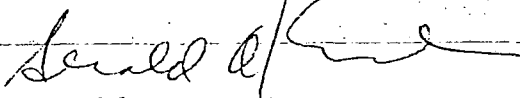
* * *

"Sec. 25. The provisions of sections three (3), four (4), five (5), six (6) and seven (7) of this Act are retroactive to January 1, 1976 for credits claimed on or after January 1, 1976 and approved under chapter four hundred twenty-five (425) of the Code for a homestead tax credit on an eligible homestead and to this extent the provisions of sections three (3), four (4), five (5), six (6), and seven (7) of this Act are retroactive."

Therefore, any questions remaining after the enactment of §14 of Chapter 1190, Acts of the 66th General Assembly by local assessors were clearly resolved against any 40 acre limitations regarding the assessment of farm land with the enactment of §§ 6 and 7 of Chapter 43, Acts of the 67th General Assembly.

In conclusion, based upon the foregoing, it is the opinion of the Attorney General that assessors can assess farm land in tracts larger than 40 acres.

Very truly yours,


Gerald A. Kuehn
Assistant Attorney General

GAK/sd

WEAPONS -- MANNER OF CONVEYANCE. §§ 702.7, 724.4, Code of Iowa, 1979. An antique handgun may be transported to a target range without a concealed weapons permit as long as it is transported in conformance with the requirements of § 724.4 of the Iowa Criminal Code. (Williams to State Representative Keith H. Dunton 5/17/79) #79-5-20(L)

May 17, 1979

The Honorable Keith H. Dunton
State Representative
Iowa State Capitol
Des Moines, Iowa 50319
L O C A L

Dear Representative Dunton:

You have asked the Attorney General for an opinion on the following question:

"whether an antique handgun, used strictly for target shooting purposes, can be transported to and from a target range without the owner possessing a concealed weapons permit?"

In general, § 724.4, Iowa Code, 1979, prohibits carrying pistols and revolvers without a permit to do so unless such weapons are carried in accordance with its provisions. Section 724.4, in parts relevant to your question, provides as follows:

"A person who goes armed with a dangerous weapon concealed on or about his or her person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor, provided that this section shall not apply to any of the following:

"5. Any person who for any lawful purpose carries an unloaded pistol, revolver, or other dangerous weapon inside a closed and fastened container or securely wrapped package which is too large to be concealed on the person.

"6. Any person who for any lawful purpose carries or transports an unloaded pistol or revolver in any vehicle inside a cargo or luggage compartment where the pistol or revolver will not be readily accessible to any person riding in the vehicle or common carrier.

"7. Any person while he or she is lawfully engaged in target practice on a range designed for that purpose or while actually engaged in lawful hunting."

The term "dangerous weapon" as used in § 724.4 is defined in § 702.7 of the 1979 Code of Iowa in part as:

"Any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which it was designed... . Dangerous weapons include, but are not limited to, any offensive weapon, pistol, revolver, or other firearm... ."

Clearly, an antique handgun falls within the definition of a dangerous weapon and, therefore, the person transporting it to and from a target range is subject to the provisions of § 724.14, including the exceptions from permit requirements cited above which under limited circumstances allow transportation of firearms without a permit.

Sincerely,

Richard A. Williams
RICHARD A. WILLIAMS
Assistant Attorney General

RAW/dlp

STATE OFFICERS AND DEPARTMENTS: Open Meetings: State Educational Radio and Television Facility Board. §§18.144, 28A.2(1), Iowa Code (1979); Ch. 1037, §12, Acts 67th G.A. (1978). To the extent that the advisory committees of the State Educational Radio and Television Facility Board are not delegated policy-making or decision-making authority, they are not "governmental bodies" under Ch. 28A, the new open meetings law. (Haskins to Thole, Executive Director, State Education Radio and Television Facility Board, 5/16/79)

#79-5-17(L)

May 16, 1979

Rod Thole, Executive Director
Iowa Public Broadcasting Network
P.O. Box 1758
Des Moines, Iowa 50306

Dear Mr. Thole:

You ask the opinion of our office as to the effect of Ch. 28A, Iowa Code (1979), the new open meetings law¹, on two statutorily created advisory bodies under the State Educational Radio and Television Facility Board (hereafter referred to as the "board"). The board has created two advisory committees for the purpose of providing specific advice to the board on certain matters. This was done pursuant to §18.144, Iowa Code (1979), which states:

The board shall appoint at least two advisory committees as follows:

1. Advisory committee on general operations and policy.
2. Advisory committee on curricula and educational matters.

Duties of said advisory committees, and such additional advisory committees as the board may from time to time appoint, shall be specified in rules of internal management adopted by the board.

The rules of internal management adopted by the board² satisfy the functions of the Advisory Committee on General

¹The new law was effective January 1, 1979. See Ch. 1037, §12, Acts 67th G.A. (1978)

²These rules are presumably exempt from Ch. 17A, Iowa Code (1979). See §17A.2(7)(a), Iowa Code (1979).

Operations and Policy as follows:

The Committee should:

- a. function as a citizens and continuing education involvement committee in the selection and support of IPBN programs in their area of jurisdiction. This includes the establishment of general program guidelines and the drafting of particular policies in such areas as political coverage and controversial issues.
- b. assist in the ascertainment of audience needs in coordination with the staff, public and educational agencies, and Friends of IPBN.
- c. assist, upon request of the Board, the Board and staff by examining the overall structure and operations of the organization and by suggesting improvements that might lead to more effective programming services.

The functions of the other committee, the Advisory Committee on Curricula and Educational Matters, are specified by the internal management rules as follows:

The committee should:

- a. function as an educators' involvement committee in the selection, support, and evaluation of IPBN programs and instructional materials in their area jurisdiction. This includes the identification of general instructional goals and trends for IPBN school and teacher programming and the drafting of specific guidelines in areas of current instructional emphasis and controversial issues.
- b. assist in arranging for effective utilization of school and professional development programming and related materials.
- c. assist in arranging for the general evaluation of school and professional development programming and related materials.

In addition to these two committees, the board has created a Merit Review Committee.

From what you indicate, none of these advisory committees apparently has any policy-making or decision-making authority. Their recommendations can be implemented only by the board itself.

Section 28A.2(1), Iowa Code (1979), the key provisions of the new open meetings law, states:

As used in this chapter:

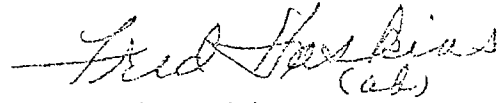
1. 'Governmental body' means:
 - a. A board, council, commission, or other governing body expressly created by the statutes of this state or by executive order.
 - b. A board, council, commission, or other governmental body of a political subdivision or tax-supported district in this state.
 - c. A multimembered body formally and directly created by one or more boards, councils, commissions, or other governing bodies subject to paragraphs "a" and "b" of this subsection.
 - d. Those multimembered bodies to which the state board of regents or a president of university has delegated the responsibility for the management and control of the inter-collegiate athletic programs at the state universities.

Subsection "a" of the above section would obviously apply to the board, as it is expressly created by statute. Although the advisory committees are arguably "expressly created" by statute, they are not within subsection "a" because they are not a "board, council, commission or other governing body." As will be developed below, the committees are not now granted policy-making or decision-making authority.

In Schantz and Haskins to Hanson, 5/4/79, our office opined that four requirements exist before a body may be considered a "governmental body" under §18A.2(1)(c). In order to be such, a body must be (1) multi-membered, (2) formally created by another board covered by subsections "a" or "b", (3) directly created thereby, and (4) have delegated to it governmental authority in the sense of policy-making or decision-making authority. While the advisory committees are multi-membered and may be formally and directly created by a board subject to subsection "a" -- the board here -- the committees singly lack any policy-making or decision-making authority. As their name indicates, they are advisory only. Of course, if the board should delegate to them actual policy-making or decision-making authority, they could not escape falling under subsection "c" merely because of their name or because the rules pertaining to them do not expressly grant them such authority. However, they do not appear to have such authority now, and to the extent that they do not have such authority delegated to them in the future, they are

not a "governmental body" under §28A.2(1).

Sincerely,

A handwritten signature in cursive script that reads "Fred Haskins".

Fred Haskins
Assistant Attorney General

FH/sw

OPEN MEETINGS LAW. Sections 28A.2(1), Iowa Code (1979). A non-profit agency which otherwise is not governed by Chapter 28A is not brought under the provisions of Chapter 28A solely by receipt of State funds. (Bremer to Representative Anderson 5/16/79)
#79-5-16 (L)

May 16, 1979

The Honorable Robert T. Anderson
State Representative
Iowa State Capitol
Des Moines, Iowa 50319
L O C A L

Dear Representative Anderson:

You ask the opinion of our office as to whether private non-profit agencies supported by public funds (e.g. mental health agencies, alcohol abuse agencies, etc.) are subject to Chapter 28A, Iowa Code (1979), pertaining to open meetings.

Please refer to OAG 79-5-4 and OAG 79-5-14, recent opinions by this office, copies of which are enclosed, for a more complete analysis of the definitions in Chapter 28A, Iowa Code (1979).

Chapter 28A, pertaining to open meetings, applies only to a "governmental body." Section 28A.2(1), Iowa Code (1979), defines that term as follows:

"As used in this chapter:

"1. 'Governmental body' means:

"a. A board, council, commission or other governing body expressly created by the statutes of this state or by executive order.

"b. A board, council, commission, or other governing body of a political subdivision or tax-supported district in this state.

"c. A multi-membered body formally and directly created by one or more boards, councils, commissions or other governing bodies subject to paragraphs 'a' and 'b' of this subsection.

The Honorable Robert T. Anderson
Page 2

"d. Those multi-membered bodies to which the state board of regents or a president of a university has delegated the responsibility for the management and control of the intercollegiate athletic programs at the state universities."

We infer from your use of "private" that the agency is not created by statute, executive order, or a board, council, commission or governing body subject to Chapter 28A, Iowa Code (1979) and whose only tie to the State is the receipt of State monies. Therefore, the question is whether a private, non-profit agency becomes a "governmental body" when supported by public funds.

The application of Chapter 28A looks to how the body to be covered was created, not how it is funded. Therefore, if the non-profit agency has not been created in a fashion defined in § 28A.2(1) Iowa Code (1979), then the provisions of that chapter do not apply.

Sincerely,



CELESTE F. BREMER
Assistant Attorney General

CFB/dlp

OPEN MEETINGS LAW. Sections 28A.2(1) and 504A.17, Iowa Code (1979). A board of directors for a non-profit corporation formed under Chapter 504A is not covered by Chapter 28A because the board itself is not expressly created by statute. (Bremer to Riedman, Director, Iowa Department of Substance Abuse, 5/16/79) #79-5-15C4

THOMAS J. MILLER
ATTORNEY GENERAL

ADDRESS REPLY TO:
STATE CAPITOL BUILDING
DES MOINES, IOWA 50319

May 16, 1979

Mr. Gary Riedmann, Director
Iowa Department of Substance Abuse
Suite 230, Liberty Building
418 Sixth Avenue
Des Moines, Iowa 50319

Dear Mr. Riedmann:

You have requested from this office an opinion regarding whether meetings of boards of directors of private, non-profit corporations, established pursuant to Chapter 504A, Iowa Code (1979) are subject to the requirements of Chapter 28A, Iowa Code (1979) pertaining to open meetings, under the definition of "governmental body" in § 28A.2(1)(a), Iowa Code (1979).

Please refer to OAG 79-5-4 and OAG 79-5-14 regarding analysis of the definitions in Chapter 28A, Iowa Code (1979), copies of which are enclosed.

Chapter 28A, pertaining to open meetings, applies only to "governmental bodies".

"28A.2 Definitions. As used in this chapter:

"1. 'Governmental body' means:

"a. A board, council, commission or other governing body expressly created by the statutes of this state or by executive order.

"b. A board, council, commission, or other governing body of a political subdivision or tax-supported district in this state.

"c. A multimembered body formally and directly created by one or more boards, councils, commissions, or other governing bodies subject to paragraphs 'a' and 'b' of this subsection.

Mr. Gary Riedmann

Page 2

"d. Those multimembered bodies to which the state board of regents or a president of a university has delegated the responsibility for the management and control of the intercollegiate athletic programs at the state universities."

Specifically, your concern was whether boards of directors of non-profit substance abuse programs are "governmental bodies" under the definition of Section 28A.2(1)(a) because of Iowa Code Section 504A.17, which provides:

"504A.17 Board of directors. The affairs of a corporation shall be managed by a board of one or more directors. Directors need not be residents of this state or members of the corporation unless the articles of incorporation so require. The articles of incorporation or the bylaws may prescribe other qualifications for directors."

While a board of directors for a non-profit corporation is authorized and required by § 504A.17, the board of directors for each non-profit corporation is not "expressly created" by statute, which is essential to bring it under the requirements of Chapter 28A.

For example, if XYZ group wishes to become a non-profit corporation, it shall, under § 504A.17 be managed by a board of one or more directors. However, this particular board specifically for the XYZ group is not "expressly created" by statute or executive order. Therefore, the board of directors for XYZ group is not a "governmental body" as defined by § 28A.2(1)(a), Iowa Code (1979). Moreover, the mere receipt of state funds by the XYZ agency would not bring it in to one of the definitions of "governmental body" of § 28A.2(1).

Should the XYZ agency or its board have been created in a fashion outlined by § 28A.2(1), the result may be different.

Sincerely,

Celeste F. Bremer

CELESTE F. BREMER

Assistant Attorney General

CFB/dlp

COUNTIES AND COUNTY OFFICERS: Signature of surveyor on plat. Section 335.2, Iowa Code (1979). The signature of a land surveyor on a plat filed with a county recorder, must be an actual signature, and not a photocopied one. (Haskins to Hanson, Special Counsel, Board of Engineering Examiners, 5/14/79)
#79-5-13(L)

May 14, 1979

Thomas D. Hanson, Special Counsel
Iowa State Board of Engineering Examiners
942 Insurance Exchange Building
Des Moines, Iowa 50309

Dear Mr. Hanson:

You have asked the opinion of our office on a matter, a more clear resolution of which will be aided if the relevant statute is first set forth. Section 335.2, Iowa Code (1979), states:

"The recorder shall keep his office at the county seat, and shall record, and as speedily as possible, all instruments in writing which may be delivered to him for record, in the manner directed by law. All instruments filed for recordation or filing with the recorder shall have typed or legibly printed the names of all signers thereon, including those of the acknowledging officers and witnesses, beneath the original signatures; provided, however, that in the event that such instrument does not contain such typed or printed names, the recorder shall accept such instrument for recordation or filing if accompanied by an affidavit, for record with the instrument, correctly spelling in legible print or type the signatures appearing on said instrument..."
[emphasis added]

You state:

"It has come to the Board's attention that numerous County Recorders in the State of Iowa have refused to file plats unless those plats contain an original signature as opposed to photocopied signature of the surveyor surveying those plats. As you are no doubt aware, Chapter 409 requires that all platting of areas in and adjacent to cities be certified by a land surveyor registered under the provisions of

Chapter 114 of the Code of Iowa. A cursory reading of Chapter 409 shows that numerous copies of the plat are necessary because of their provision to various city and county agencies and officials for approval prior to any real estate development on the land platted. Because of the necessity of the preparation of numerous copies of the plat, it is the practice of many registered land surveyors to simply sign the original plat and make photocopies as needed.

The Board of Engineering Examiners believes that photocopies of the properly certified and signed documents are all that are required by Section 335.2 of the Code of Iowa and, therefore, request your opinion with regard to this matter. It is the Board's belief that the word "original" in the phrase "original signatures" in Section 335.2 merely means that the document must contain a signature rather than meaning each recorded document must be separately signed by those who are signatories to the document."

Your question is whether a plat is sufficient, for filing under §335.2, if it contains a photocopied signature as opposed to the actual signature of the surveyor who made the plat. It will be assumed that the photocopied signature is a photographically accurate reproduction of the signature.

It is well established that each duplicate copy of a writing made by the same mechanical operation as the original is an "original" for evidentiary purposes. See e.g., State v. Lee, 138 So. 662 (La. 1931).

Here, a plat containing a photocopied signature is not made in the same operation as the original signature. It may be that in the age of accurate photocopying devices, the validity of any distinction between a reproduction method which makes copies in the same operation as the original (carbon copies) and one which does not (photocopying) is doubtful. See Cleary et al., McCormick on Evidence, §236, at 569 (2nd Ed. 1972). However, the issue before us is the acceptability of a photocopy in the context of records relating to the title to real estate. There, authenticity and verifiability can become critical many years after the plat containing the signature is filed. Any inconvenience to a land surveyor in having to actually sign the plat which is to be filed with the county recorder rather than photocopying a plat already signed and then filing the photocopy is outweighed by the importance of the document. In this situation, the word "original" requires that the plat filed with the county recorder bear the actual signature of the land surveyor and not

a mere photocopy of it.

Sincerely,

A handwritten signature in cursive script that reads "Fred Haskins". The signature is written in dark ink and is positioned above the typed name.

Fred Haskins
Assistant Attorney General

FH/sw

COUNTIES: Licensing of food service establishments. Sections 170.2, 170A.2(5), 170A.2(8), 170A.4, and 332.23, Code of Iowa (1979). The Secretary of Agriculture has exclusive jurisdiction of the licensing of food service establishments and the county may not license the establishment as a county business pursuant to Section 332.23. However, a county may license a business other than a food service establishment even though a food service establishment is also on the premises. (Condon to Bordwell, Washington County Attorney, 5/14/79) #79-5-11(L)

May 14, 1979

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

Dear Mr. Bordwell:

This letter is in response to your request for an opinion regarding the effect of the Iowa Food Service Sanitation Code, Chapter 170A, Code of Iowa (1979), on the county's licensing of county business pursuant to Sections 332.23 and 332.24, Code of Iowa (1979).

Section 332.23 empowers the county board of supervisors to license the following business enterprises:

For the purpose of promoting the health, safety, recreation, and general welfare of the people of the county, the county board of supervisors shall have the power to regulate and license outside the limits of an incorporated city any theatre, moving picture show, pool or billiard room or table, dance hall, skating rink, amusement park, bowling alley, restaurant or other business establishment open to the public and located on or accessible to a road or highway outside the limits of an incorporated city where entertainment, foodstuffs, prepared food or drink

is furnished to the general public for hire, sale or profit.

Pursuant to Section 170.2 a license from the Iowa Department of Agriculture is required for the operation of a "food establishment," which includes the business of selling foodstuffs and prepared food or drink that were required by Section 332.23 to have county licenses. An opinion issued by this office on April 17, 1970, concluded that the two provisions were not inconsistent and that they both were to be independently exercised and enforced.

However, the new Iowa Food Services Sanitation Code, Chapter 170A, differs from Chapter 170 in that Section 170A.4 vests "sole and exclusive authority to regulate, license, and inspect food service establishments" with the Iowa Secretary of Agriculture. It further provides that:

Municipal corporations shall not regulate, license, inspect or collect license fees from food service establishments except as provided for in the Iowa food service sanitation code. [Emphasis added]

"Municipal corporation" is defined as "a political subdivision of this state" in Section 170A.2(8), so it does include counties.

The language of Section 170A.4 clearly expresses the legislative intent that the county board of supervisors cannot exercise the licensing powers of Section 332.23 with respect to food services establishments unless it does so in compliance with the delegation provisions of Section 170A.4. Although, as you point out, the language of Section 332.23 which has permitted counties to license food establishments was not altered by the legislature, repeal by implication has occurred.

Repeal by implication occurs when a later enacted statute manifests clearly the legislative intent that it control an earlier enacted statute relating to the same or closely allied subject matter. Section 4.8. In Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co., 165 N.W.2d 771, 774 (Iowa 1969), the Iowa Supreme Court noted:

We have repeatedly held repeal by implication is not favored and will not be upheld unless the intent to repeal clearly and unmistakably appears from the language of the later statute and such holding is absolutely necessary. (Cites omitted.)

In Section 170A.4, the legislature used that clear and unmistakable language the Court requires.

In your letter you asked if the county could license a food service establishment if it provided entertainment, or if the county could license the non-food service aspect of the establishment as a county business. As we have said, Section 170A.4 confers upon the Secretary of Agriculture exclusive jurisdiction to license food service establishments and provides that a municipal corporation has authority only pursuant to an agreement with Secretary of Agriculture. A food service establishment is defined in Section 170A.2(5) as:

Food service establishment" means any place where food is prepared and intended for individual portion services, and includes the site at which individual portions are provided. The term includes any such place regardless of whether consumption is on or off the premises and regardless of whether there is a charge for the food. The term also includes delicatessen-type operations that prepare sandwiches intended for individual portion service and food service operations in schools and summer camps. The term does not include private homes where food is prepared or stored for individual family consumption, retail food stores, the location of food vending machines, and supply vehicles. The term does not include child day care facilities, food service facilities subject to inspection by other agencies of the state and located in nursing homes, health care facilities, or hospitals.

From this language, we may conclude that state licensing pre-empts county licensing of those establishments in which food is prepared for individual portion service. However, since this pre-emption is accomplished by an implied repeal of the county's licensing power, it is not to be applied broadly. Therefore, we conclude that although the county cannot license a food service establishment, Chapter 170A does not preclude the county from licensing a business operation that is separate from the food service establishment.

For example, the county may license a bowling alley pursuant to Section 332.23. Many bowling alleys contain a snack bar which is within the Section 170A.2(5) definition of food service establishment. The snack bar would be licensed by the Agriculture Department, but this would not preclude the county

Richard S. Bordwell

Page 4

from licensing the bowling alley since it is a separate business operation.

Sincerely,

Marie A. Condon

Marie A. Condon
Assistant Attorney General

MAC/sw

COUNTIES: Licensing of food service establishments. Sections 170.2, 170A.2(5), 170A.2(8), 170A.4, and 332.23. The Secretary of Agriculture has exclusive control of the regulation, inspection, and licensing of food service establishments, precluding counties from licensing the establishments as county businesses pursuant to Section 332.23. However, a county may license a business other than a food service establishment even though a food service establishment is also on the premises. (Condon to Burk, Blackhawk Assistant County Attorney, 5/14/79)
#79-5-10 (L)

May 14, 1979

Peter W. Burk
Assistant County Attorney
309 Courthouse Building
Waterloo, Iowa 50703

Dear Mr. Burk:

This letter is in response to your request for an opinion regarding the effect of the Iowa Food Service Sanitation Code, Chapter 170A, Code of Iowa (1979), on the county's licensing of county business pursuant to Sections 332.23 and 332.24, Code of Iowa (1979).

Section 332.23 empowers the county board of supervisors to license the following business enterprises:

For the purpose of promoting the health, safety, recreation, and general welfare of the people of the county, the county board of supervisors shall have the power to regulate and license outside the limits of an incorporated city any theatre, moving picture show, pool or billiard room or table, dance hall, skating rink, amusement park, bowling alley, restaurant or other business establishment open to the public and located on or accessible to a road or highway outside the limits of an incorporated city where entertainment, foodstuffs, prepared food or drink

is furnished to the general public for hire, sale or profit.

Pursuant to Section 170.2 a license from the Iowa Department of Agriculture is required for the operation of a "food establishment," which includes the business of selling foodstuffs and prepared food or drink that were required by Section 332.23 to have county licenses. An opinion issued by this office on April 17, 1970, concluded that the two provisions were not inconsistent and that they both were to be independently exercised and enforced.

However, the new Iowa Food Services Sanitation Code, Chapter 170A, differs from Chapter 170 in that Section 170A.4 vests "sole and exclusive authority to regulate, license, and inspect food service establishments" with the Iowa Secretary of Agriculture. It further provides that:

Municipal corporations shall not regulate, license, inspect or collect license fees from food service establishments except as provided for in the Iowa food service sanitation code. [Emphasis added]

"Municipal corporation" is defined as "a political subdivision of this state" in Section 170A.2(8) so it does include counties.

The language of Section 170A.4 clearly expresses the legislative intent that the county board of supervisors cannot exercise the licensing powers of Section 332.23 with respect to food services establishments unless it does so in compliance with the delegation provisions of Section 170A.4. Although, as you point out, the language of Section 332.23 which has permitted counties to license food establishments was not altered by the legislature, repeal by implication has occurred.

Repeal by implication occurs when a later enacted statute manifests clearly the legislative intent that it control an earlier enacted statute relating to the same or closely allied subject matter. Section 4.8. In Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co., 165 N.W.2d 771, 774 (Iowa 1969), the Iowa Supreme Court noted:

We have repeatedly held repeal by implication is not favored and will not be upheld unless the intent to repeal clearly and unmistakably appears from the language of the later statute and such holding is absolutely necessary. (Cites omitted.)

In Section 170A.4, the legislature used that clear and unmistakable language the Court requires.

The remaining question is which food establishments are regulated by Chapter 170A. Section 170A.4 refers to the regulation, inspection and licensing of food service establishments. They are defined as follows in Section 170A.2(5):

"Food service establishment" means any place where food is prepared and intended for individual portion service, and includes the site at which individual portions are provided. The term includes any such place regardless of whether consumption is on or off the premises and regardless of whether there is a charge for the food. The term also includes delicatessen-type operations that prepare sandwiches intended for individual portion service and food service operations in schools and summer camps. The term does not include private homes where food is prepared or stored for individual family consumption, retail food stores, the location of food vending machines, and supply vehicles. The term does not include child day care facilities, food service facilities subject to inspection by other agencies of the state and located in nursing homes, health care facilities, or hospitals.

From this language, we may conclude that state licensing pre-empts county licensing of those establishments in which food is prepared for individual portion service. However, since this pre-emption is accomplished by an implied repeal of the county's licensing power, it is not to be applied broadly. Therefore, we conclude that although the county cannot license as food services establishment, Chapter 170A does not preclude the county from licensing a business operation that is separate from the food service establishment.

For example, the county may license a bowling alley pursuant to Section 332.23. Many bowling alleys contain a snack bar which is within the Section 170A.2(5) definition of food service establishment. The snack bar would be licensed by the Agriculture Department, but this would not preclude the county from licensing the bowling alley since it is a separate business operation.

In your opinion request, you asked about the licensing authority for grocery stores specifically. Grocery stores are excluded expressly from Chapter 170A regulation. The previous

opinion of April 4, 1978, to which you referred in your request concluded correctly that grocery stores were included in Section 332.23. Thus, the county may license grocery stores. If the grocery store contains a snack bar or delicatessen that is a food service establishment, it will be licensed pursuant to Chapter 170A. The Department of Agriculture will license it and the county may license the grocery store since it is a separate business operation.

Sincerely,

Marie A. Condon
ak

Marie A. Condon
Assistant Attorney General

MAC/sw

MOTOR VEHICLES: Section 321.233, Code of Iowa (1977), does not exempt maintenance personnel hauling snow on a public highway, not officially closed, from complying with local traffic signals. (Miller to Allbee, Franklin County Attorney, 5/4/79) #79-5-5(L)

Mr. Richard A. Allbee
Franklin County Attorney
P.O. Box 87
Hampton, IA 50441

May 4, 1979

Dear Mr. Allbee:

You have requested an Attorney General's opinion interpreting Section 321.233, Code of Iowa (1977), which states:

321.233 Road Workers Exempted

The provisions of this chapter, except the provisions of sections three hundred twenty-one point two hundred eighty (321.280) through three hundred twenty-one point two hundred eighty-three (321.283) of the Code, shall not apply to persons, teams, motor vehicles and other equipment while actually engaged in work upon the surface of a highway officially closed to traffic but shall apply to such persons and vehicles when traveling to or from such work. The provisions of this chapter shall not apply to maintenance equipment operated by or under lease to any state or local authority while engaged in road maintenance work, including to or from such work.

Your letter inquires as to whether "maintenance personnel under city authority that are removing snow . . . have to comply with traffic signals such as stop signs, etc. while hauling snow." At the outset it should be noted that Chapter 321, The Code, is a comprehensive chapter which is designed to regulate all facets of the registration, operation, size, weight load, equipment and lighting of motor vehicles; the licensing of operators and chauffeurs; the manner in which motor vehicles are operated; and provide penalties for violations of these regulations.

Section 321.233, The Code, eliminates certain restraints on the operators of maintenance equipment on closed highways and also eliminates size, weight, and load limits otherwise applicable to maintenance equipment. A possible contradiction exists within §321.233 as it deals with operators of maintenance equipment. While the operators of maintenance equipment are exempt from most moving violations which occur out of necessity during maintenance operations on closed highways, it is only the equipment which is exempted from certain restrictions while being operated on highways not officially closed. The answer to your letter, therefore, ultimately rests on the distinction between the immunity granted persons in the first sentence of §321.233 and the immunity granted to equipment in the second sentence of that section.

The primary objective in statutory construction is to give effect to the legislative intent. State v. Prybil, 211 N.W. 2d 308 (Iowa 1973). The legislative intent of §321.233 becomes readily apparent when we look at "the consequences of a particular construction" and "the preamble or Statement of Policy." Section 4.6, Code of Iowa (1977).

To construe §321.233 as a total grant of immunity from the provisions of Chapter 321 would in effect authorize operators of maintenance equipment hauling snow to drive their vehicles in any manner they so desire in total disregard of the motor vehicle laws. These drivers would be immune, not only during the hauling of snow, but also driving to and from such work on any highway open or closed. The absurdity of this interpretation is heightened when compared to Section 321.231, Code of Iowa (1977), which states:

321.231 Authorized Emergency Vehicles

1. The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected perpetrator of a felony or in response to an incident dangerous to the public or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section.
2. The driver of any authorized emergency vehicle, may:
 - a. Park or stand an authorized emergency vehicle, irrespective of the provisions of this chapter.
 - b. Disregard laws or regulations governing direction of movement for the minimum distance necessary before an alternative route that conform to the traffic laws and regulations is available.

3. The driver of a fire department vehicle, police vehicle or ambulance may:
 - a. Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation.
 - b. Exceed the maximum speed limits so long as the driver does not endanger life or property.
4. The exemptions granted to an authorized emergency vehicle under subsection 2 and for a fire department vehicle, police vehicle or ambulance as provided in subsection 3 shall apply only when such vehicle is making use of an audible signaling device meeting the requirements of Section 321.433, or a visual signaling device approved by the department except that use of an audible or visual signaling device shall not be required when exercising the exemption granted under subsection 3, paragraph "b" of this section when the vehicle is operated by a peace officer, pursuing a suspected violator of the speed restrictions imposed by or pursuant to this chapter, for the purpose of determining the speed of travel of such suspected violator.
5. The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

Thus, the latter interpretation allowing drivers hauling snow to disregard all motor vehicle laws, even going to or from work, would grant those operators authority far in excess of peace officers in pursuit of a felon. Statutory construction which reaches an absurd result such as this must be avoided if at all possible. State v. Berry, 247 N.W. 2d 263 (Iowa 1976).

The last sentence of §321.233, which is the subject of your inquiry, was added by Chapter 213, Laws of the Sixty-fifth G.A. (1973). The title of that chapter reads "SIZE AND WEIGHT OF VEHICLES." Article III, Section 29, Constitution of the State of Iowa, states inter alia; "Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title." In addition, the Preamble of Chapter 213, Laws of the Sixty-fifth General Assembly (1973) states, "AN ACT relating to the size, weight, and load of vehicles operated on Iowa's roads."

Mr. Richard Allbee
Page 4

The first sentence of §321.233 exempts the operator of vehicles engaged in road work from most of Chapter 321 when the operator is driving a vehicle engaged in work on a highway officially closed to traffic. This is compared to the second sentence of §321.233 which exempts the maintenance equipment, not the operator, from the provisions of Chapter 321 "while it is engaged in the maintenance work, including to or from such work." Section 321.233, Code of Iowa (1977). It is clear that the scope of the last sentence of §321.233 is intended to exempt the vehicle from various provisions of Chapter 321, i.e. size, weight, load limit, etc., and is not intended to immunize operators from those provisions of Chapter 321 which are designed to protect the motoring public.

It is, therefore, the opinion of this office that the operators of maintenance vehicles hauling snow on highways not officially closed must comply with local traffic signals, such as stop signs.

Very truly yours,



Stuart D. Miller
Assistant Attorney General

ps

STATE OFFICERS AND DEPARTMENTS: Department of Agriculture;
Disposing of Dead Animals. Section 167.3, Code of Iowa (1979). A
person who collects parts of an animal for the purpose of obtaining
the hide, skin or grease therefrom must obtain a license to dispose
of the bodies of dead animals, Schantz to Lounsberry, Secretary of
Agriculture, 5/3/79). #79-5-3(L)

May 3, 1979

The Honorable Robert H. Lounsberry
Secretary of Agriculture
Wallace State Office Building

LOCAL

Dear Secretary Lounsberry:

Your have requested an Opinion of the Attorney General con-
cerning the proper construction of Chapter 167, Code of Iowa
(1979), Use and Disposal of Dead Animals. In particular, you
asked:

"Is a person who collects hides, tallow, bones
and scraps from slaughter plants, stores, and
restaurants and then pools and sells the various
items to outlets, required to obtain a license
to dispose of the bodies of dead animals?"

Section 167.2, Code of Iowa (1979), provides:

"No person shall engage in the business of
disposing of dead animals without first obtain-
ing a license for that purpose from the
department of agriculture."

Section 167.3, Code of Iowa (1979), defines "disposing" as
follows:

"Any person who shall receive from any other
person the body of any dead animal for the purpose
of obtaining the hide, skin, or grease from such
animal, in any way whatsoever, or any part thereof,
shall be deemed to be engaged in the business of
disposing of the bodies of dead animals, and must
be the operator or employee of a licensed disposal
plant." (Emphasis added).

The underscored language was added by amendment in 1955. Section 2, ch. 104, Acts of the 56th G.A. (1955). The placement of this language creates an ambiguity in the statute and the resolution of the ambiguity is critical to your question. Stated precisely, the question is this: does "or any part thereof" modify the phrase "the body of any dead animal" or does it rather modify the phrase "for the purpose of obtaining the hide, skin, or grease from such animal." If the former construction is correct, one would be deemed in the business of disposing of dead animals if one collected only "parts" of dead animals and your question would be answered in the affirmative. If the latter construction is adopted, one would be deemed in the business of disposing of dead animals only if the whole body is collected and your question would be answered in the negative. Familiar principles of statutory construction lead us to the former conclusion and we answer your question in the affirmative.

Section 4.6, Code of Iowa (1979), provides:

"If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

1. The object sought to be attained.
2. The circumstances under which the statute was enacted.
3. The legislative history.
4. The common law or former statutory provisions, including laws upon the same or similar subjects.
5. The consequences of a particular construction.
6. The administrative construction of the statute.
7. The preamble or statement of policy."

Of particular significance here is "the object sought to be attained" by the amendment. Viewing chapter 167 as a whole, it is apparent that the legislature sought to protect the public health by regulating the disposition and transportation of dead animals. Disease and other sanitary hazards obviously result if these tasks are not properly performed. These hazards can occur whether the animal is disposed of or transported whole or in pieces. Thus, by making clear that the act regulated the disposition of parts of the carcass as well as the whole carcass, the object of the chapter would be more effectively accomplished. On the other hand, it is not obvious that the object would be advanced significantly by broadening the reference to the purpose for which the carcass is collected beyond that of obtaining the "hide, skin or grease."

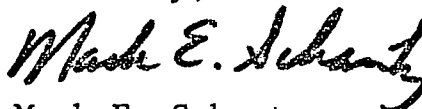
That the former object was intended by the legislature is clarified by reference to the "Explanation of H.F. 188," which was appended to the bill from its inception:

"The purpose of the foregoing amendment is to subject those persons engaged in the collection and disposal of bones, butcher scraps and other types of inedible and unprocessed animal wastes to the same restrictions and regulations as those imposed by chapter 167 of the Code of Iowa, 1954 upon persons engaged in the business of collection and disposal of dead animals."

At least when a statute is ambiguous and when a bill is not amended subsequent to the addition of the "Explanation," this statement of purpose is entitled to some weight in ascertaining legislative intent. State ex rel. Chwirka v. Audino, 260 N.W.2d 279, 284 (Iowa 1977); City of Altoona v. Sandquist, 230 N.W. 507, 509 (Iowa 1975). Here, that explanation strongly supports a construction of the statute that would read "or any part thereof" as modifying "the body of any dead animal."

In summary, in our opinion, a person who collects hides, tallow, bones and scraps from slaughter plants, stores, and restaurants and then pools and sells the various items to outlets, must, insofar as the immediate or ultimate purpose of the collection is to obtain the hide, skin or grease, obtain a license to dispose of the bodies of dead animals.

Sincerely,



Mark E. Schantz
Solicitor General

MES:ab

AUTHORITY OF COUNTY BOARD OF SUPERVISORS OVER COMMUNITY MENTAL HEALTH CENTER. Article III, Section 39A, Iowa Constitution, Chapters 230A, 504 and 504A, 1979 Code of Iowa, §§ 230A.1, 230A.2, 230A.3, 230A.3(1), 230A.3(2), 230A.4, 230A.5, 230A.6, 230A.10, 230A.10(2), 230A.12, 230A.13, 332.3(6), 504.14, 504A.17, 504A.18. A board of supervisors does not have authority to establish a mental health department within county government in order to provide direct services to clients through employees hired and controlled by the board. A board of supervisors does not have authority to assume control of a community mental health center established pursuant to Chapter 230A, Code of Iowa, Fortney to Wells and Horn, State Representatives, 5/3/79) #79-5-2 (L)

May 3, 1979

The Honorable James D. Wells and
The Honorable Wally E. Horn
Iowa House of Representatives
State Capitol
L O C A L

Gentlemen:

You inquired whether a board of supervisors had authority to establish a mental health department within county government in order to provide direct services to clients through employees hired and controlled by the board.

You further inquired whether a board of supervisors had authority to assume control of a community mental health center established pursuant to Chapter 230A, Code of Iowa, including the authority to "dissolve" the center and engage in the direct delivery of services formerly provided by the center; to establish a mental health department within county government; to convert the board of directors of the community mental health center into a non-governing advisory board; and to replace the board of directors with the board of supervisors.

It is our opinion that the board of supervisors has authority to take none of the above actions. The above actions would either conflict with or circumvent the framework established by the Legislature in Chapter 230A, Code of Iowa.

In order to address your question as to whether a board of supervisors has the power to establish a department of mental health, it is necessary to turn first to the Iowa Constitution. In 1978 the Constitution was amended to add Article III, Section 39A, commonly known as the county home rule amendment. This amendment provides, in part, as follows: "Counties or joint county-municipal corporation governments are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government . . ." (Emphasis supplied.) The amendment further provides that "the proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only those powers granted in express words is not a part of the law of this state." Article III, Section 39A can best be summarized as conferring on counties the power to take any action regarding local matters as long as such action does not conflict with some statutory provision, and such action can be taken regardless of whether it is expressly authorized by statute. Section 332.3(6), Code of Iowa grants to the board of supervisors the authority to transact all county business unless a contrary provision is made.

Applying the above provisions of the Iowa Constitution and Code to the question at hand, a board of supervisors has the authority to establish a department of mental health and to engage in the direct delivery of mental health services UNLESS to do so would be "inconsistent with the laws of the general assembly." Article III, Section 39A, Iowa Constitution.

In Chapter 230A, Code of Iowa, the Legislature has devised a specific framework for the delivery of mental health services at the county level. The framework anticipates a role for the board of supervisors, but the scope of that role is prescribed. The critical issue would appear to be whether or not the services which the board of supervisors contemplates providing is analogous to the program contemplated by Chapter 230A, Code of Iowa. If the program is analogous, it would be inconsistent with the system established by the Legislature for the delivery of mental health services at the county level.

Section 230A.2, Code of Iowa delineates the nature and type of services which may be provided by a community mental health center. Included is a full range of mental health programming on both an inpatient and an outpatient basis. The program can include treatment, as well as diagnostic services. Programming can be provided for individuals having problems characterized as mental illness, mental

retardation, emotional disorders, or alcohol and drug addiction or dependency. Such centers can provide services on a prehospitalization basis and can engage in aftercare as well. Twenty-four hour emergency services are contemplated by the Legislature. Consultative, educational and preventive programs may be included in the services offered by a center. From this overview, it can be seen that the range of services to be offered by a community mental health center runs the gamut of available programming for mental health at the local level. The programming contemplated is comprehensive.

Through Chapter 230A, Code of Iowa, the Legislature has clearly demonstrated an intent to provide a comprehensive framework for the delivery of local mental health services. It would be inconsistent with Chapter 230A for a county to develop a program such as the one set forth in § 230A.2 and do so outside the Chapter 230A framework.

Should a county elect to establish a community mental health center pursuant to § 230A.1, Code of Iowa, it has two organizational options available to it. Section 230A.3(1) permits the county to directly establish a center rather than contracting for the services. But if a county wishes to use this option, the operation of the center is vested in an elected board of trustees. A board of supervisors would be powerless to remove these trustees as they are officials directly elected by the public. See § 230A.5. They could be removed by the electorate at the polls. The powers and duties of the trustees are defined by § 230A.10. Since their duties are statutorily defined, the trustees could not be converted into an advisory board by vote of the board of supervisors, nor could the board assume control over the center's staff as this is within the scope of the trustee's powers. See § 230A.10(2).

In the event a county elects not to directly establish a center, § 230A.3(2) provides the county with the option of contracting for services from a nonprofit corporation. Such a corporation would be organized under either Chapter 504 or Chapter 504A of the Code. In either instance, control of the corporation, its assets, employees and general affairs is vested in its board of directors. (See §§ 504.14 and 504A.17.) In this context, the county electing to operate under § 230A.3(2) is in the position of a party to a contract, the nonprofit corporation being the other contracting party. Barring other provisions to the contrary, such a contractual arrangement does not confer on the board of supervisors any control over the selection of directors or the internal affairs of the corporation. Removal or replacement of

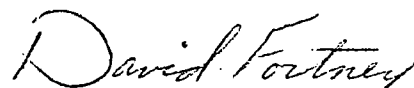
members of the board of directors is governed by the corporate articles and bylaws. See §§ 504.14 and 504A.18. A board of supervisors contracting with such corporation is not inherently vested with the power to alter the membership of the board of directors or to convert it to an advisory body.

As mentioned earlier, the framework established by Chapter 230A, Code of Iowa anticipates a role for the board of supervisors, but it is a defined role. Organizationally, the board has the option of whether to directly establish a center or to contract with a nonprofit corporation. (§ 230A.3.) If the board of supervisors elects to provide direct services under the supervision of an elected board of trustees, the continuing role of the supervisors includes appointment of the initial trustees (§ 230A.4), filling of vacancies on the board of trustees if over half the seats are vacant (§ 230A.6), and determining, in conjunction with the trustees, what fee scale for services will be employed and the eligibility of non-county residents for services (§ 230A.10).

In the event the board of supervisors elects to contract for mental health services from a nonprofit corporation, the board of supervisors may negotiate with the corporation the length of the contract term, the services to be provided, what fee scale for services will be employed, and the eligibility of non-county residents for services. See § 230A.12. To an extent, the board of supervisors has a degree of fiscal control over the nonprofit corporation. Section 230A.13 gives the board of supervisors approval authority over the center's annual budget after it is prepared by the board of directors.

Except for the express provisions of Chapter 230A, Code of Iowa, which confer elements of control over the affairs of a community mental health center on the board of supervisors, the trustees or board of directors of a center are independent of the board of supervisors. The supervisors cannot abolish the trustees or the board of directors. They cannot dissolve the center and they cannot take over the hiring and control of center personnel. Conversion of the board of directors or the trustees into an advisory board is beyond the supervisors' authority.

Respectfully yours,



David Fortney
Assistant Attorney General

COUNTIES: Proration by sheriff of mileage expenses for serving legal papers. Section 337.11(10), Code of Iowa (1979). The sheriff may charge full mileage for each action in which subpoenas or original notices are served, but must prorate mileage expenses for several legal papers other than original notices or subpoenas served on the same trip. (Condon to Mossman, Benton County Attorney, 5/2/79) #79-5-1(L)

Mark Mossman
Benton County Attorney
122 East Fourth
Vinton, Iowa 52349

May 2, 1979

Dear Mr. Mossman:

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

"1. When the Sheriff serves original notices in civil cases and he serves more than one original notice in the same vicinity but not at exactly the same location, is he required to prorate the mileage expenses from the county seat town to the location of the service between the number of notices which are actually served or does he charge the full mileage from the county seat town to the location of service in each case.

"2. Is the rule the same or different for the services of civil papers other than original notices and subpoenas."

In answer to your first question, Section 337.11(10), Code of Iowa (1979), permits the sheriff to charge full mileage "in each action wherein such original notices or subpoena are served, with a minimum mileage expense of one dollar for each service."

Regarding your second question, the same statutory provision allows the sheriff to receive only one mileage when he serves more than one legal paper on the same trip, unless the papers are original notices or subpoenas. He is required to prorate the mileage cost for the several papers served.

Very truly yours,

Marie A. Condon

MARIE A. CONDON
Assistant Attorney General

MAC:pml

PUBLIC EMPLOYEES: Retirement - §§97B.45 and 97B.47, the Code, 1979. A member of IPERS must retire on the first day of a month. A member must retire on the first day of the month in which he or she reaches retirement age, unless the employer permits the member to work beyond the retirement age. A member reaches the retirement age on his or her birthday. (Blumberg to Priebe and Tieden, State Senators, 6/27/79) #79-6-28(L)

June 27, 1979

The Honorable Berl E. Priebe
State Senator
Rural Route 2, Box 145-A
Algona, Iowa 50511

The Honorable Dale L. Tieden
State Senator
Rural Route 2
Elkader, Iowa 52043

Dear Senators Priebe and Tieden:

We have your opinion request regarding the payment of IPERS benefits. You specifically asked:

1. Does job service rule 370-8.13, relating to early retirement, correctly implement §97B.47, 1979 Code? That rule provides:

[8.13(3)] A members early retirement date shall be the first of any month coinciding or following the fifty-fifth birthday and prior to the normal retirement date.

2. Does job service rule 370-8.18, relating to retirement dates, correctly implement section 97B.45, 1979 Code? That rule provides:

8.18(1) The first month of entitlement of a member who qualifies for retirement benefits shall be the first month coinciding with or next following the members termination date from the payroll of the employing unit, except as provided in 8.18(2).

8.18(2) the first month of entitlement of a teacher who qualifies for retirement benefits shall be the first month after such teachers termination date. The fact that such teacher may have one or two months salary payable after the date of termination does not affect the retirement date.

3. Does an IPERS member "attain" the requisite age upon the members birthday, or is the requisite age actually attained on the day before the members birthday?
4. Does the example contained in the job service pamphlet "Your IPERS Benefits" misinterpret or misstate the normal retirement dates established in section 97B.45, 1979 Code. That example provides:

John Smith reaches 65 in December 1978, and retires December 31st, 1978, with 30 or more years service, including 23 1/2 years of membership service and 6 1/2 or more years of prior service.

Section 97B.45, the Code, 1979, provides, in pertinent part:

A member's normal retirement date shall be the first of the month in which a member attains the age of sixty-five years. A member may retire after the member's sixty-fifth birthday except as otherwise provided in section 97B.46. A member retiring on or after the normal retirement date, as provided in section 97B.46, shall submit a written notice to the department setting forth the date the retirement is to become effective, provided that such date shall be after the member's last day of service and not before the first day of the sixth

calendar month preceding the month in which the notice is filed, except that credit for service shall cease when contributions cease as provided in section 97B.11. [Emphasis added]

The emphasized portion means that one looks to the first of the month within which a member reaches the age of 65 to determine the normal retirement date. This is a different result from the section as it read in the 1977 Code, wherein it was provided that the normal retirement date was the first of the month coinciding with, or next following, the sixty-fifth birthday. In other words, in previous years, unless the birthday was on the first of the month, the retirement date was the first of the following month. With these amendments most employees will retire a month earlier and not get the benefit of that month's salary or other benefits. In lieu thereof, they will receive a pension, which is less than the salary and other benefits. There is a caveat in the section that the retirement date set by the notice shall not be before the sixth calendar month preceding the month in which the notice is filed.

The same can be said of §97B.47. It presently reads:

A member's early retirement date shall be the first of the month in which a member attains the age of fifty-five years or the first of any month after attaining the age of fifty-five years prior to the member's normal retirement date, provided such date shall be after the last day of service. A member may retire on the member's early retirement date by submitting written notice to the department setting forth the early retirement date which shall not be before the first day of the sixth calendar month preceding the month in which such notice is filed.

In previous years, it provided that the early retirement date was the first of the month coinciding with or following the attainment of age 55. Section 97B.47, the Code, 1979, provides, in effect, that whenever a member under the age of 65 and at least 55, retires, the date of retirement shall be the first of the month in which the member attains the age of 55 or older, provided that the first of the month that is used shall be after the last day of service. That is, if the last day of service is after the first of the month, the first of the following month is used. There is, as in §97B.45, a further caveat that the early retirement date set by the notice of early retirement shall not be before the sixth calendar month preceding the month in which the notice is filed.

We interpret §97B.47 to mean that the retirement date must be the first of a month. If the member wishes to retire upon attaining the age of 55, such member's retirement date shall be the first of the month in which the member reaches 55. Thereafter, the member may select early retirement at any time as long as it is the first of a month.

The rules to which you refer were consistent with the language of §§97B.45 and 97B.47 as they existed in the 1977 Code. However, because of the amendments to those sections in 1978 [see §§29 and 31, Ch. 1060, 67th G.A. (1978)] these rules are now inconsistent with the present sections. A mere amendment to the rules to reflect the statutory amendments is all that is required.

Your third question is whether a member attains the retirement age on the day of the member's birthday or the preceding day. Since the retirement date is the first of the month in which the member reaches the retirement age, it matters not when the birthday is. The only circumstance which could be affected by this question is when the birthday is on the first day of the month. If the attainment of the retirement age is the day before the birthday (the last day of the preceding month) then the date of retirement would be the first of the preceding month. As an example, if the member's birthday is July 1, and the attainment of the requisite

age is the day before (June 30) then the retirement date would be June 1, and the member would lose an entire month's work and salary in lieu of the pension.

In 86 C.J.S. Time §8 (1954) there is a discussion of the computation of one's age. There, it is stated:

Computation of age. In computing the age of a person, the common-law rule, which has been generally adopted, is that the day of birth will be included, and the person attains a given age at the first moment of the day preceding the anniversary of birth, and, consequently, a person born on the first day of the year is deemed to be one year old on the three hundred and sixty-fifth day after his birth-the last day of that year. Statutes providing for the computation of periods of time have not changed the common-law rule. This rule is frequently applied in computing a period of limitations, such as one following removal of the disability of infancy, and for that purpose a year is counted not from the date of birth, but from the day preceding.

There is some difference of opinion as to what constitutes being "over" a specified age, and it has been held that a person born November 28, 1875, had finished the entire span of sixty calendar years on November 28, 1935, and two months and ten days later, on February 8, 1935, when he came to his death, he was, on the last-mentioned date, "over" the age of sixty years. On the other hand, it has also been held that a person who reached his sixty-fifth birthday on February 22, 1928, and at the time of death on October 19, 1928, had not reached his sixty-sixth birthday, was not "over" the age of sixty-five years; and thus a person is

not over thirty-one years of age until he reaches his thirty-second birthday, and not over forty-five until he reaches his forty-sixth birthday, and a person is not over fifty-five years of age until he arrives at the age of fifty-six.

Several states have adopted the common-law rules referred to in C.J.S. for computing age. The basis for the computations is that the first day, or the day of birth, is used. Thus, a full year has actually passed the day before the birthday or anniversary date. See, Turnbull v. Bonkowski, 419 F.2d 104 (9th Cir. 1969); Fisher v. Smith, 319 F.Supp. 855 (W.D. Wash. 1970); Taylor v. Aetna Life Ins. Co., 49 F.Supp. 990 (N.D. Tex. 1943); Erwin v. Benton, 294 Ky. 536, 87 S.W. 291 (1905); Nelson v. Sandkamp, 227 Minn. 177, 34 N.W.2d 640 (1948); Ostmann v. Ostmann, 237 Mo. App. 223, 169 S.W.2d 81 (1943); Fox v. City of Manchester, 88 N.H. 355; 189 A. 868; People v. Stevenson, 41 Misc. 2d 542, 245 N.Y.S.2d 161 (1963); People v. Schneider, 194 Misc. 746, 87 N.Y.S.2d 680 (1949); In Re Bardol's Will, 254 App. Div. 647, 4 N.Y.S.2d 795 (1938); Firing v. Kephart, 466 Pa. 560, 353 A.2d 833 (1976); Scott v. National Travelers Life Insurance Co., 171 N.W.2d 749 (S.D. 1969); Pate v. Thompson, 179 S.W.2d 355 (Ct. Civ. App. Tex. 1944); and Ross v. Morrow, 85 Tex. 172, 19 S.W. 1090 (1892). As stated in Taylor v. Aetna Life Ins. Co., supra, a person is twenty-one years old "on the day before his twenty-first anniversary".

Some states hold otherwise. See, for example, Allen v. Baird, 208 Ark. 975, 188 S.W.2d 505 (1945); Watkins v. Metropolitan Life Ins. Co., 156 Kan. 27, 131 P.2d 722 (1942); and, Wilson v. Mid-Continental Life Ins. Co. of Oklahoma City, 159 Okl. 191, 14 P.2d 945 (1932). Iowa appears to adhere to this line of cases. In Knott v. Rawlings, 250 Iowa 892, 894, 196 N.W.2d 900 (1959), it was stated: "A child is one year old on the first anniversary of his birth and is sixteen years old on the sixteenth anniversary." The word "anniversary" is defined, in Webster's New World Dictionary (1957) at page 60 to mean "recurring at the same date every year". It thus appears that a person reaches the retirement age on the date of his or her birthday.

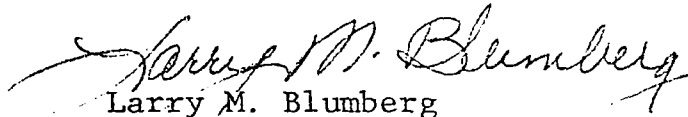
Honorable Berl E. Priebe
Honorable Dale L. Tieden

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Finally, you ask whether the example quoted in your last question from the Job Service pamphlet is in line with §97B.45. It is not. In order to comport with the section, it would have to state that John Smith, who becomes 65 in December, 1978, retires on December 1, 1978.

In summary, a member of IPERS must retire on the first of a month. A member must retire on the first of the month in which he or she reaches the retirement age, unless, of course, the employer permits the member to work beyond the retirement age. A member reaches the retirement age on his or her birthday.

Very truly yours,


Larry M. Blumberg
Assistant Attorney General

LMB:rcp

CONSERVATION COMMISSION: Disposition of obsolete state property -- Sections 18.3, 18.3(4), 18.6, 18.9, 18.12(3), 18.12(6) (b) and (c), 18.12(8), 107.17, 107.24(7), The Code, 1979; Section 19.23, The Code, 1971; Art. XI, Sec. 8, Iowa Constitution; Chapter 84, Section 99, Laws of Sixty-Fourth G.A., First Session; Chapter 121, Section 12, Laws of the Sixty-Fifth G.A., 1973 Session. The Conservation Commission need not seek the authorization of the Director of the Department of General Services to conduct a sale of obsolete personal property not under the Director's control. The proceeds from such a sale conducted by the Conservation Commission should be deposited in those funds specified in Section 107.17, The Code, 1979. (Benton to Brabham, Iowa Conservation Commission, 6/26/79) #79-6-26(L)

June 26, 1979

Mr. William C. Brabham
Acting Director
Iowa Conservation Commission
Des Moines, Iowa 50309
L O C A L

Dear Mr. Brabham:

As your letter of April 12, 1979 notes, the Conservation Commission annually conducts a public auction to dispose of surplus and obsolete personal property. The proceeds from the annual spring auction have traditionally been credited by the Commission to certain funds established pursuant to Section 107.17, The Code, 1979. Section 107.17 provides:

"The financial resources of said commission shall consist of three funds:

- "1. A state fish and game protection fund,
- "2. A state conservation fund, and
- "3. An administration fund.

"The state fish and game protection fund, except as otherwise provided, shall consist of all moneys accruing from license fees and all other sources of revenue arising under the division of fish and game.

"The conservation fund, except as otherwise provided, shall consist of all other funds accruing to the conservation commission.

Mr. William C. Brabham

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"The administration fund shall consist of an equitable portion of the gross amount of the two aforesaid funds, to be determined by the commission, sufficient to pay the expense of administration entailed by this chapter.

"All receipts and refunds and reimbursements related to activities funded by the administration fund are appropriated to the administration fund. All refunds and reimbursements relating to activities of the state fish and game protection fund shall be credited to the state fish and game protection fund."

Each fund was credited according to the fund from which the personal property was originally purchased. Your letter further indicates that prior to the creation of the General Services Department, the Commission sought approval from the Executive Council to hold these public sales. Since the creation of the General Services Department however, the Commission has routinely sought the approval of the Director of General Services, based upon the understanding that the authority to approve such sales had been transferred to that person.

The problem which gives rise to your opinion request concerns the 1979 auction. The Commission sought and received permission from the Director of General Services to conduct the public auction. The letter granting permission to conduct the auction, however, also directed that the proceeds from the sale be credited to the State's General Fund pursuant to Section 18.12(8), The Code, 1979. This departure from custom would in your words, ". . . have the immediate effect of reducing the budgets authorized by the Sixty-Seventh G.A., Second Session for the department by approximately \$40,000." You have raised two necessarily interrelated questions concerning this situation. First, you ask whether that portion of Section 18.12(8), The Code, 1979, which directs that the proceeds from sale of obsolete state property be deposited in the State's general fund applies to all personal property owned by the State of Iowa? Secondly, you inquire whether Chapter 18 requires that the Commission obtain the approval of the Director of General Services prior to the Commission's sale of obsolete personal property? Because the latter question is in large part determinative of the first, we will first address the question of whether Chapter 18 requires that the Commission receive the approval of the Director of General Services as a prerequisite to the valid sale of obsolete personal property.

Your question concerning the authority of the Commission to dispose of obsolete personal property is a difficult one of first impression in Iowa. In the analysis of this question, we can be guided by certain principles of statutory construction. First, the primary goal of statutory construction must be to ascertain and give effect to the intent of the Legislature. Doe v. Ray, 251 N.W.2d 496 (Iowa 1977). The seminal point in the construction of statutes must be a consideration of the words used in the statute, which are to be given their ordinary meaning unless defined differently by the Legislature or possessed of a peculiar and appropriate meaning in law. Kelly v. Brewer, 239 N.W.2d 109 (Iowa 1976); Northern Natural Gas Co. v. Forst, 205 N.W.2d 692 (Iowa 1973).

The Director of the General Services Department relied upon Section 18.12(8) in requiring that the Commission deposit proceeds from the auction in the general fund, rather than the traditional disposition. Section 18.12 provides that, in addition to other duties, the Director of General Services shall perform the duties enumerated in this section. Specifically, Section 18.12(8) mandates that the Director shall:

"Dispose of all personal property of the state under his control when it becomes unnecessary or unfit for further use by the state. Proceeds from the sale of personal property shall be deposited in the state general fund."

At the outset, it must be noted that the Director's authority to dispose of all personal property of the state is expressly limited by the phrase "under his control". Similarly, this phrase re-occurs elsewhere in Section 18.12 as a modification of the Director's duties. For example, Section 18.12(3) empowers the Director to institute legal proceedings against persons who have injured public property "under his control". The Director is further required under Section 18.12(4) to maintain an itemized account of all state property, "under his care and control". The phrase "under his control" appears in Section 18.12(6) (b) and (c). The extent to which the phrase "under his control" limits the Director's power to dispose of the State's personal property depends upon the definition of the word "control". In Connies' Const. v. Fireman's Fund Ins., 227 N.W.2d 207 (Iowa 1975), the Iowa Supreme Court construed the term "control" in the context of an insurance contract. The Court noted that:

"More specifically, the word 'care' refers to temporary charge, the word 'custody' implies a keeping or guardian of, and 'control' indicates the power or authority to manage, superintend, direct or oversee." Connies' Const. at p. 210.

"Control" has also been defined as:

"Power or authority to manage, direct, superintend, restrict, regulate, direct, govern, administer, or oversee." Black's Law Dictionary, Revised Fourth Edition, 1968.

Having defined the modifying term, the next step in this analysis must be to consider the extent to which the Director exercises control over the personal property which the Commission has sold at public auction.

Pursuant to Section 18.3, The Code, 1979, the personal property at issue here was purchased through the Department of General Services bidding procedures. Section 18.9, The Code, 1979, also pertains to the purchasing procedure. This section states:

"The director shall keep an accurate itemized account for each state agency purchasing through the department, state agency using services provided for by the department, and postage supplied by the department.

"1. At the end of each month the director shall render a statement to each state agency for the actual cost of items purchased through the department, the actual cost of services and postage used by the agency. The monthly statement shall also include a fair proportion of the cost of administration of the department of general services during the month. The portion of administrative costs shall be determined by the director subject to review by the executive council upon complaint from any state agency adversely affected.

"2. Statements rendered to the various state agencies shall be paid by the state agencies in the manner determined by the

state comptroller's office. When the statements are paid the sums shall be credited to the general service revolving fund. If any funds accrued to the revolving fund in excess of two hundred twenty-five thousand dollars and there is no anticipated need or use for such funds, the governor shall order the excess funds credited to the general fund of the state."

Under this mechanism, although the personal property is purchased through the General Services bidding procedure, the agency obtaining the property, here the Conservation Commission, must ultimately reimburse the revolving fund for the cost of the purchase. Thus this acquisition procedure does not itself grant the director power to manage, direct or superintend the property which the Commission has purchased. Moreover, these concepts would logically seem to require an immediate and direct power over the use of the personal property; for example, the power to direct that property located at various field stations throughout the state be used for a specific purpose.

Construing the phrase "under his control" as encompassing all personal property owned by the State of Iowa would enlarge the word "control" beyond its proper definition. However, this language should be considered together with other provisions of Chapter 18, and should not be construed so as to be rendered superfluous. Millsap v. Cedar Rapids Civil Service Com'n., 248 N.W.2d 679 (Iowa 1977); Northern Natural Gas Co. v. Forst, 205 N.W.2d 692 (Iowa 1973). Section 18.3(4), The Code, 1979, describes as one duty of the Director:

"Providing for the proper maintenance of the state capitol, grounds, and equipment and all other state buildings, ground, and equipment at the seat of government, except those referred to in section 601B.6, subsection 9."

Article XI, Section 8 of the Iowa Constitution establishes the seat of government at Des Moines and the State University at Iowa City. Without expressing a detailed opinion concerning the scope of the Director's authority over personal property or state buildings and grounds at the seat of government, we think it clear that, when Chapter 18 is viewed as a whole, the Director's authority plainly does not extend to all personal property owned by the State of Iowa. Accordingly, we conclude that the personal property of the Commission is not "under the control" of the

Director of General Services, as that term is used in Section 18.12(8). As a consequence, the Commission need not seek the authorization of the Director before disposing of its obsolete personal property.

This conclusion is buttressed by an examination of the legislative history of Chapter 18. Your letter notes that prior to the creation of the General Services Department, the Commission requested the approval of the Executive Council to hold the auction of surplus property. The Executive Council exercised this authority pursuant to Section 19.23, The Code, 1971, which provided:

"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."

Chapter 84, Section 99, Laws of the Sixty-Fourth General Assembly, First Session, expressly repealed Section 19.23. In addition, this bill created the Department of General Services, transferring many of the Executive Council's functions to the newly created department. However, the power to authorize the disposition of obsolete property was not included in the initial legislation. The present Section 18.12(8) was subsequently enacted in Chapter 121, Section 12, Laws of the Sixty-Fifth General Assembly, 1973 Session. When this section was enacted, the Legislature added the modifying phrase "under his control". Under the old section 19.23 there was no such limitation upon the Executive Council's authority. By the addition of the modifying phrase, the Legislature limited the scope of the Director's authority to dispose of personal property to a power less than that formerly possessed by the Executive Council. Plainly, under the prior law, the Commission was required to seek the authorization of the Executive Council to conduct its annual auction. The legislation which created the Department of General Services and subsequently gave the Director the power to dispose of obsolete state property is not as broad as the prior law, with the consequence that the Commission need not seek the Director's approval to sell obsolete personal property not "under his control".

Further, it seems to follow naturally from this conclusion that the Commission may dispose of property under its control, that is property which it directly superintends or manages. Several factors support this inference. First, the very fact that the Legislature chose to limit the Director's authority

Mr. William C. Brabham

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implies that property not under his control may be disposed of by that body which does exercise control over the property. Secondly, as noted earlier, the Commission under Section 18.9 must reimburse the revolving fund after purchasing property through the General Services Department. Moreover, Section 107.24(7), The Code, 1979, empowers the Commission to:

". . . expend money for necessary supplies and equipment, and to make such other expenditures as may be necessary for the carrying into effect the purposes of this chapter."

This broad power to expend money for the acquisition of personal property carries with it the implicit concomitant authority to dispose of the property when it becomes obsolete. 1 Am. Jur.2d Administrative Law, Section 44, p. 846 states:

"An administrative agency has, and should be accorded, every power which is indispensable to the powers expressly enacted, that is, those powers which are necessarily, or fairly or reasonably, implied as an incident to the powers expressly granted."

Moreover, the concluding paragraph of Section 107.17 states in part that:

"All receipts and refunds and reimbursements related to activities funded by the administration fund are appropriated to the administration fund."

This section contemplates "activities", like a public auction to dispose of obsolete property, which generate receipts for the administration fund. The Commission may hold a public auction to dispose of obsolete personal property which it controls.

This conclusion in effect answers your remaining question concerning the disposition of the proceeds from such a sale. Under Section 18.12(8) proceeds from the sale of obsolete property by the Director are deposited in the general fund. Those proceeds which result from the Commission sale of property it controls should be deposited in the funds specified in Section

Mr. William C. Brabham
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107.17. This provision makes allowance for the receipt of these proceeds through language stating that the fish and game protection fund may be enhanced by ". . . all other sources of revenue arising under the division of fish and game", and that the conservation fund, ". . . shall consist of all other funds accruing to the conservation commission".

Sincerely,

Timothy D. Benton
TIMOTHY D. BENTON
Assistant Attorney General

TDB/dlp

MOTOR VEHICLES: Left turns -- Ch. 321, §§ 320, 354, 1979 Code of Iowa. Complete stops on the travelled portion of a roadway which are made pursuant to §320 are not forbidden by §321.354. Gregersen to Gallagher, State Senator, 6/25/79) #79-6-24(L)

June 25, 1979

Mr. James V. Gallagher
State Senator
The Senate
State of Iowa
Sixty-Seventh General Assembly
Statehouse
Des Moines, IA 50319

Dear Mr. Gallagher:

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

Whether the driver of a vehicle intending to make a left turn may come to a complete halt on the travelled portion of the roadway to allow traffic which may constitute a hazard to pass.

While to an experienced driver the answer to this inquiry may at first glance seem to be somewhat obvious, a careful perusal of the applicable statutes and case law illustrates that the question is not as simple as it may appear. Statutes which bear most directly on this question provide, inter alia:

321.311 Turning at intersections. The driver of a vehicle intending to turn at an intersection shall do so as follows:

Approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and after entering the intersection the left turn shall be made so as to depart from the intersection to the right of the center line of the roadway being entered.

Approach for a left turn from a two-way street into a one-way street shall be made in that portion of the right half of the roadway nearest the center line thereof and by passing to the right of such center line where it enters the intersection. A left turn from a one-way

street into two-way street shall be made by passing to the right of the center line of the street being entered upon leaving the intersection.

Local authorities may cause markers, buttons, or signs to be placed within or adjacent to intersections and thereby require and direct that a different course from that specified in this section be traveled by vehicles turning at an intersection.

321.320 Left turns--yielding. The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road or driveway shall yield the right of way to all vehicles approaching from the opposite direction which are within the intersection or so close thereto as to constitute an immediate hazard, then said driver, having so yielded and having given a signal when and as required by this chapter, may make such left turn.

321.322(2) The driver of a vehicle approaching a yield sign shall slow to a speed reasonable for the existing conditions and, if required for safety, shall stop

Stopping, Standing and Parking

321.354 Stopping on traveled way. Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, but in every event a clear and unobstructed width of at least twenty feet of such part of the highway opposite such standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle be available from a distance of two hundred feet in each direction upon such highway; provided, however, school buses may stop on highway for receiving and discharging pupils and all other vehicles shall stop for school buses which are stopped to receive or discharge pupils, as provided in §321.372. This section shall not apply to a vehicle making a turn as provided in §321.311.

The basic thrust of your question requires reconciliation of §354 with §320. Initially, §321.354 seems to prohibit any stop, however momentary, upon the "paved or improved or travelled part of the highway when it is practical to stop . . . such vehicle off such part of such highway." (All citations hereinafter are to Chapter 321 of the 1979 edition of the Code of Iowa). Even when it is practical to stop a vehicle off the travelled portion of a roadway, strict requirements relating to the amount of space that must be left for clear passage on the roadway and the distance for which the vehicle must be clearly visible must be complied with. Id. Three exceptions to these general rules are then set forth by the statute: (1) The statute regulates only highways "outside of a business or residence district;" (2) The statute is not applicable to turns made in compliance with §311, supra.; and (3) The statute is not applicable to school buses stopping to load or unload pupils nor to vehicles stopped for stopped schoolbuses. Id. In addition, a fourth exception to §354 is found in §355 for disabled vehicles. No exception to §354 for a vehicle turning left in compliance with §320 appears.

Case law regarding the interrelationship of §320 with §354 is scanty. In April of 1957 a decision was handed down by the Iowa Supreme Court which offered two quite opposed views to the interpretation of §354. In Jesse v. Wemer & Wemer Co., 248 Iowa 1002, 82 N.W.2d 82 (1957), plaintiff semi-trailer truck driver brought his vehicle to a stop on the travelled portion of a highway to allow another semi-trailer truck to pass first through a railroad underpass. While waiting for the other vehicle plaintiff was struck in the rear by defendant. 248 Iowa at 1004, 1005, 82 N.W.2d at 82. The case resulted in a 4-1-4 decision with the lone member of the Court simply concurring in the result reached by the plurality opinion.

In its interpretation of §354 the Wemer plurality said:

Clearly the word "stop" used in the statute is intended as synonymous with "park" or "leave standing". They must be read together. "Park" means to halt and to leave standing, or to stop and remain standing. . . . It is inconceivable that every stopping, regardless of the emergency or cause, even of a momentary nature, was intended to be prohibited by this statute, and in this regard it must be considered ambiguous as to legislative intent. Such a change from the common law rules requiring due care under compelling circumstances such as we observe here, would not meet with reason or expediency. 248 Iowa at 1007, 82 N.W.2d at 84.

Thus the word "stop" was seemingly read out of the statute by a plurality opinion which cited no case authority for its position. See Comment, 43 Iowa L. Rev. 401 (1958).

The dissent in Wemer took vigorous issue with the plurality's reading of the statute. It cited many opinions and rules of statutory construction in its attack upon the construction given §354 and the word "stop". Its basic thrust was that if the legislature had intended that "stop" and "park" were synonymous, "stop" would have been left out of the statute. 248 Iowa at 1021-29 82 N.W.2d 92-97.

One month after Wemer was handed down, the Court decided a case where a stop prior to a left turn was made. The Court in a unanimous decision stated:

So there may be no doubt as to our holding it is, stated abstractly, that where a motorist intending to make a left turn gives a proper signal of his intent to a driver following him the driver thereby has notice that the motorist who signals may be required to stop in order to yield the right of way to a vehicle approaching from the opposite direction, and no additional signal of intention to stop is required by statute.

Whether or not §354 applied to the facts of this case was not discussed by the Court.

Several later decisions of the Court offered little clarification of the problem. In Pinckney v. Watkinson, 254 Iowa 144, 116 N.W.2d 258 (1962) it was held that a momentary stop to pick up passengers violated §354. In Mazur v. Grantham, 255 Iowa 1292, 125 N.W.2d 807 (1964), where plaintiff was rear-ended after having stopped on the roadway for up to one minute while waiting for traffic to clear before making a left turn, the Court did not decide whether the statute was violated since the factual and procedural elements of this case made the decision unnecessary. The Court, however, did cite to a statement in Pinckney, supra, which approved stops made in response to a hazard, a traffic command, or in the exercise of due care. 255 Iowa at 1297, 125 N.W.2d at 807.

Final resolution of the issue appears to have been reached in two cases in the 1970's. In Cook v. Clark, 186 N.W.2d 645 (Iowa 1971), defendant, who had been struck while waiting to make a left turn, made several inconsistent statements regarding the length of time he had been stopped, ranging from 10 or 15 seconds or from 7 to 10 minutes. The Court held that an instruction on §354 was valid since the jury could believe he had stopped and waited for 7 to 10 minutes. Id at 648. The inference of that statement seems to be that a momentary stop prior to making a left turn would not violate §354. The latest Supreme Court interpretation supports that inference. Larsen v. Johannsen, 220 N.W.2d 872 (Iowa 1974) (§354 held not applicable

where driver made momentary stop to shift to forward after backing onto roadway.)

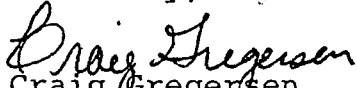
Statutes prohibiting stopping, parking, or leaving vehicles standing do not apply to every kind of stop on a highway. This court has said "All voluntary stopping of a vehicle which amounts to parking or leaving a vehicle standing, attended or otherwise, with the exceptions stated therein, is prohibited by statute." Pinckney v. Watkinson, 254 Iowa, 144, 153, 116 N.W.2d 258, 263. The courts hold that maneuvers which are intended to be regulated by other statutes rather than by the anti-stopping statute do not come within the latter statute. Several but not all such cases involve stopping to let oncoming traffic clear before making a left turn. (citations omitted) (emphasis added) 220 N.W.2d at 873.

Of significance in the above quoted material is the sentence beginning "The courts hold . . ." Iowa has two statutes addressed to left turns. The first, §311, sets forth the mechanics for making a proper left turn. The second, §320, establishes a standard of care for making such a turn. Neither prevents a momentary stop. §320 requires only that one yield the right of way to traffic which may constitute a hazard.

It appears that §320 should be interpreted in a manner similar to the pronouncement of §322(2). That is, prior to making a left turn a driver should slow to a reasonable speed, signal properly, and "if required for safety," stop. Any other rule would see drivers attempting turns in hazardous situations.

Thus, in the Larsen decision, the Supreme Court seems to have moved to a position that a momentary stop prior to making a left turn does not come within the prohibition of §354. Cases from other jurisdictions support this position. Dromey v. Inter State Motor Freight Service, 121 F.2d 361 (7th Cir. 1941); Alex v. Joselich, 78 N.W.2d 440 (Minn. 1956). But see Guerin v. Thompson, 335 P.2d 36 (Wash. 1959). This does not, however, sanction making stops or left turns in any haphazard manner. Common law and statutory requirements relative to making such maneuvers must still be complied with. See §§311, 314-316, 320.

Sincerely,


Craig Gregersen

Assistant Attorney General

ps

STATE OFFICERS AND DEPARTMENTS: Commission for the Blind; §601B.6(9), §17A.2; Rule prescribing use of guide dogs in adjustment centers is not outside jurisdictional authority of Commission. Such a rule may be subject to rulemaking under Iowa Administrative Procedure Act, but question need not be decided since commission has voluntarily agreed to promulgate appropriate rule. Such rules may be subject to judicial challenge under §17(19)(g) of the IAPA. (Appel to Kudart, 6/22/79) #79-6-23(L)

June 22, 1979

Honorable A. R. Bud Kudart
State Senator
1900 Second Ave., S. E.
Cedar Rapids, Iowa 52403

Dear Senator Kudart:

We are in receipt of your April 25th request for an opinion concerning the policies of the Commission for the Blind. You ask:

Can persons who otherwise qualify for vocational training from the Commission be excluded from training because they wish to have guide dogs with them during the training program? That is, can they be required to leave the guide dogs at home in order to participate in the training programs which require an extended stay at the Commission's facility in Des Moines?

These questions are precisely the same that were posed in an opinion request by State Senator Sovern and answered by Solicitor General Haesemeyer on March 26, 1976, 1976 OAG 525. In that opinion, the Solicitor General noted that the Commission for the Blind is given broad powers to manage the adjustment centers by statute.

We agree with the earlier opinion's conclusion that the Commission has broad powers to regulate its adjustment centers. Section 601B.6 (9) authorizes the Commission to "establish, manage, and control a special training, orientation, and adjustment center or centers for the blind." A rule regulating the use of guide dogs at the facilities thus does not appear outside the scope of this express legislative delegation of authority to the Commission.

The earlier opinion, however, did not address the question of whether such a policy would be a rule subject to the notice and comment procedures of the Iowa Administrative Procedure Act (IAPA), §17A et seq., Code of Iowa, 1979. An argument could be made that the rule affects the rights of the public by limiting who may make use of the Commission's facilities. On the other hand, it could be asserted that the rule is simply an internal management policy in an educational institution that does not affect the rights of the public, §17A.2(k).

In close cases, state agencies should follow the notice and comment rulemaking procedures of the Iowa Administrative Procedure Act. The statute expressly states that the "Act shall be construed broadly to effect its purposes," §17A.23. And, conversely, the courts have generally narrowly construed exceptions to the general rulemaking provisions of the Act, Airhart v. Iowa Department of Social Services, 248 N.W.2d 83 (1976).

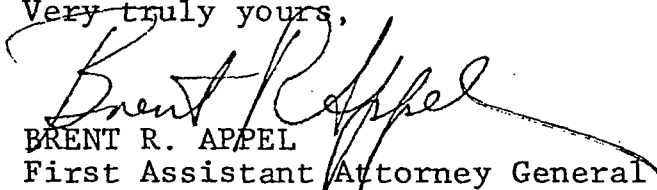
Moreover, we think the benefits of rulemaking proceedings in situations such as this are obvious. Public participation in rulemaking promotes openness in government; assists decisionmakers in evaluating the wisdom of proposed policy, and helps insure that state agencies exercise their discretion consistently with the legislative mandate. See §17A.1(2). Through rulemaking, the public obtains the benefits of what amounts to a mini-legislative process -- the offering of a proposal, followed by input from interested persons, and ultimately a public decision of Commission members who are ultimately responsible for their actions.

We need not reach the questions of whether a policy prohibiting guide dogs from adjustment centers is technically a rule and therefore subject to the notice and comment procedures of the IAPA, however, since the Commission for the Blind, in a recent notice of intended action, has voluntarily elected to promulgate such a rule. See I Iowa Administrative Bulletin 1467 (June 13, 1979). Written comments on the proposed rule are now being solicited by the Commission, and a hearing has been scheduled for July 11, 1979, at 10:00 a.m. at the Commission's Office in Des Moines. Persons interested in informing the agency of their views will thus have an opportunity to appear before the agency and press their case.

After the agency has considered oral and written commentary, the IAPA provides that it formally promulgate its final rule by publishing it in the Iowa Administrative Bulletin. Any rule so adopted would be subject to judicial review under §17A.19(g) of the Iowa Administrative Procedure Act. In a proceeding for judicial review of a rule, the court would consider whether the agency action was "arbitrary, capricious, or a clear abuse of agency discretion." Whether any rule on guide dogs could be so characterized would rest in large part upon the kind of comments the agency received and the force of the factual evidence and logical arguments that can be marshalled in opposition to the rule.

While it may be appropriate for an Attorney General's opinion to declare a rule unreasonable on its face, see OAG #79-3-11 (Appel to Redmond, 3-26-79), an opinion is not generally the proper vehicle for evaluating a rule where, as here, a factual investigation is necessary to informed consideration of the rule's reasonableness. Moreover, where rules are not obviously invalid on their face, it would be premature for the Attorney General to express an opinion on a proposed rule prior to public hearing and informed agency consideration. We therefore decline to express an opinion as to whether the proposed rule would survive judicial examination under §17A.19(g).

Very truly yours,


BRENT R. APPEL
First Assistant Attorney General

BA:s

CONSERVATION COMMISSION: Wildlife habitat stamps — Sections 110.1, 110.3, 110.7, 110A.5, 110A.6, Iowa Code, 1979. Persons hunting upon licensed Game Breeding and Shooting Preserves must possess a wildlife habitat stamp. Nonresidents hunting upon licensed Game Breeding and Shooting Preserves must also possess an unused pheasant tag issued pursuant to section 110.7, Iowa Code, 1979. (Benton to Brabham, Acting Director, Iowa Conservation Commission, 6/15/79) #79-6-20(L)

June 15, 1979

Mr. William C. Brabham
Acting Director
Iowa Conservation Commission
L O C A L

Dear Mr. Brabham:

In a letter to this office dated April 9, 1979, you have requested our opinion concerning the relationship of Chapter 110 governing the issuance of Fish and Game Licenses and Chapter 110A which regulates Game Breeding and Shooting Preserves within the State of Iowa. Noting that section 110.3, Iowa Code, 1979, requires that both resident and nonresident persons obtain a valid Wildlife Habitat Stamp, you ask whether individuals hunting on Game and Shooting Preserves regulated pursuant to Chapter 110A are also required to possess the Wildlife Habitat Stamp.

Section 110A.6, Iowa Code, 1979, provides:

"No person shall take any game bird upon a game breeding and shooting preserve area, by shooting in any manner, except between September 1, and March 31, of each year, both dates inclusive.

Waterfowl may not be shot over any water area wherein pen-reared birds might serve as live decoys for wild waterfowl.

Every person taking game birds upon such licensed game breeding and shooting preserve area shall secure a hunting license so to do in accordance with the provisions of the game laws of Iowa, with the exception that a non-resident may secure a hunting license restricted to shooting preserve areas for a license fee of five dollars per year. (Emphasis supplied)

Mr. William C. Brabham
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Under the last sentence of this section, the licensing requirements of Chapter 110 are made applicable to those persons hunting upon game preserves. As your letter states, section 110.3, Iowa Code, 1979, states in pertinent part:

"A resident or nonresident person required to have a hunting or trapping license shall not hunt or trap unless he or she has on his or her person a valid wildlife habitat stamp signed in ink with his or her signature across the face of the stamp. This section shall not apply to residents who are permanently disabled or who are younger than sixteen or older than sixty-five years of age. Special wildlife habitat stamps shall be administered in the same manner as hunting and trapping licenses except all revenue derived from the sale of the wildlife habitat stamps shall be used within the State of Iowa for habitat development and shall be deposited in the state fish and game protection fund."

This section makes clear that no person required to obtain a license as a precondition to hunt or trap may perform either activity without also acquiring the wildlife habitat stamp. Given that section 110A.6 renders the licensing requirements of Chapter 110 applicable to those hunting upon game preserves, the requirement that a licensed hunter obtain a wildlife habitat stamp must also apply to those hunters utilizing game preserves.

Section 110.1, Iowa Code, 1979, provides in pertinent part:

"Except as otherwise provided in this chapter, no person shall fish, trap, hunt, pursue, catch, kill or take in any manner, or use or have possession of, or sell or transport all or any portion of any wild animal, bird, game or fish, the protection and regulation of which is desirable for the conservation of the resources of the state, without first procuring a license or certificate so to do and the payment of a fee as follows:

1. Fishing licenses:

* * *

f. Special trout license stamp.

2. Hunting licenses:

* * *

g. Nonresidents raccoon stamp and tags.

h. Nonresidents pheasant stamp.

7. Other licenses:

* * *

m. Special wildlife habitat stamp."

In determining that county recorders and depositaries may charge a 25 cent fee for each of the stamps issued pursuant to this chapter, our office has recently noted that:

"The legislature thus has designated as licenses the 'special trout license stamp', the 'nonresidents raccoon stamp and tags', the 'nonresidents pheasant stamp', and the 'special wildlife habitat stamp'", . . .
(O.A.G. #79-2-8 Peterson to Priedert, 2-21-79)

In Cedar Mem. Park Cem. Ass'n. v. Personnel Assoc., Inc. 178 N.W.2d 343, 346 (Iowa 1970) the Iowa Supreme Court noted that the legislature may serve as its own lexicographer; its definitions bind the courts in the construction of legislative terms. The various stamps enumerated in section 110.1 have been legislatively defined as licenses. As a result the requirement imposed by section 110A.6 that persons taking game birds upon preserves secure a hunting license must also encompass a duty to secure the requisite stamp.

Section 110.7, Iowa Code, 1979, provides:

"1. A nonresident shall not hunt pheasants unless the pheasant stamp is purchased and affixed to the nonresident hunting license and the nonresident hunter possesses an unused pheasant tag. A nonresident shall not possess an untagged pheasant.

2. The pheasant stamp shall permit the license holder to hunt pheasants. The stamps shall be issued with tags in the amount of twice the possession limit established by the commission for pheasant. The tags shall bear the same number as the stamp and shall be designed to be used only once. A nonresi-

Mr. William C. Brabham
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dent may purchase another pheasant stamp and tags when the tags of the previous stamp are exhausted."

The legislature has also included a similar provision within Chapter 110A. Specifically, section 110A.5 states in pertinent part:

"The commission shall prepare special tags suitable for use upon legs of game birds, which tags shall be of a type not removable without breaking and mutilating the tag, such tags, to be used to designate birds taken upon a licensed game breeding and shooting preserve area. Upon application and payment of a fee of five cents for each such tag, the commission shall furnish licenses with such tags; provided that the commission shall not in any year furnish any licensee a number of tags in excess of the number of game birds which may lawfully be taken from such licensed area as hereinafter provided. One of such tags shall be securely affixed to one of the legs of each game bird taken before removing same from such licensed area, and such tag shall remain upon the leg of such game bird until such bird is finally prepared for consumption."

In light of these provisions you have asked whether birds taken from game preserves must be tagged twice.

Section 4.7, Iowa Code, 1979, addresses situations in which statutes may conflict with the following language:

"If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision."

A corollary to this rule is the principle that when one statute deals with a subject in general terms and another deals with the same subject in a more detailed way, the two must be harmonized, if possible. Northern Natural Gas Co. v. Forst, 205 N.W.2d 692 (Iowa 1973). Under this principle we conclude that sections 110.7 and 110A.5 may be harmonized and construed so that effect is given to both.

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The duty to possess an unused pheasant tag imposed by section 110.7 is a general one attendant upon all nonresidents hunting pheasants. The tagging requirement of section 110A.5 applies to residents and nonresidents taking birds from game preserves. For nonresident hunters, the tagging requirement is co-extensive with the requirement to obtain a license and pheasant stamp. The stamp itself, as mentioned earlier, is but a sub-category of the license under this legislative scheme. Since all persons hunting upon game preserves are required to ". . . secure a hunting license so to do in accordance with the game laws of Iowa . . . ", it follows from this language that nonresidents hunting upon game preserves must possess the unused pheasant tag required by section 110.7(1). Accordingly we conclude that nonresidents utilizing game preserves must possess an unused pheasant tag as required by section 110.7(1) and the special tag issued pursuant to section 110A.5 to designate birds taken from licensed game preserves.

Sincerely,

Timothy D. Benton

TIMOTHY D. BENTON
Assistant Attorney General

TDB/bje

STATE OFFICERS AND DEPARTMENT: Credit Union Department. Chapter 533, 1979 Code of Iowa; §§533.1, 533.6, 533.37, 533.51, 533.53, 533.54, and 533.55, 1979 Code of Iowa; §533.1, 1977 Code of Iowa. The Credit Union Review Board may review and reverse important decisions of the Administrator if such action is deemed necessary or suitable to effect the provisions of Chapter 533. The Board should not reverse routine, day-to-day administrative decisions made by the Administrator. The Credit Union Department should promulgate rules to more specifically define the relationship of the Board and the Administrator. (McDonald to Reed, Acting Deputy Administrator, Credit Union Department, 6/15/79) #79-6-18(L)

June 15, 1979

Mr. Marlin Reed
Acting Deputy Administrator
Iowa Credit Union Department
530 Liberty Building
418 6th Avenue
Des Moines, Iowa 50319

Dear Mr. Reed:

You have requested an opinion of the Attorney General concerning the respective roles of the Administrator and the Credit Union Review Board in the newly-created Credit Union Department. Specifically, you have requested an answer to the following question:

Excluding the board's authority with respect to the rule making process, the question we specifically ask you to address in your opinion is as follows: Does the Credit Union Review Board have the power and authority to reverse any routine or controversial decisions that may be made by the Administrator of the Credit Union Department?

The Administrator of the Credit Union Department has supervisory and regulatory authority of all state chartered credit unions, and is charged with the administration and execution of the laws of this state. See §§ 533.1 and 533.51(3), 1979 Code of Iowa. Chapter 533 of the Code of Iowa also confers upon the Administrator specific powers and duties through which he supervises and regulates credit unions. See §§ 533.1(4), 533.1(5), 533.6, and 533.37.

The Credit Union Review Board is created in § 533.53, 1979 Code of Iowa. Section 533.54 sets forth the powers and duties of the board as follows:

The board may adopt, amend, and repeal rules pursuant to Chapter 17A or take

other action as it deems necessary or suitable, to effect the provisions of this chapter.

Your inquiry turns on an interpretation of the scope of authority granted to the Credit Union Review Board under § 533.54.

Chapter 533 of the Code of Iowa contemplates a scheme whereby the Administrator is charged with the routine, day-to-day administration of the Credit Union Department. This is apparent from the duties imposed upon the Administrator in Chapter 533, and by virtue of the fact that Chapter 533 requires only four annual meetings of the Credit Union Review Board. See § 533.53(4), 1979 Code of Iowa. This is further evidenced by the Administrator's authority to hire employees in § 533.55(1) of the Code.

The Credit Union Review Board is the policy-making body for the Credit Union Department. The Board must approve all rules promulgated by the Administrator. See §§ 533.1 and 533.55(3), 1979 Code of Iowa. The Board approves salaries established by the Administrator for employees. See § 533.55(2), 1979 Code of Iowa. The Board may also promulgate rules and take other action as deems necessary or suitable. See § 533.54, 1979 Code of Iowa.

The specific relationship of the Board and the Administrator is not set forth in Chapter 533. Chapter 533 gives a generic outline of the relationship, but reserves to the agency the authority to adopt rules to more specifically define this relationship. See §§ 533.1, 533.54, 533.55(3), 1979 Code of Iowa.

The scope of the Board's review is not specifically delineated in Chapter 533. However, the grant of authority in § 533.54 is very broad in nature.

In interpreting statutes we are guided by familiar principles of statutory construction, as are set forth in Huff v. St. Joseph's Mercy Hospital of Dubuque Corporation, 261 N.W.2d 695, 699 (Iowa 1978) and Doe v. Ray, 251 N.W.2d 496, 500-501 (Iowa 1977) as follows:

... the polestar is legislative intent. Iowa Department of Revenue v. Iowa Merit Employment Commission, 243 N.W.2d 610, 614 (Iowa 1976); Cassady v. Wheeler, 224 N.W.2d 649, 651 (Iowa 1974). Our goal is to ascertain that intent and, if possible, give it effect. State v. Prybil, 211 N.W.2d 308, 311 (Iowa 1973); Isaacson v. Iowa State Tax Commission, 183 N.W.2d 693, 695 (Iowa 1971). Thus, intent is

shown by construing the statute as a whole. In searching for legislative intent we consider the objects sought to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. Peters v. Iowa Emp. Security Commission, 235 N.W.2d 306, 310 (Iowa 1975); Iowa Nat. Indus. Loan Co. v. Iowa State, Etc., 224 N.W.2d 437, 440 (Iowa 1974)...

Finally, we note that in construing a statute we must be mindful of the state of the law when it was enacted and seek to harmonize it, if possible, with other statutes relating to the same subject. Egan v. Naylor, 208 N.W.2d 915, 918 (Iowa 1973) and citations.

In addition, the Iowa Supreme Court has stated that in construing a statute, an attempt is made to give it a sensible, practical, workable and logical construction. See Huff v. St. Joseph's Mercy Hospital of Dubuque Corp., supra, at 699; Doe v. Ray, supra, at 504.

It is clear that the legislature intended that the Credit Union Review Board should review important decisions made by the Administrator. This intent is discerned from the very creation of the Review Board, the broad-sweeping authority granted to the Board in § 533.54, and the limitation of the Administrator's authority by the requirement of approval by the Board. See §§ 533.1, 533.55(2), and 533.55(3). Furthermore, § 533.53(5) of the Code reads as follows:

5. A member of the credit union review board shall not take part in any action or participate in any decision when the matter under consideration specifically relates to a credit union of which the board member is a member.

Section 533.53(5) clearly contemplates participation by the Credit Union Review Board in decisions relating to credit unions.

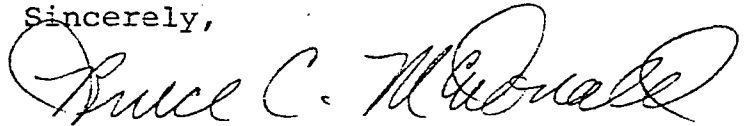
In the previous Chapter 533, the superintendent of banking was the sole decision-maker concerning credit unions. See § 533.1, 1977 Code of Iowa. Therefore, by the creation of the Review Board in § 533.53, the legislature created a check on the Administrator's decision-making authority. The apparent evil sought to be remedied was abuse of discretion by the Administrator in his decisions.

Mr. Marlin Reed

Page 4

Therefore, Chapter 533 clearly contemplates that the Credit Union Review Board review important decisions made by the Administrator. The Board may reverse the decision of the Administrator if such action is deemed necessary or suitable to effect the provisions of Chapter 533. Without the power to reverse the Administrator, the review function performed by the Board would serve only as a "rubber stamp" approval of the decisions of the Administrator. However, because the Board is required to meet only four times per year, it is not in a position to review routine, day-to-day administrative decisions made by the Administrator, and therefore should not reverse such decisions. The Credit Union Department should promulgate rules to more specifically define the relationship of the Board and the Administrator.

Sincerely,

A handwritten signature in cursive script that reads "Bruce C. McDonald". The signature is written in dark ink and is positioned above the typed name.

Bruce C. McDonald
Assistant Attorney General

TJM/BCM/ch

STATE OFFICERS AND DEPARTMENTS: Department of Social Services, Office of Communications. Sections 217.30 and 229.27, 1979 Code of Iowa; §§ 770-17.5(1), 770-18.6(1), 770-19.3(1), 770-20.3(1), 770-21.4(3), 770-22.6(1), and 770-28.5, Iowa Administrative Code. A written release should be secured from a client before his photograph is taken for a departmental publication. Such release should describe the publication for which the photograph is to be used, including the purpose and date of release of the publication. A client release should be executed each time the photograph is used or the publication is reprinted. The Office of Communications should investigate the status of the client before the photograph is used or released in a publication. In instances where the status of the client has changed since the taking of the photograph, the photograph should not be used for publication, notwithstanding a prior secured written release from the client (McDonald to Fredericci, Director, Office of Communications, 6/14/79) #79-6-17(L)

Ms. Gini Fredericci
Office of Communications
Department of Social Services
L O C A L

June 14, 1979

Dear Ms. Fredericci:

You have requested an opinion of the Attorney General to clarify departmental policy concerning the right to privacy of clients who are photographed to appear in departmental publications. Your questions address the requirements and proper procedure with regard to securing signed releases from clients in order to photograph them and to subsequently use those photographs.

There is no explicit reference, in the United States Constitution nor in the Constitution of Iowa, to an individual's right to privacy. However, the United States Supreme Court has recognized that a right of personal privacy does exist under the Constitution. See Roe v. Wade, 410 U.S. 113, 152-153 (1973); Paul v. Davis, 424 U.S. 693, 712-713 (1976).

Many sources of the right to privacy have been cited by the Supreme Court. Among the sources are the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969); the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968), Katz v. United States, 389 U.S. 347, 350 (1967), Boyd v. United States, 116 U.S. 616 (1886), Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 488 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, Meyer v. Nebraska, 262 U.S. 390, 399 (1923). See generally, Roe v. Wade, supra.

The right to privacy has also been explained as a peripheral or derivative right that emanates from specific rights guaranteed in the Bill of Rights. Such an explanation stems from the theory that specific guarantees in the Bill of Rights have penumbras, formed

by emanations from the specific guarantees, that help give the specific guarantees life and substance. See Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Poe v. Ullman, 367 U.S. 497, 516-522 (1961) (Douglas, J., dissenting).

Although abstract in nature, the right to privacy can best be described as the right to be left alone by other people. See Katz v. United States, *supra*, at 350-351; Olmstead v. United States, *supra*.

The questions you have posited present situations in which a client's right to privacy may be breached by the department. In particular, the chief concern is for the client (inmate, mental health patient, etc.) whose photograph could potentially appear in a departmental publication after the client has been released or no longer is receiving services. Although the United States Supreme Court has stated that reputational interest alone is not sufficient to invoke the protection of the Due Process Clause, reputation combined with a more tangible interest, such as employment, would probably receive due process protection. See Paul v. Davis, 424 U.S. 693, 701 (1976).

Therefore, there is a need for extreme caution concerning the department's policy for photographing clients. The department must insure that such photographs will not lead to an unconsented reputational injury that may lead to a further loss of a tangible benefit to the client (i.e., loss of or failure to secure employment; loss of or failure to secure housing; etc.).

The protection of a person's general right to privacy--his right to be left alone by other people--is, like protection of his property, left largely to the law of the individual states. See Katz v. United States, *supra*, at 350-351. Therefore, reference to Iowa law is necessary to further clarify departmental policy in this area.

Records of departmental clients are accorded strict protection under § 217.30 of the Code of Iowa. However, the general confidentiality outline in § 217.30 does not address the photography issue. Therefore, we refer to departmental rules in the Iowa Administrative Code.

Departmental rules require a consent to be photographed by the client in the form of a written release. Such requirement does not vary according to the type of client or institution in which the client receives services. Reference should be made to the following sections of the Iowa Administrative Code:

Iowa State Penitentiary, § 770-17.5(1)
Iowa State Men's Reformatory, § 770-18.6(1)
Women's Reformatory, § 770-19.3(1)
Iowa Security Medical Facility, § 770-20.3(1)
Riverview Release Center, § 770-21.4(3)
Mount Pleasant Medium Security Facility, § 770-22.6(1)
Mental Health Institutions, § 770-28.5

When the rules are silent concerning a particular institution, departmental policy should be interpreted so as to be consistent with the procedures set forth in the citations above, in order to ensure that the client's right to privacy is not violated.

The Office of Communications should secure a client release before the client is photographed. When the client is a minor or is legally incompetent under § 229.27, 1979 Code of Iowa, the written release must be secured from the legal guardian of the client. Such a release form should incorporate a general description of the publication for which the photograph will be used. Such a description should also include a purpose statement expressing the ends to be served by the publication and the date for public release of the publication.

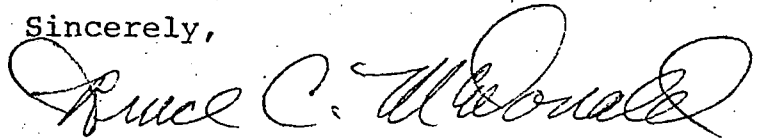
Client photography releases should be restricted to one publication. Blanket releases should not be used. Because the client's status could change between publications, the Office of Communications should secure a separate release each time a picture is used, as well as each time a publication is reprinted. Furthermore, the Office of Communications is obligated to determine whether or not the client's circumstances have changed between the taking of the photograph and its publication, as well as between each publication or use of the photograph. If the client's status has changed in these instances, the photographs should not be used, notwithstanding the consent obtained pursuant to a signed written release.

In summary, a client's right to privacy should be accorded strict protection by the Office of Communications. A written release should be secured from the client before the photograph is taken. Such release should describe the publication for which the photograph is to be used, including the purpose and date of release of the publication. A client release should be executed each time the photograph is used or the publication is reprinted. The Office of Communications should investigate the status of the client before the photograph is used or released in a publication. In instances

Ms. Gini Fredericci
Page 4

where the status of the client has changed since the taking of the photograph, the photograph should not be used for publication, notwithstanding a prior-secured written release from the client.

Sincerely,

A handwritten signature in cursive script, reading "Bruce C. McDonald". The signature is written in dark ink and is positioned above the typed name and title.

Bruce C. McDonald
Assistant Attorney General

TJM/BCM/ch

MENTAL HEALTH: Role of county attorney under Chapter 229, Code of Iowa. §§ 229.6-8, 229.12, 229.21, 229.50-53, 333.2. Chapter 229, Code of Iowa, does not permit the county attorney to screen applications for orders of involuntary hospitalization prior to the time of filing with the clerk of court. The Code of Iowa does not charge the county attorney with the duty of presenting evidence in support of the involuntary commitment of a substance abuser. (Fortney to Wickey, Assistant Woodbury County Attorney, 6/8/79) #79-6-6(L)

June 8, 1979

Mr. Gene A. Wickey
Assistant Woodbury County Attorney
Third Floor, Court House
Sioux City, Iowa 51101

Dear Mr. Wickey:

You inquired whether Chapter 229, Code of Iowa, allows the county attorney or his or her assistant to screen applications for orders of involuntary hospitalization prior to the time of filing with the clerk of court. It is our opinion that such screening is not permitted by the Code.

You further inquired whether the county attorney or his or her assistant is charged with the duty of presenting the evidence in support of the involuntary commitment of a substance abuser under §§ 229.50-53, Code of Iowa. It is our opinion that the Code does not charge the county attorney with this duty.

I.

Beginning with § 229.6, the Code sets forth the procedural steps to be followed in processing an application for involuntary hospitalization of an individual alleged to be seriously mentally impaired. The Code further specifies which individuals or officials are charged with responsibilities at various points in the process. The procedure as outlined in the Code does not contemplate the screening of applications by the county attorney prior to filing with the clerk of court.

A proceeding for involuntary hospitalization begins with the filing of a verified application with the clerk of court. See § 229.6, Code of Iowa. The clerk is charged with responsibility for assisting an individual with completion of the application. The only discretion conferred on the clerk by § 229.6 is the

authority to determine whether information of a corroborative nature should be obtained by the clerk and reduced to writing in order to supplement the information contained in the application. It should be noted that this discretion does not extend to a decision by the clerk as to whether an application should be filed. At this point in the process, the county attorney has no role.

Once an application is filed, § 229.7, Code of Iowa, requires the clerk to docket the application and immediately notify a district court judge of the filing. The judge is charged with reviewing the application, but, to the extent that this is a screening process, the screening is limited to a review of the application's form, not substance. Following this review by the judge, the application is forwarded by the clerk, with appropriate notices, to the sheriff for service upon the respondent.

The first involvement of the county attorney comes after the filing of the application. Section 229.8, Code of Iowa, states that "as soon as practicable after the filing of an application for involuntary hospitalization, the court shall: . . . (2) Cause copies of the application and supporting documentation to be sent to the county attorney or his or her attorney-designate for review." Prior to presenting "evidence in support of the contentions made in the application" at the time of the hearing, as required by § 229.12, Code of Iowa, the county attorney is given no responsibility for taking action in the hospitalization process. The Code confers no screening function on the county attorney, in the sense that he or she has no discretion as to whether an application is filed or whether the process goes forward.

II.

Sections 229.50-53, Code of Iowa, establish a procedure whereby a substance abuser may be involuntarily committed for treatment. A hearing procedure is provided, but the Code fails to specify who is responsible for presenting evidence in support of the petition for involuntary commitment. When §§ 229.50-53 are compared to the sections of Chapter 229 dealing with involuntary hospitalization of individuals alleged to be seriously mentally impaired, it can be seen that separate procedures have been established to accommodate the two categories. The failure to charge the county attorney with responsibility under §§ 229.50-53 would seem to be but one of a series of distinctions between the two proceedings. To that extent, it can be presumed to be intentional, rather than an oversight.

Chapter 229, Code of Iowa, establishes procedures whereby society can require certain individuals, suffering from certain defined conditions, to obtain treatment if they will not, or cannot, do so voluntarily. The chapter addresses the problems of two categories of people: first, individuals alleged to be seriously mentally impaired; and second, individuals alleged to be substance abusers. In dealing with these two categories, the Legislature established two separate procedures. With one minor exception¹, the two procedures are independent of one another and do not adopt the other's processes. As a result, it would be incorrect to infer that the responsibilities of the county attorney in a proceeding regarding an individual who is seriously mentally impaired are to be carried over to a proceeding regarding an individual who is a substance abuser.

Section 229.12, Code of Iowa, requires that the county attorney present the evidence in support of the application for an order of involuntary hospitalization; that the respondent has a right to be present during the hearing; that the respondent be afforded the right to testify, as well as to present and cross-examine witnesses; and that the public be excluded from the proceedings. In contrast, § 229.52 confers on a respondent who is alleged to be a substance abuser a more limited right to be present at the hearing. The alleged substance abuser can be totally excluded from the hearing if being present would be injurious to the respondent. Furthermore, a proceeding under § 229.52 takes place in open court, with no provision made for excluding the public.

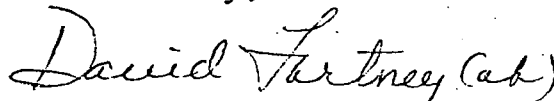
In other ways, §§ 229.12 and 229.52 employ identical procedures and standards. Both proceedings allow the court to consider all relevant evidence and to base a finding on clear and convincing evidence. In both proceedings the respondent is afforded the right to counsel, such counsel to be employed at court expense if the respondent is unable to afford an attorney. See §§ 229.8 and 229.52(6).

A comparison of proceedings under § 229.12, Code of Iowa, with those under § 229.52, Code of Iowa, demonstrates that the Legislature

1. Section 229.51(3) states in part that "if a judicial hospitalization referee has been appointed under Section 229.21 for the county in which the petition is filed, the clerk of the district court shall immediately notify the referee of the filing of the petition and the referee shall thereupon discharge all of the duties imposed upon judges of the district court by this division, except the duty to hear appeals filed under subsection 2 of Section 229.52."

devised differing methods of handling individuals alleged to be seriously mentally impaired and those alleged to be substance abusers. It therefore cannot be inferred that the omission of a role for the county attorney was unintentional. Section 229.52, Code of Iowa, imposes no duty on the county attorney to present the evidence in support of a petition filed under § 229.51, Code of Iowa² and it would appear that a petitioner under § 229.51 may either appear pro se or obtain private counsel to present evidence in support of the petition.

Yours truly,



David Fortney
Assistant Attorney General

TJM:SCR:DF/jam

2. The general duties of the county attorney as set forth in § 336.2, Code of Iowa, do not encompass presentations of evidence in support of a § 229.51 petition.

COUNTIES: Incompatibility of Offices -- Chapter 173, Sections 332.3 (23), 336.2 (7), 347.13, 347.14 (13) and 347.27, the Code, 1979. A member of a board of supervisors may not simultaneously be a member of a county hospital board or a county fair board. A member of a board of supervisors may be a member of the State Fair Board. The doctrine of incompatibility of offices is not an obstacle to an assistant county attorney representing a local school district, but such representation may raise several ethical problems under the Code of Professional Responsibility. (Appel and Blumberg to Arends, Assistant Humboldt County Attorney, 6/8/79) #79-6-5 (L)

June 8, 1979

Mr. Marc D. Arends
Assistant Humboldt County Attorney
520 Sumner Avenue
P.O. Box 672
Humboldt, Iowa 50548

Dear Mr. Arends:

You have requested an official opinion on the following questions:

1. Whether a member of the Board of supervisors can simultaneously occupy positions on the County Hospital Board, County Fair Board or State Fair Board.
2. Whether a part-time assistant county attorney can also represent the local school district.

We recently issued an opinion, No. 79-4-4, holding that a member of a board of supervisors could not simultaneously occupy a position on the county fair board. The reasoning in that opinion is applicable here to a member of the board of supervisors simultaneously occupying a position on the county hospital board. Section 347.13, the Code, 1979, provides that the hospital board shall submit an annual report to the board of supervisors. Section 347.27 provides that the board of supervisors may authorize revenue bonds for county hospitals "after it has been determined by the board of hospital trustees to be advisable. . . ." Finally, pursuant to §332.3(23), the board of supervisors can establish a county ambulance service, while §347.14(13) permits the hospital trustees to operate ambulances.

These facts appear to fall within the confines of the two leading Iowa cases on the common law doctrine of incompatibility of offices: State ex rel. Crawford v. Anderson, 155 Iowa 271, 273, 136 N.W. 128 (1912), and State ex rel. LeBuhn v. White, 257 Iowa 660, 133 N.W. 2d 903 (1965). These cases apply to offices and officers, not to mere employees. See, 63 Am. Jur. 2d Public Officers and Employees §64 (1972). We find not only a supervisory power of one position over the other, but we also believe that it is against the public interest to have the same person occupy both positions.

A different result is reached for the State Fair Board. A reading of Chapter 173 of the Code, 1979, does not reveal any interaction between a fair board member and a supervisor. Nor is there any indication of the same when reading Chapter 332. We do not find any incompatibility between membership on the State Fair Board and a county board of supervisors.

It should be noted that the Legislature responded to the earlier incompatibility opinion of this office dealing with memberships on boards of supervisors and boards of health by passing H. F. 647 which provides, in relevant part:

A county supervisor who before May 1, 1979, accepted an appointment to any appointive board, commission, or committee of this state or a political subdivision of this state may continue to hold the office of the county supervisor and membership on the board, commission, or committee until the expiration of his or her term as county supervisor or July 1, 1981, whichever occurs first.

Since the Legislature has the power to modify the common law by statute, this bill, if signed into law by the Governor, may well limit the impact of this opinion for dual office holders. Even if the bill becomes law, however, it would not apply to supervisors who after May 1, 1979 accept an incompatible office. To this extent, the common law will retain its vitality notwithstanding the prospect of the statutory modification.

Your second question is whether a part-time county attorney can also represent a local school district. In order to invoke the common law incompatibility doctrine, the person must hold two public offices. See 63 Am. Jur. 2d Public Officers and Employees, §64 (1972). It does not apply where the person holds one office and is merely employed by another body, 1967 OAG 257 (state representative may be employed as collector of institutional accounts since latter position is not a public office.) The Iowa Supreme

Court has held that in order to hold an office, the position must 1) be created by Constitution or the Legislature or through authority conferred by the Legislature, 2) exercise a portion of the sovereign power of government, 3) must have duties and powers defined, directly or impliedly, by the Legislature or through legislative authority, 4) have duties that must be performed independently and without control of a superior power other than the law, and 5) must have permanence and continuity, and not be only temporary and occasional. State v. Taylor, 260 Iowa 634, 144 N.W. 2d 289, 292 (1967), Hutton v. State, 235 Iowa 52, 16 N.W. 2d 18, 19 (1947).

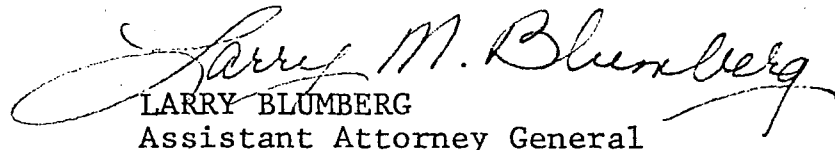
We do not believe representation of a local school board by an attorney is sufficient to make an attorney an office holder. Section 279.37, Code of Iowa, 1979, allows school districts to "employ" counsel in legal actions by or against any school officer to enforce any provision of law. But it seems clear that by representing school officials, the attorney is not exercising any sovereign authority. The attorney must generally adhere to the wishes of the client, and may be discharged whenever the client so decides.

However, we do note that a lawyer may encounter severe and possibly insurmountable ethical problems by representing both the county and local school board. See DR-504 (c) and (d), Iowa Code of Professional Responsibility. Whether such a conflict exists will depend on the facts and circumstances of each individual case. In close cases, the lawyer should decline dual representation in order to prevent even the appearance of impropriety. See DR 9-101.

Very truly yours,



BRENT R. APPEL
First Assistant Attorney General



LARRY BLUMBERG
Assistant Attorney General

BA:LB:s

APPLICATION OF SECTION 334.13 TO LOSS OF COUNTY TREASURER'S FUND:
Sections 64.2, 64.10, 334.13-26, Code of Iowa, 1979. Losses from robbery in a county treasurer's office in excess of the amount of the treasurer's bond of \$25,000 are covered by §334.13. Losses less than \$25,000 not covered by insurance are to be recovered from the treasurer's surety or borne by the county. (Hagen to Johnson, State Auditor, 6/8/79) #79-6-4 (L)

June 8, 1979

Richard D. Johnson, CPA
Auditor of State
L O C A L

Dear Mr. Johnson:

You have requested an opinion of the Attorney General concerning the applicability of Chapter 334.13, Code of Iowa, 1979, to losses in a county treasurer's office due to robbery and pose the following specific questions for our consideration:

1. Do the provisions of §334.13 apply where funds in the legal custody of the county treasurer are lost through a robbery, and the loss exceeds the insurance coverage carried by the treasurer?
2. Are there any other Code sections which would identify how this loss should be allocated to the appropriate taxing bodies?

Your questions were raised because of a robbery in the Appanoose County Treasurer's Office which resulted in a loss of \$23,189. The county was insured to the extent of \$8,000 which resulted in a net loss of \$15,189. You stated that in your judgment "the treasurer was carrying an excessive cash balance."

Your first question focuses on §334.13 which provides:

334.13 Losses. All losses of funds in the legal custody of a county treasurer, resulting from any act of omission or commission for which the said treasurer is legally responsible, except losses to the amount of the treasurer's bond, and except losses which are or may be occasioned by depositing said funds in authorized depositories, shall be replaced by the several counties of the state as hereinafter directed.

It is our opinion that this section does provide for replacement of funds in the legal custody of a county treasurer which are lost because of an act of omission or commission for which the treasurer is legally responsible but only in an amount which is in excess of the treasurer's bond of \$25,000 required by §64.10. Thus, the loss from robbery in the Appanoose County Treasurer's Office is not to be replaced under the procedures of §§334.13 to 26. If a loss occurs which is above \$25,000 and which is due to acts of omission or commission by the treasurer, §334.13 would apply and such a loss would be spread among counties.

Our conclusion is based on the exception in the statute which covers "All losses . . . except losses to the amount of the treasurer's bond . . ." [Emphasis supplied]. Inasmuch as "a proviso or exemption in any statute in derogation of its general enacting clause must be strictly construed", Palmer v. State Board of Assessment and Review, 226 Iowa 92, 94, 283 N.W. 415, 416 (1939), we conclude that loss up to the amount of the bond is to be borne by the county. A previous opinion of this office concluded that it was the intention of the Legislature in the adoption of the statute that losses less than the amount of the bond are to be borne by the county as a loss "that would not be too great a local burden." Op. Atty. Gen., 1959, p. 187, 188. See also Op. Atty. Gen., 1934, p. 100 and p. 324.

However, if the treasurer was not exercising "all reasonable diligence and care in the preservation and lawful disposal of all money . . .", §64.2, the treasurer and her surety may be liable for the loss in excess of the insurance coverage. On the other hand it has been held that if a treasurer has exercised "reasonable diligence and care" as required by §64.2, the treasurer "is not liable on his bond for any loss of the money occurring by theft or casualty." Rose v. Hatch, 5 Iowa 149, 150 (1857).

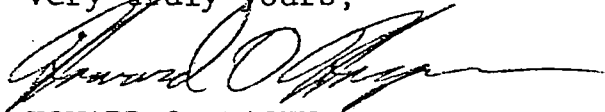
Richard Johnson, CPA
Auditor of State

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It is our conclusion that \$334.13 covers "all losses of funds" experienced by a county treasurer's office "except losses to the amount of the treasurer's bond".

Thus, without any conclusions by this office as to the acts or omissions on the part of anyone, we are of the opinion that the first step is to seek recovery for the loss from the Appanoose County Treasurer's surety. If it is determined that neither the treasurer nor anyone else failed to exercise due care in performance of their official duties, we know of no provision in the Iowa Code which will permit the burden of uninsured loss of \$15,189 due to robbery to be shared with other taxing units.

Very truly yours,



HOWARD O. HAGEN
Assistant Attorney General

HOH:sh

MUNICIPALITIES: Civil Service — Section 400.11, the Code, 1979. Preference shall be given to those on eligibility lists for temporary service. (Blumberg to Walter, State Representative, 6/7/79) #79-6-3(L)

June 7, 1979

The Honorable Craig D. Walter
State Representative
LOCAL

Dear Representative Walter:

We have your opinion request of April 9, 1979, in which you seek a clarification of §400.11, the Code, 1979. Specifically, you ask whether temporary appointments must be made from the certified eligible lists to fill positions in the absence of the regular person due to vacation or extended sick leave.

Section 400.11 provides in pertinent part:

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. If a tie occurs in

the examination scores which would qualify persons for the tenth position on the list, the list of the names of the persons who qualify with the highest standing as a result of each examination shall include all persons who qualify for the tenth position. Preference for temporary service in civil service positions shall be given those on such lists.

. . .

When there is no such preferred list or certified eligible list, or when the eligible list shall be exhausted, the person or body having the appointing power may temporarily fill a newly created office or other vacancy only until an examination can be held and the names of qualified persons be certified by the commission, and such temporary appointments are hereby limited to ninety days for any one person in the same vacancy, but such limitation shall not apply to persons temporarily acting in positions regularly held by another. Any person temporarily filling a vacancy in a position of higher grade for twenty days or more, shall receive the salary paid in such higher grade.

[Emphasis added]

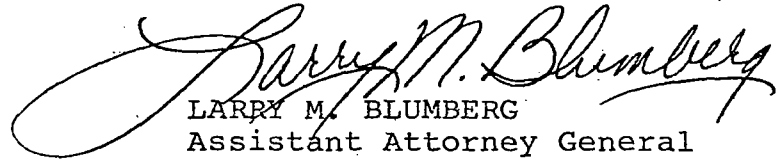
This section, by its wording, appears to contemplate two types of temporary service. The first is to fill a vacancy or a new position when there is no current eligible list. The second applies to persons temporarily acting in positions regularly held by another. Your facts fall within the latter.

The emphasized portion of the above-quoted section is applicable to your question. When referring to vacancies or new offices, the statute speaks of "temporary appointments". When referring to a situation such as contemplated by your facts, the statute speaks of "temporarily acting". However, the last sentence of the first paragraph of §400.11 provides for "temporary service". We believe that the Legislature intended, by that sentence, that preference shall be given to persons on the eligibility lists, if any exist, for all temporary service. No distinction is

made in the sentence between the two types of temporary service.

Accordingly, we are of the opinion that where an individual is on vacation or an extended sick leave, preference must be given to those on the applicable eligibility list, if any exists, for temporarily acting in such a position.

Very truly yours,


LARRY M. BLUMBERG
Assistant Attorney General

LMB:pml

COUNTIES: Commission on Veteran Affairs. Iowa Const. art. III, §39A; The Code 1979, §§250.7, 250.9, 250.12, 250.13, 332.3(6). A county board of supervisors may reorganize the provision of clerical services to the Commission on Veterans Affairs without violating §250.12, forbidding placing the administration of commission duties under any other county agency. (Cosson to Allbaugh, Chairman, Iowa Commission of Veterans Affairs, 7/27/79) #79-7-32 (L)

July 27, 1979

Mr. Warren K. Allbaugh
Chairman
Iowa Commission of Veterans Affairs
State Capitol
Des Moines, Iowa 50319
L O C A L

Dear Mr. Allbaugh:

You have asked for our opinion concerning certain actions taken by the Scott County Board of Supervisors affecting the Scott County Commission on Veteran Affairs.

On April 5, 1979, the Scott County Board of Supervisors adopted a resolution reading in part as follows:

WHEREAS, the Board of Supervisors is in receipt of recommendations from the Board of Social Welfare to establish a Human Resources Center by combining the offices of General Relief and Institutional Placement and coordinating the office of Veterans Affairs...

* * *

THEREFORE, BE IT RESOLVED, that the Board of Supervisors hereby approves and establishes said Human Resources Center...

* * *

AND BE IT FURTHER RESOLVED, that the Chairman of the Board of Supervisors is hereby authorized to sign pertinent correspondence to affected employees of the reorganization resulting from the creation of the Human Resources Center.

The resolution also established a position of Human Resources Director and appointed a person to fill that position.

This resolution was based upon a study conducted by the Board of Social Welfare of Scott County undertaken to determine if administrative costs for delivering direct assistance to the poor could be reduced. The study recognized that The Code (§250.12) prohibited a county from placing the administration of the duties of the county commission or veterans affairs under any other county agency. However, included in the specific recommendations of the study was a proposal to eliminate the position of clerk-typist attached to the Commission of Veteran's Affairs and to provide reception and clerical services through a pool arrangement of personnel responsible to the Human Resources Director. The position of Veterans Affairs Secretary, a person who "would handle and be responsible for all areas relating to eligible veterans," was not affected by the reorganization.

As a general matter, a county board of supervisors has considerable authority with respect to the administration of county service programs. Section 332.3(6) authorizes the board "to represent its county and have the care and management of the property and business thereof where no other provision is made." Also relevant is the County Home Rule Amendment, Iowa Const. art. III, §39A, which provides in pertinent part as follows:

Counties . . . are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government. . . .

The proposition or rule of law that a county . . . possesses and can exercise only those powers granted in express words is not a part of the law of this state.

Of course, it is plain that §332.3(6) and the Home Rule Amendment grant authority only to the extent its exercise is not inconsistent with a specific statute.

With respect to the Commission on Veterans Affairs, §250.12, The Code 1979, specifically provides as follows:


It shall be unlawful for any county board of supervisors or any county commission of veteran affairs to place the administration of the duties of the county commission of veteran affairs under any other agency of any county. . . .

Thus, your precise question is whether the replacement of the clerk-typist by a pool arrangement for providing clerical service to the commission and its secretary is inconsistent with §250.12. In our opinion, it is not.

The key phrase in §250.12 is "administration of the duties of the county commission of veterans affairs." The term "administer" is defined by Webster as follows: "to manage or direct (the affairs of a government, institution, etc):" The duties of the commission include determination of eligibility for benefits (§250.7), certification of persons eligible for benefits to the board of supervisors (§250.9) and the provision of burial expenses for honorably discharged veterans who died without leaving sufficient means to defray such expenses (§250.13). It does not appear that the resolution of the Board of Supervisors attempts to interfere in the management or direction of these duties. In particular, a clerk-typist would exercise ministerial rather than managerial functions and the substitute arrangement provided does not appear to involve the "administration" of commission duties.

Two prior opinions of the Attorney General should also be noted. It has been held that §250.12 prohibited bestowing the duties of the soldier's relief commission (as it was then called) upon the director of social welfare. 1964 Op.Att'yGen. 130. However, it was subsequently concluded that the executive director of a county poor fund could also serve, with the approval of the commission on veterans affairs, as secretary to the commission. 1968 Op.Att'yGen. 908. Although the rationale for these opinions is not elaborate, the common thread appears to be that §250.12 requires the commission on veterans affairs to maintain at least indirect control over the performance of its statutory duties. Thus, while it does not appear that the clerk-typist position eliminated in the reorganization affected administration of veterans affairs, were the board of supervisors to consider delegating authority to the Human Resources Director to hire and fire the secretary to the commission (who apparently is involved in administration) without the approval of the commission, a rather different question would be presented.

Sincerely,


(ab)

George Cosson
Assistant Attorney General

STATE OFFICERS AND DEPARTMENTS: Audiologists -- §§147.151, 154A.1 and 154A.19, The Code 1979. Licensed audiologists cannot dispense hearing aids without the additional license to dispense hearing aids required by Chapter 154A. They may, however, determine the need for and the use of hearing aids, and may loan them without remuneration. (Mueller to Ver Hoef, Chairperson, Board of Speech Pathology and Audiology, 7/27/79) #79-7-31(L)

July 27, 1979

Mr. Neil Ver Hoef
Chairperson
Board of Speech Pathology
and Audiology
Lucas State Office Building
L O C A L

Dear Mr. Ver Hoef:

You recently requested an opinion of the Attorney General concerning the following question: "May an audiologist licensed under the provisions of Section 147.151 of the Code dispense a hearing aid?"

Section 147.151(3), Code of Iowa (1979) defines an "audiologist" as "a person who engages in the practice of audiology". The "practice of audiology" is defined in §147.151(5) as meaning:

the application of principles, methods, and procedures for measurement, testing, evaluation, prediction, consultation, counseling, instruction, habilitation, or remediation related to hearing and disorders of hearing and associated communication disorders for the purpose of nonmedically evaluating, identifying, preventing, ameliorating, modifying, or remediating such disorders and conditions in individuals or groups of individuals, including the determination and use of appropriate amplification. [Emphasis added.]

Clearly this language indicates that the legislature contemplated the need for audiologists to determine and use hearing aids as well as other amplification equipment in the evaluation and rehabilitation of hearing disorders. However, it is our opinion that licensed audiologists cannot dispense hearing aids without acquiring the license required by Chapter 154A, Code of Iowa (1979).

Section 154A.1(6), Code of Iowa (1979), which is entitled "Hearing Aid Dealers," defines "dispense" or "sell" as "a transfer of title or of the right to use by lease, bailment, or any other means, but excludes . . . the temporary, charitable loan or educational loan of a hearing aid without remuneration." Therefore, "dispense," which is interchangeable with the word "sell" as defined in the Code, has to do with the retail aspects of hearing aid distribution. The legislature omitted from section 147.151(5) the word "dispense" when defining the practice of audiology, indicating an intent to keep the practice of audiology separate from the retail aspects of hearing aid dealers.

It should be noted, however, that the prohibition against audiologists dispensing hearing aids does not bar them from using or determining the need for hearing aids while correcting and remedying hearing disorders. Also, "the temporary, charitable loan or educational loan of a hearing aid, without remuneration" is not dispensing within the meaning of 154A.1(6). Therefore, the use of hearing aids remains intact as a viable part of the practice of audiology and hearing disorder rehabilitation.

The above-stated result is further supported by Section 154A.19 of the Code:

This chapter shall not prevent any person from engaging in practices covered by this chapter, provided the person, or organization employing the person, does not dispense or sell hearing aids.

Thus, the legislature recognized the overlap between the authority granted audiologists and the practices of hearing aid dealers; and as long as the audiologist neither dispenses nor sells hearing aids, as defined in 154A.1, the licensed audiologist can engage in practices otherwise reserved to licensed hearing aid dealers.

Mr. Neil Ver Hoef

Page 3

In conclusion, although it is our opinion that licensed audiologists may not dispense or sell hearing aids, there are many remaining purposes for which licensed audiologists can continue to use hearing aids.

Sincerely yours,

James P. Mueller
James P. Mueller
Assistant Attorney General

JPM:rcp

MOTOR VEHICLES: Exceeding speed limits -- authorized emergency vehicles. Sections 321.230, 321.1(26), 321.231, 321.285, Code of Iowa (1979). A police officer responding to an emergency call may lawfully exceed the speed limit only when making use of an approved audible or visual signaling device. (Miller to Jochum, State Representative, 7/26/79) #79-7-30 (L)

July 26, 1979

The Honorable Tom Jochum
State Representative
2368 Jackson
Dubuque, Iowa 52001

Dear Representative Jochum:

You have requested an opinion of the Attorney General with respect to the following question:

Is it a violation of The Code for a police officer, responding to a call, to exceed the authorized speed limit without using either the vehicle's flashing lights or siren?

Section 321.230, Code of Iowa (1979) states:

Public officers not exempt. The provisions of this chapter applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by the United States, this state or any county, city, district, or any other political subdivision of the state, subject to such specific exceptions as are set forth in this chapter with reference to authorized emergency vehicles.

A police vehicle is included in the definition of an authorized emergency vehicle. §321.1(26), Code of Iowa (1979).

The specific exceptions to Chapter 321 referred to above are set out in §321.231, Code of Iowa (1979), which states, in pertinent part:

Authorized emergency vehicles.

1. The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected perpetrator of a felony or in response to an incident dangerous to the public or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section.

* * *

3. The driver of a fire department vehicle, police vehicle or ambulance may:

* * *

b. Exceed the maximum speed limits so long as the driver does not endanger life or property.

4. The exemptions granted to [a] . . . police vehicle or ambulance as provided in subsection 3 shall apply only when such vehicle is making use of an audible signaling device meeting the requirements of §321.433, or a visual signaling device approved by the department except that use of an audible or visual signaling device shall not be required when exercising the exemption granted under subsection 3, paragraph "b" of this section when the vehicle is operated by a peace officer, pursuing a suspected violator of the speed restrictions imposed by or pursuant to this chapter, for the purpose of determining the speed of travel of such suspected violator.

It is, therefore, clear that a police vehicle may exceed the speed limit when responding to an emergency call, when in pursuit of an actual or suspected felon, and when responding to an incident dangerous to the public, if and only if the officer is using either an audible or visual signaling device and if the driver does not endanger life or property.

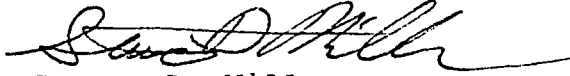
In addition, a peace officer may also exceed the speed limit when in pursuit of a suspected speeder, in order to determine the violator's actual speed. Only in this limited situation, pacing a suspected speeder, may a peace officer exceed the maximum speed limit without using an audible or visual signaling device, so long as life or property is not endangered.

It is, therefore, the opinion of this office that a police officer would be in violation of §321.285, Code of Iowa (1979),

Honorable Tom Jochum
State Representative
Page 3

for exceeding the speed limit when responding to an emergency
call without using an audible or visual signaling device.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Stuart D. Miller".

Stuart D. Miller
Assistant Attorney General

ps

STATE OFFICERS AND EMPLOYEES: Airline discount coupon ownership. §8.13(2), Iowa Code (1979). Where the State pays for the airline travel of its officers or employees, including legislators, discount coupons received by the officer or employee from the airline as a result of the travel are the property of the State. (Haskins to Halvorson, State Representative, 7/25/79) #79-7-29(L)

July 25, 1979

Mr. Roger A. Halvorson
State Representative
P.O. Box 627
Monona, Iowa 52159

Dear Representative Halvorson:

You have asked the opinion of our office as to whether the State of Iowa owns discount coupons given without charge by commercial airlines to their passengers when the passenger is a state officer or employee traveling at state expense. The discount coupons, we are informed, were given by a certain airline for a brief period of time to recoup loss of business to other airlines during a strike and authorized further flight on the airline for a reduced rate. The discount coupons were given to passengers after boarding the plane and were valid as to the "holder," thus allowing their use by one other than the purchaser of the airline tickets.

The Code plainly contemplates reimbursement to state employees for authorized travel on state business. See, e.g., §§8.13, 18.117, 79.9-79.11, 91A.3(6). See also 270 I.A.C. §1.2(8).

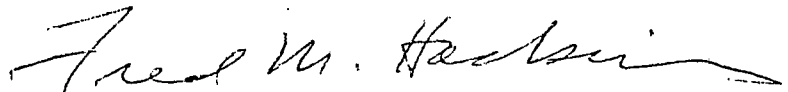
When the State does undertake to pay the travel expenses of a state officer or employee, it assumes the primary obligation of payment. Reimbursement for travel expenses previously incurred by a governmental officer or employee does not violate Art. VII, §1, Iowa Constitution, forbidding the State to assume the debts or liabilities of an individual. See O.A.G., Cleland to Holden, State Senator, 7/12/79. This is because the obligation of the State to pay such travel expenses is primary and not secondary. See *id.* In the present situation, while the coupons may be given prior to actual reimbursement of the state officer or employee by the State and after he or she has incurred a personal obligation to the

airline for his or her ticket, it remains that the coupons are given only because the obligation to pay for a ticket has been incurred and that obligation is ultimately upon the State. Therefore, the State owns the coupons, regardless of whether the State pays for the tickets before or after the coupons are received by the officer or employee. The coupons are received only because of the travel at state expense and hence it is logical that the State owns them in any event. It should be noted that nothing differentiates a state legislator from any other state officer in this respect.

On the other hand, if a state officer or employee in fact elected to pay for his or her own airfare, i.e. did not submit a voucher for a travel advance or for reimbursement, even though the trip may have been for state business and reimbursable, then the discount coupon could properly be retained by the officer or employee. In short, the discount coupon belongs to whomever assumed the obligation to pay for the original fare.

In sum, then, where the State pays for the airline travel of one of its officers or employees, including a legislator, discount coupons received by the officer or employee from the airline as a result of the travel are the property of the State. In the first instance, an officer or employee of the State whose original fare was reimbursed should place the discount coupons in the custody of the responsible state officer of the department against whose budget the original fare has been or will be charged.

Very truly yours,



Fred M. Haskins
Assistant Attorney General

FMH:rcp

STATE OFFICERS AND DEPARTMENTS: Compatibility of offices §§29C.9 and 29C.10, The Code, 1979. The positions of Chief of Police and Coordinator of the joint city-county disaster services and emergency planning administration are compatible. (Blumberg to Bruhn, Acting Director, Office of Disaster Services, 7/25/79) #79-7-28(L)

July 25, 1979

Mr. Donald E. Bruhn
Acting Director
Office of Disaster Services
L O C A L

Dear Mr. Bruhn:

We have your opinion request of June 20, 1979, regarding a question of incompatibility of positions. You ask whether a chief of police can also be the coordinator of the joint city-county disaster services and emergency planning administration.

Section 29C.9, The Code, 1979, provides for the cooperation between counties, cities and school districts in the establishment of a joint county-municipal disaster services and emergency planning administration. The joint administration shall appoint a co-ordinator who possesses the qualifications set forth in the rules of the Office of Disaster Services. Unfortunately, those rules, 650-5.1 through 5.2(7) IAC, do not contain any qualifications for the co-ordinator.

The duties of the co-ordinator, as set forth in §29C.9, include preparing a comprehensive countywide disaster plan, signing vouchers and claims, and preparing a proposed budget. In further conversation with you, it was indicated that the co-ordinator could be either full or part-time. The co-ordinator, pursuant to §29C.10(3), may also be the co-ordinator employed by a county board of supervisors as the local co-ordinator. Such a local co-ordinator shall, in addition to preparing local disaster plans, serve as an operations officer of the joint administration.

State ex rel. Crawford v. Anderson, 155 Iowa 271, 273, 136 N.W. 128 (1912) provides:

The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of officers, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. *Bryan v. Catell*, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other "and subject in some degree to its revisory power," or where the duties of the two officers "are inherently inconsistent and repugnant." *State v. Bus*, 135 Mo. 338, 36 S.W. 639, 33 L.R.A. 616; *Attorney General v. Common Council of Detroit*, supra [112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211]; *State v. Goff*, 15 R.I. 505, 9A. 226, 2 Am.St. Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists "where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both".

See also, *State ex rel. LeBuhn v. White*, 257 Iowa 606, 133 N.W.2d 903 (1965).

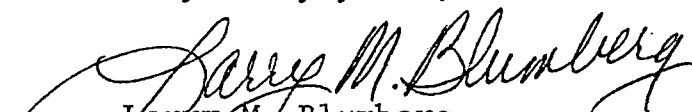
We do not find that the two positions are inconsistent or that there is a revisory power. Nor do we feel that the two are repugnant. Although we have previously held that the mayor of a city could not be the co-ordinator, see 1976 O.A.G. 364, the positions and responsibilities of the mayor and chief of police are different enough that the former opinion is not applicable. It would appear to be logical for a police chief, who is trained in emergency procedures, and who would normally be in a position to initiate and enforce them, to co-ordinate disaster services.

The problem, however, may be one of physical inability to perform the duties of each at the same time. This would obviously be true if the co-ordinator's position was full-time. It might also be true if the position was only part-time. The answer can only be made upon a given set of facts. A physical inability to perform the duties at the same time is not, however, a basis for incompatibility of offices. 63 Am. Jur. 2d Public Officers and Employees §73 (1972).- See also, State ex rel. Crawford v. Anderson, supra; Bryan v. Cattell, 15 Iowa 538 (1864). Thus, because the positions are not incompatible, the acceptance of the latter position does not automatically create a vacancy in the first.

However, there are risks associated with the performance of both duties. As indicated above, both positions may be full-time. Facts may exist which prevent the dual office holder from fully complying with his duties of either or both positions. This could result in a vacancy being created in one or both of the positions for habitual neglect to perform the duties. See §66.1, The Code, 1979; and, Bryan v. Cattell, supra. The same could be true if the co-ordinator's position was only part-time.

Accordingly, we are of the opinion that the positions of chief of police and co-ordinator of the joint county-municipal disaster services and emergency planning administration are compatible.

Very truly yours,


Larry M. Blumberg
Assistant Attorney General

LMB:rcp

COURTS: Records, preservation and destruction thereof.
§§ 255.1, 255.4, 606.22, Code of Iowa, 1979. Section 255.4
of the Code provides that the records maintained by the
clerk of court, pursuant to Chapter 255 of the Code, may be
destroyed by the clerk of court, after five years, without
reproduction of those records by the clerk of court. (Heintz
to Frisk, Harrison County Attorney, 7/23/79) #79-7-26(L)

July 23, 1979

Mr. Judson L. Frisk
Harrison County Attorney
Logan, Iowa 51546

Dear Mr. Frisk:

In your letter dated May 28, 1979, you request an
Opinion of the Attorney General concerning the following
matter.

I am requesting an opinion regarding the destruc-
tion of records by the Clerk of the District Court.

The clerk is required to retain the records for
the medical and surgical treatment of indigent persons
under Chapter 255 of the 1977 Code. Would this be
considered as administrative record that could be
destroyed under Section 606.22 (2) after five years
have passed, without reproduction of the record by the
clerk?

Section 255.1, Code of Iowa, 1979 provides as follows:

Any adult resident of the state may file a complaint
in the office of the clerk of any juvenile court,
charging that any legal resident of Iowa residing in
the county where the complaint is filed is pregnant or
is suffering from malady or deformity that can probably
be improved or cured or advantageously treated by
medical or surgical treatment or hospital care, and
that neither such person nor persons legally chargeable
with his support are able to pay therefor.

Section 255.4, Code of Iowa, 1979, provides as follows:

Upon the filing of such complaint, the clerk shall number and index the same and shall appoint a competent physician and surgeon, living in the vicinity of the patient, who shall personally examine the patient with respect to said pregnancy, malady, or deformity. The clerk may, after the expiration of five years from the filing of a complaint, destroy it and all papers or records in connection therewith.

Section 606.22, Code of Iowa, 1979 provides as follows:

The following may be destroyed by the clerk without prior court order or reproduction of any kind: . . .
2. All administrative records, after five years, including, but not limited to, warrants, subpoenas, clerks' certificates, statements, praecipes and depositions.

It is our opinion that Section 255.4, Code of Iowa, 1979, clearly delimits the conditions for the destruction of records which the clerk of court must maintain pursuant to Chapter 255 of the Code. This section provides that the clerk may, "after the expiration of five years from the filing of a complaint, destroy it and all papers or records in connection therewith." No mention of reproduction of records appears in Chapter 255. It is our opinion, then, that the clerk may, without reproducing the records maintained pursuant to the direction of Chapter 255 of the Code, after the expiration of five years from the filing of a complaint, destroy the complaint and all the papers or records subsequently filed in connection with that particular complaint.

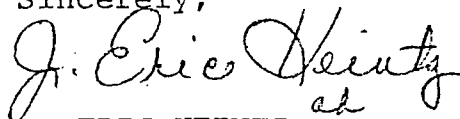
This interpretation of Section 255.4 is consistent with the provisions of Section 606.22, Code of Iowa, 1979. The five year period which must lapse before records may be destroyed is included in both statutes. In addition, the general nature of documents and records specifically mentioned in Section 606.22(2) appears to be similar to that of the documents and records to which Section 255.4 refers.

In summary, we believe that Section 255.4 of the Code affirmatively answers your question whether the records maintained by the clerk of court, pursuant to Chapter 255 of the Code, may be destroyed by the clerk of court, after five years, without reproduction of those records by the clerk of court. We believe that this interpretation is consistent

Mr. Judson L. Frisk
Page Three

with Section 606.22(2) of the Code which delimits criteria
for the destruction of other records maintained by the clerk
of court.

Sincerely,

A handwritten signature in cursive script that reads "J. Eric Heintz". The signature is written in dark ink and is positioned above the typed name.

J. ERIC HEINTZ
Assistant Attorney General

JEH/maw

STATE OFFICERS AND DEPARTMENTS: Commission on the Aging. 42 U.S.C. §3001 et. seq.; 42 U.S.C. §§3025(a)(1)(E), 3025(b)(1), 3025(b)(4); Chapters 7A, 17A, 249B, 1979 Code of Iowa, §§20-1.1(6) and 20-1.2(2)(f), Iowa Administrative Code. The Iowa Commission on the Aging has the responsibility to designate planning and service areas under the Older Americans Act. The Commission on the Aging may designate as a planning and service area any unit of general purpose local government with a population of 100,000 or more. No conflicts exist in state law to this authority granted within the Older Americans Act. (Appel and McDonald to Glenn R. Bowles, Director, Commission on the Aging, 7/16/79) #79-7-19(L)

Mr. Glenn R. Bowles, Director
Iowa Commission on the Aging
L O C A L

Dear Mr. Bowles:

You have requested an opinion of the Attorney General concerning the designation of a planning and service area. Specifically, you have asked the following:

1. Section 305(b)(1) of the Older Americans Act [42 U.S.C. §3025(b)(1)] states that "... the State may designate as a planning and service area any unit of general purpose local government which has a population of 100,000 or more." Does the term "State" mean the State Agency (Iowa Commission on the Aging)?
2. If the first question is answered in the affirmative, is there any conflict with existing state law or rule which would prohibit the Commission from designating a unit of general purpose local government, with a population of 100,000 or more, as a planning and service area?

Section 3025(b)(1) of Title 42 of the United States Code reads as follows:

(b)(1) In carrying out the requirement of clause (1) subsection (a) of this section, the State may designate as a planning and service area any unit of general purpose local government which has a population of 100,000 or more. In any case in which a unit of general purpose local government makes application to the State agency under the preceding sentence to be designated as a planning and service area, the State agency shall, upon request, provide an opportunity for a hearing to such unit of general purpose local government. A State may designate as a planning and service area under clause (1) of subsection (a) of this section, any region within the State recognized for purposes of areawide planning which includes one or more such units of general purpose local government when the State determines that the designation of such a regional planning and service area is necessary for, and will enhance, the effective administration of the programs authorized by this subchapter. The State may include in any planning and service area designated under clause (1) of subsection (a) of this section such additional areas adjacent to the unit of general purpose local government or regions so designated as the State determines to be necessary for, and will enhance the effective administration of the programs authorized by this subchapter.

A reading of the second sentence in §3025(b)(1) clearly indicates that the term "State" in the first sentence means the "State Agency". Furthermore, such a scheme is contemplated by the Older Americans Act, which provides that the state is to designate a state agency to divide the state into distinct areas upon a consideration of various factors. See 42 U.S.C. §3025(a)(1)(E); see also §20-1.2(2)(f), Iowa Administrative Code, which specifically vests in the Commission on the Aging the duty to divide the state into planning and service areas.

Therefore, the term "State" within §305(b)(1) of the Older Americans Act [42 U.S.C. §3025(b)(1)] means the state agency, which is the Iowa Commission on the Aging.

Section 3025(b)(1) of Title 42 of the United States Code provides that the State may designate as a planning and service area any unit of general purpose local government with a population of 100,000 or more. This provision is not mandatory, but permissive, by virtue of the language which states that the state "may designate". This provision confers discretion upon the Commission on the Aging to grant or deny an application by such a local government unit to become a designated planning and service area. [See also 42 U.S.C. §3025(b)(4), which provides for an appeal when the state agency denies such applications.] Such a decision must be based on the ability of the local government unit to effectuate the purposes and the administration of the Older Americans Act. See 42 U.S.C. §§3025(a)(1)(E) and 3025(b)(1). Also, in any case in which a unit of general purpose local government makes application to the Commission to be designated as a planning and service area under the Older Americans Act, the Commission must provide a hearing, upon request, to such unit of general purpose local government. See 42 U.S.C. §3025(b)(1).

The Iowa Commission on the Aging was created by Chapter 249B of the Code of Iowa to implement the federal Older Americans Act, 42 U.S.C. §3001 et. seq. Section 249B.8 of the Code of Iowa reads as follows:

249B.8 Area agencies. The commission on aging may establish area agencies on aging for the planning and service areas developed by the office for planning and programming pursuant to the "Older Americans Comprehensive Services Amendments of 1973", United States Public Law 93-29, section 304. An area agency may be merged with a contiguous planning and service area but not without the approval of each policy making body which is a party to the merger. Merged planning and service areas forming one area agency shall be governed by only one policy making body. Funds appropriated pursuant to this Act* shall be allocated to each planning and service area for which an area agency has been designated by the end of the funding period, and shall be available for both program maintenance of effort and administrative expenditures. [Emphasis added]

The Office for Planning and Programming referred to in §249B.8 is the planning and programming office created in Chapter 7A of the Code of Iowa. Your second question concerns the restrictiveness of the language underscored in §249B.8. Rephrased, your question is: Does the language in §249B.8, which authorizes the Commission to establish area agencies "for the planning and service areas developed by the Office for Planning and Programming", prevent the Commission on the Aging from designating a unit of local government [pursuant to 42 U.S.C. §3025(b)(1)] as a planning and service area? This question must be answered negatively.

It is true that §249B.8, on its face, only authorizes the Commission on Aging to establish area agencies for the planning and service areas developed by the Office of Planning and Programming. However, 42 U.S.C., §3025(a)(1)(E) requires the state agency administering funds under the Act, to:

(E) divide the State into distinct areas, in accordance with guidelines issued by the Commissioner, after considering the geographical distribution of individuals aged 60 and older in the State, the incidence of the need for social services, nutrition services, multipurpose senior centers, and legal services, the distribution of resources available to provide such services or centers, the boundaries were drawn for the planning or administration of social services programs, the location of units of general purpose local government within the State, and any other relevant factors. . . .

And, 42 U.S.C. §3025(b)(1) provides that, upon request, the state provide a hearing to a unit of general purpose local government that requests designation as a planning and service area. If state law were construed to require that any area agencies also be OPP planning and service agencies, the State of Iowa could be in jeopardy of losing federal funds for noncompliance with 42 U.S.C. §3025(a)(1)(E), supra, and 42 U.S.C. §3025(b)(1).

But we think Chapter 249B, when read as a whole, clearly evinces a legislative intent to comply with the requisites of the Older Americans Act and qualify for federal funding. The Chapter calls for cooperation with federal agencies in the administration and supervision of demonstration service programs, §249B.4(5), and authorizes the Commission to receive federal funds, §249B.7. These express statutory provisions would become largely meaningless if §249B.8 were read in such a way so as to disqualify Iowa from participating in the Older American Act programs. Where a statute confers powers or duties in general terms, all powers and duties necessary to make such legislation effective are included by implication, Sutherland, Statutory Construction, §55.04. We therefore conclude that §249B.8, in addition to expressly granting

the Commission on Aging the discretionary power to establish area agencies along the boundaries of OPP planning districts, also confers upon the Commission the implied power to establish area agencies in accordance with 42 U.S.C. §3025(a)(1)(E) and 42 U.S.C. §3025(b)(1).

In addition to being supported by the clear purposes of Chapter 249B, this interpretation is reinforced by administrative practice. Pursuant to §249B.8, the Commission on Aging has promulgated rules outlining the responsibilities of the Commission. Section 20-1.2(2) of the Administrative Code states:

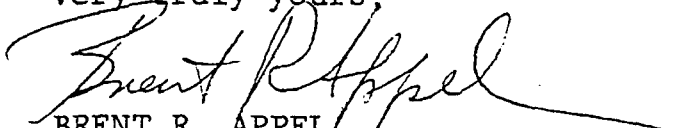
1.2(2) Specific responsibilities. Specific responsibilities of the commission shall include:

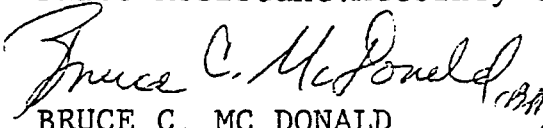
f. Dividing the entire state into distinct planning and service areas, giving consideration to the geographical distribution of individuals aged sixty and older in the state; the incidence of the need for social services; the boundaries of existing areas within the state which were drawn for the planning or administration of social service programs; the location of general purpose local government within the state; and other relevant factors; [Emphasis added]

Where proper interpretation of a statute is uncertain, administrative practice is entitled to some weight, Yarn v. City of Des Moines, 243 Iowa 991, 54 N.W.2d 439 at 442(1952).

In summary, the Iowa Commission on the Aging has the responsibility to designate the planning and service areas under the Older American Act. The Commission on the Aging may designate as a planning and service area any unit of general purpose local government which has a population of 100,000 or more.

Very truly yours,


BRENT R. APPEL
First Assistant Attorney General


BRUCE C. MC DONALD
Assistant Attorney General

BRA: BCM: sh

STATE OFFICERS AND DEPARTMENTS: City Development Board--
Annexations--Chapter 368, the Code, 1979. The provisions
of §§368.11, 368.12, 368.14, 368.15, 368.16, 368.17,
368.18 and 368.19 do not apply to voluntary annexations in
§368.7. (Blumberg to Nail, Chairperson, City Development
Board, 7/11/79) #79-7-17(L)

July 11, 1979

Ms. Sharon K. Nail
Chairperson
City Development Board
L O C A L

Dear Ms. Nail:

We have your opinion request of May 31, 1979, regarding
Chapter 368, the Code, 1979. You ask which provisions, if
any, within Division III of that Chapter are applicable to
§368.7.

Chapter 368 creates the City Development Board, which
oversees annexations to and severances from cities, and
incorporations and discontinuances of cities. Division II
of the Chapter is entitled "General Provisions" and encompasses
§§368.2 through 368.8. Division III is entitled "City
Development Board" and encompasses §§368.9 through 368.22.
Section 368.7 is entitled "Voluntary annexation by petition"
and provides:

All of the owners of land in a territory
adjoining a city may apply in writing to the
council of the adjoining city requesting
annexation of the territory. Territory
comprising railway right of way may be
included in the application without the
consent of the railway if a copy of the
application is mailed by certified mail
to the owner of the right of way, at least
ten days prior to the filing of the appli-
cation with the city council. The appli-
cation must contain a map of the territory
showing its location in relationship to
the city.

An application for annexation of territory not within the urbanized area of a city other than the city to which the annexation is directed must be approved by resolution of the council which receives the application. Upon receiving approval of the council, the city clerk shall file a copy of the resolution, map, and legal description of the territory involved with the state department of transportation. The city clerk shall also file a copy of the map and resolution with the county recorder, secretary of state, and the board. The annexation is completed upon acknowledgment by the board that it has received the map and resolution and a certification by the city clerk that copies of the map and resolution have been filed with the county recorder and secretary of state and that copies of the resolution, map, and legal description of the territory involved have been filed with the state department of transportation.

An application for annexation of territory within the urbanized area of a city other than the city to which the annexation is directed must be approved both by resolution of the council which receives the application and by the board. The annexation is completed when the board has filed copies of applicable portions of the proceedings as required by section 368.20, subsection 2.

The problems that have occurred are in reference to the last paragraph of this section. Voluntary annexations, generally, are not a matter for the Board, even if the requirements of a common boundary have not been met. See, Opinion No. 78-10-11, Blumberg to Tyson, issued October 23, 1978. An exception to this is made by the last paragraph of §368.7, which provides that voluntary annexations of territory within the urbanized

area of another city must be approved by the Board in addition to the approval by the city council. Because the Board must approve such annexations, other cities, whose urbanized areas the territory is within, have maintained that the requirements of Division III, specifically §368.11, must be followed. That is, there must be a petition filed with the Board satisfying the requirements of §368.11. It is unclear whether these cities also maintain that a hearing pursuant to §368.15 must be held.

It is apparent from a reading of the chapter that there is a distinction between voluntary and involuntary annexations. Such a distinction has existed for some time. Solid reasons for such a distinction exist. When all the residents of a territory desire to be annexed to a city, and therefore make application for annexation, the need to have all available information regarding topography, services and the like is not great. Nor is a hearing to determine both sides of the issue necessary. Requiring a petition as set forth in §368.11 for a voluntary annexation within another city's urbanized area would render meaningless the distinction between voluntary and involuntary annexations.

Presumably, the intent of the Legislature in requiring approval by the Board of voluntary annexations within urbanized areas was to provide a check by an impartial body on competition between cities for certain territories. In addition, there is nothing within the Chapter which suggests that voluntary annexations within urbanized areas are to be treated the same as involuntary annexations. If a city, in whose urbanized area the territory is situated, wishes to object to the voluntary annexation it may appear before the Board to present its objections and the reasons therefor. Such a city is not prevented from discussing the annexation in relation to those things included within §368.11. Section 368.22 provides for an appeal from a decision of the Board. Such an appeal is applicable to a decision on a voluntary annexation within an urbanized area. Subject to the limitations in §368.22, an appeal would also lie pursuant to Chapter 17A.

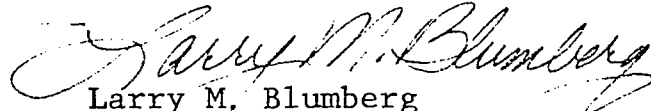
As stated previously, applying the provisions of §§368.11, 368.12, 368.14, 368.15, 368.16, 368.17, 368.18 and 368.19 are unnecessary, and would thwart the legislative scheme of distinguishing between voluntary and involuntary annexations.

Ms. Sharon K. Nail

Page 4

Accordingly, we are of the opinion that the requirements in Division III for involuntary annexations with regard to the petition, appointment of the committee, public hearing, approval or disapproval by the committee, and the election are not applicable to voluntary annexations.

Very truly yours,


Larry M. Blumberg
Assistant Attorney General

LMB:rcp

CONSTITUTIONAL LAW: Land Preservation - §§93A.1 and 93A.3, the Code, 1979. Section 93A.3(c) is constitutional. (Blumberg to Hoth, Des Moines County Attorney, 7/11/79) #79-7-16(L)

July 11, 1979

Mr. Steven S. Hoth
Des Moines County Attorney
200 Jefferson Street
Burlington, Iowa 52601

Dear Mr. Hoth:

You have requested an opinion from this office regarding §93A.3(c), the Code, 1979. You asked the following question:

Please advise if, in your opinion, equal protection requires that all cities containing 50% or more of the total population of a county should be excluded from participation in the convention of mayors and councilpersons as is mandated for those cities having 50% or more of the population in counties containing more than 50,000 persons.

It is the opinion of the City of Middletown that permitting the City of Burlington to participate in the convention of mayors and councilpersons with two of the three appointed members, constitutes discrimination against the small towns in the county.

Chapter 93A of the Code establishes a land preservation policy for the State. Section 93A.3 creates a temporary county land preservation commission. Subsections (a) and (b) set forth the members appointed by the district soil conservation commissioners and the county boards of supervisors. Subsection (c) provides for the members from the cities, and states:

Three members appointed by and from a convention of the mayors and councilpersons of the cities of the county. If a participating city contains fifty percent or more

of the total population of the participating cities, that city may appoint two members of the members appointed under this paragraph.

However, if a city contains more than one-half of the population of a county which has a population exceeding fifty thousand persons, that city shall not participate in the convention of mayors and councilpersons and the members appointed under paragraph "c" of this subsection shall be three members appointed by and from the mayor and councilpersons of that city and three members appointed by and from the convention of mayors and councilpersons and the members appointed under paragraph "b" of this subsection shall be three residents of the county engaged in actual farming operations appointed by the board of supervisors. [Emphasis added]

What this section means is that in counties under fifty thousand population, cities with fifty percent or more of the county's population may appoint two of the three members. In counties over fifty thousand population, cities containing more than half of the county's population shall appoint three members in addition to the three members appointed by the convention of the other cities.

Statutes are presumed to be constitutional, and will not be invalidated unless they clearly, plainly and palpably infringe the constitution. Those claiming unconstitutionality have the burden to prove beyond a reasonable doubt the act is unconstitutional. Every reasonable basis supporting the statute must be negatived, and every reasonable doubt must be resolved in favor of constitutionality. City of Waterloo v. Selden, 251 N.W.2d 506, 508 (Iowa 1977); Avery v. Peterson, 243 N.W.2d 630, 633 (Iowa 1976); Dickinson v. Porter, 240 Iowa 393, 399-400, 35 N.W.2d 66, 71 (1949).

In City of Waterloo v. Selden, *supra*, the issue was the constitutionality of legislative budget limitations on municipalities with a population of over 750. There, the plaintiffs contended that the limitation on larger cities

offended equal protection. The Court stated that "[e]nactment of the statute amounts to a contrary finding by the legislature." 251 N.W.2d at 508. The Court also recognized the legislature's wide discretion in determining classifications. The statute need only be rationally related to a legitimate state interest. Equal protection assurances do not require dissimilar situations to be treated similarly.

The Court, in City of Waterloo v. Selden, found that an analysis of information showing substantially higher budgets per assessed valuation in larger cities than in smaller ones was a reasonable basis for the statutory scheme, and a judgment totally within the legislative prerogative. In conclusion, the Court held that once a rational relationship between legislative purpose and the population of cities is shown, the line of demarcation is largely a matter of legislative discretion.

In State ex rel. Welsh v. Darling, 216 Iowa 553, 246 N.W. 390 (1933), a statute differentiating between cities based upon population was upheld. The Court held that the legislature may constitutionally make a statute applicable to certain cities based on population provided the subject matter of the statute has some reasonable necessity for the distinction. See also Knudsen v. Linstrum, 233 Iowa 709, 8 N.W.2d 495 (1943).

Federal Courts apply the same rules regarding constitutionality of statutes. See Thompson v. Whitley, 344 F.Supp. 480, 483 (E.D.N.Car. 1972), citing to McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed. 2d 222 (1964); Salsburg v. Maryland, 346 U.S. 545, 74 S.Ct. 280, 98 L.Ed. 281 (1954); Atchison, Topeka & Santa Fe Railroad Co. v. Matthews, 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909 (1898); and, Metropolitan Casualty Insurance Co. v. Brownell, 294 U.S. 580, 55 S.Ct. 538, 79 L.Ed. 1070 (1934). In Thompson, the statute in question differentiated between cities below five thousand population and those over five thousand population for purposes of annexation. It also further differentiated between cities below five thousand population regarding voting rights on the annexation proposition of those to be annexed. Residents of the annexed areas of certain of those smaller cities were permitted to vote on the question, whereas similarly situated residents

of other smaller cities were not so permitted. The Court found that the legislative intent of sound urban development in relation to the divergent areas of the state was rational. The statute was therefore upheld. See also Kaelin v. Warden, 334 F.Supp. 602 (E.D.Pa. 1971).

Section 93A.1, the Code, sets forth the legislative intent:

It is the intent of the general assembly of the state of Iowa to provide for the development of land preservation policy recommendations for the consideration of the general assembly through a process that emphasizes the participation and recommendations of citizens and local governments. The general assembly intends to provide for the development of recommendations which will provide for the orderly use and development of land and related natural resources in Iowa, preserve private property rights, preserve the use of prime agricultural land for agricultural production, preserve, guide the development of critical areas, key facilities and large-scale development, and provide for the future housing, commercial, industrial and recreational needs of the state.

Natural resources, agricultural land and production, large scale development, housing, commercial, industrial, and recreational needs are not the same throughout the State. The Legislature could properly find a distinction between large and small counties, and large and small cities within those counties regarding these matters.

Accordingly, based on the above discussion, we are of the opinion that the statute in question is constitutional, and not violative of equal protection.

Very truly yours,


Larry M. Blumberg
Assistant Attorney General

LMB:rcp

STATE OFFICERS AND DEPARTMENTS: Department of Public Safety; Criminal History Data. Sections 691.1(10), 692.2, 692.5, 692.19, Code of Iowa, 1979. An individual may not obtain a certified copy of his criminal history record or a copy certifying no record. (Boecker to Larson, Commissioner, Department of Public Safety, 7/10/79) #79-7-15(L)

Mr. Charles W. Larson
Commissioner
Iowa Department of Public Safety
Wallace State Office Building
LOCAL

Dear Mr. Larson:

This is in response to your request for an opinion of the Attorney General with respect to the following questions:

1. Pursuant to Chapter 692, Code of Iowa, 1979, may an individual who alleges he or she has no criminal record secure from the Iowa Department of Public Safety a certificate of no record?
2. May an individual request the Department of Public Safety to certify that he or she has no record between specific dates, i.e., 1973 to present?

The first relevant part of the Code that deals with any right of access to state repository records maintained by the Department of Public Safety is Section 692.2, Code of Iowa, 1979:

"692.2 Dissemination of criminal history data. The department and bureau may provide copies or communicate information from criminal history data only to criminal justice agencies, or such other public agencies as are authorized by the confidential records council. The bureau shall maintain a list showing the individual or agency to whom the data is disseminated and the date of dissemination.

"Authorized agencies and criminal justice agencies shall request and may receive criminal history data only when:

"1. The data is for official purposes in connection with prescribed duties, and

"2. The request for data is based upon name, fingerprints, or other individual identifying characteristics.

"The provisions of this section and section 692.3 which relate to the requiring of an individually identified request prior to the dissemination or redissemination of criminal history data shall not apply to the furnishing of criminal history data to the federal bureau of investigation or to the dissemination or redissemination of information that an arrest warrant has been or will be issued, and other relevant information including but not limited to, the offense and the date and place of alleged commission, individually identifying characteristics of the person to be arrested, and the court or jurisdiction issuing the warrant."

Thus, initially only two groups are eligible to receive criminal history data--a criminal justice agency and such other public agencies as are authorized by the confidential records council.

A criminal justice agency is defined in Section 692.1(10), Code of Iowa, 1979, which states:

"'Criminal justice agency' means any agency or department of any level of government which performs as its principal function the apprehension, prosecution, adjudication, incarceration, or rehabilitation of criminal offenders."

The other group that may receive criminal history data is a public agency authorized by the Confidential Records Council. These public agencies, as well as criminal justice agencies, must meet the criteria set forth in Section 692.2, Code of Iowa, 1979, to receive criminal history data.

The Confidential Records Council is established in Section 692.19, Code of Iowa, 1979. The Council has the following responsibilities and duties as stated in Section 692.19, Code of Iowa, 1979:

"1. Shall periodically monitor the operation of governmental information systems which deal with the collection, storage, use and dissemination of criminal history or intelligence data.

"2. Shall review the implementation and effectiveness of legislation and administrative rules concerning such systems.

"3. May recommend changes in said rules and legislation to the legislature and the appropriate administrative officials.

"4. May require such reports from state agencies as may be necessary to perform its duties.

"5. May receive and review complaints from the public concerning the operation of such systems.

"6. May conduct such inquiries and investigations as it finds appropriate to achieve the purposes of this chapter. Each criminal justice agency in this state and each state and local agency otherwise authorized access to criminal history data is authorized and directed to furnish to the council, upon its request, such statistical data, reports, and other information in its possession as the council deems necessary to carry out its functions under this chapter. However, the council and its members, in such capacity, shall not have access to criminal history data or intelligence data unless it is data from which individual identities are not ascertainable or data which has been masked so that individual identities are not ascertainable. However, the council may examine data from which the identity of an individual is ascertainable if requested in writing by that individual or his attorney with written authorization and fingerprint identification.

"7. Shall annually approve rules adopted in accordance with section 692.10 and rules to assure the accuracy, completeness and proper purging of criminal history data.

"8. Shall approve all agreements, arrangements and systems for the interstate transmission and exchange of criminal history data."

Particular emphasis should be given to the wording of Section 692.5 which authorizes an individual to view criminal history data. Section 692.5 Code of Iowa, 1979, states:

"692.5 Right of notice, access and challenge. Any person or his attorney with written authorization and fingerprint identification shall have the right to examine criminal history data filed with the bureau that refers to the person. The bureau may prescribe reasonable hours and places of examination.

"Any person who files with the bureau a written statement to the effect that a statement contained in the criminal history data that refers to him is nonfactual, or information not authorized by law to be kept, and requests a

correction or elimination of that information that refers to him shall be notified within twenty days by the bureau, in writing, of the bureau's decision or order regarding the correction or elimination. Judicial review of the actions of the bureau may be sought in accordance with the terms of the Iowa administrative procedure Act. Immediately upon the filing of the petition for judicial review the court shall order the bureau to file with the court a certified copy of the criminal history data and in no other situation shall the bureau furnish an individual or his attorney with a certified copy, except as provided by this chapter.

"Upon the request of the petitioner, the record and evidence in a judicial review proceeding shall be closed to all but the court and its officers, and access thereto shall be refused unless otherwise ordered by the court. The clerk shall maintain a separate docket for such actions. No person, other than the petitioner shall permit a copy of any of the testimony or pleadings or the substance thereof to be made available to any person other than a party to the action or his attorney. Violation of the provisions of this section shall be a public offense, punishable under section 692.7.

"Whenever the bureau corrects or eliminates data as requested or as ordered by the court, the bureau shall advise all agencies or individuals who have received the incorrect information to correct their files. Upon application to the district court and service of notice on the commissioner of public safety, any individual may request and obtain a list of all persons and agencies who received criminal history data referring to him, unless good cause be shown why the individual should not receive said list." (Emphasis added).

An individual is given only the right to examine his or her file. Certified copies of criminal history data may be given to the court upon order of the court and in no other situation shall an individual be given a certified copy.

Clearly, then, no provision is made for an individual person to receive a copy of his own record stored by the Department of Public Safety. He qualifies as neither a criminal justice agency nor a public agency and, in express language at least, is not specifically entitled to a copy.

There is further support in the legislative history for the position that the legislature did not intend for an individual to be able

to get a certified copy of his criminal history record. That is, the absence of mention of an individual's right to a copy is not an oversight, but a purposeful omission.

During consideration of the bill in the 1973 session of the legislature, two amendments were considered which would have directed the Department to do otherwise. One, in the Senate, stated: "A person shall be furnished a certified copy of his record upon payment of the costs of certification." Amend. 223 b, S.F. 115, Senate Journal of March 9, 1973, p. 561. This was defeated, along with another section of Senator Willits' amendment which he withdrew after discussion, to "strike words and in no other situation shall the bureau furnish an individual or his attorney with a certified copy except as provided by this Act." Amend. 223c, S.F. 115, Senate Journal of March 9, 1973, p. 561. This section now remains in Section 692.5, paragraph 2, Code of Iowa, 1979.

Although at first glance it may have appeared desirable to permit an individual to obtain a certified copy of "no record," upon reflection the legislature apparently determined that this practice might lead to abuses. If the records were available to individuals, employers might routinely require a person to obtain a certified copy of "no record" as a condition of employment. This practice would have the effect of permitting private employers to circumvent other provisions of the statute and to obtain information they are clearly barred from receiving. Plainly, if an individual cannot routinely receive a copy of his record, this invasion of privacy could not occur.

In construing statutes the primary consideration is the intent of the legislature. Schmitt v. Iowa Dept. of Social Services, 263 N.W.2d 739 (Iowa 1978). Clearly the legislature reviewed the option of permitting an individual to obtain a copy of his criminal record and rejected this proposal. "The striking of a provision before enactment of a statute is an indication the statute should not be construed to include it." Chelsea Theater Corp. v. City of Burlington, 258 N.W. 2d 372 (Iowa 1977), at p. 374.

Therefore, since the legislature chose not to allow an individual to obtain a certified copy of his record, one must assume this would

also include his ability to obtain a certificate of no record.

The federal government has similar rules dealing with criminal history records and their dissemination. 28 C.F.R. Section 20.1 states the purpose:

"It is the purpose of these regulations to assure that criminal history record information wherever it appears is collected, stored, and disseminated in a manner to insure the completeness, integrity, accuracy and security of such information and to protect individual privacy."
(Emphasis added)

It would be difficult to see how an individual could "begin again" or be assured of personal privacy if he had to produce a certificate of no record upon every job change or application.

28 C.F.R. Section 20.21(b) (1) and (2) limits dissemination to:

"(1) Criminal justice agencies, for purposes of administration of criminal justice and criminal justice agency employment.

"(2) Individuals and agencies for any purpose authorized by statute, ordinance, executive order, or court rule, decision, or order as construed by appropriate state or local officials or agencies."

28 C.F.R. Section 20.3(c) defines criminal justice agency in the same manner as Iowa, so it would seem that the intent of the federal rules also is to not allow an individual a copy of his record.

28 C.F.R. Sections 20.21(c) (2) and (3) are even more specific on this point:

"(2) No agency or individual shall confirm the existence or non-existence of criminal history record information to any person or agency that would not be eligible to receive the information itself. (Emphasis added)

"(3) Subsection (b) does not mandate dissemination of criminal history record information to any agency or individual. State and local governments will determine the purposes for which dissemination of criminal history record information is authorized by State law, executive order, local ordinance, court rule, decision or order."

Clearly, an individual is not authorized by another section of this Act to receive this information, so 28 C.F.R. Section 20.21(c) (2) definitively excludes him from receiving it.

The appendix attached to 28 C.F.R. contains the discussion surrounding Section 20.21(c)(2) and seems to clarify the intent of the federal rule. At p. 252:

"Presently some employers are circumventing State and local dissemination restrictions by requesting applicants to obtain an official certification of no criminal record. An employer's request under the above circumstances gives the applicant the unenviable choice of invasion of his privacy or loss of possible job opportunities. Under this subsection routine certification of no record would no longer be permitted. In extraordinary circumstances, however, an individual could obtain a court order permitting such a certification." (Emphasis added)

Since both state and federal rules are similar and cover the control of similar information, it can be assumed that the interpretation given the federal rules would be equally applicable to the state statutory scheme.

This is not to say an individual does not have access to his own criminal history record. Section 692.5 permits any person or his attorney with proper identification to see his file at a time convenient to himself and the Department. And, should an individual discover data in his record that he believes to be incorrect, the process of judicial review is established. This includes the obtaining by court order from the bureau a certified copy to be filed with the court, and in no other circumstance furnishing an individual or his attorney with a certified copy except provided by that chapter. Section 692.5, Code of Iowa, 1979.

28 C.F.R. 20.21(g)(1) on access and review is similar:

"(1) Any individual shall, upon satisfactory verification of his identity, be entitled to review without undue burden to either the criminal justice agency or the individual, any criminal history record information maintained about the individual and obtain a copy thereof when necessary for the purpose of challenge or correction."

The commentary following that section makes clear the meaning of challenge at p. 252:

"20.21(g)(1) A 'challenge' under this section is an oral or written contention by an individual that his record is inaccurate or incomplete. While an individual should have access to his record for review, a copy of the record should ordinarily only be given when it is clearly established that

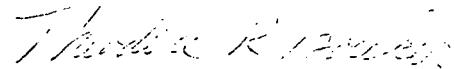
it is necessary for the purpose of challenge." (Emphasis added)

An individual, then, under the federal rules, may see his record and obtain a copy only when it is necessary to challenge the accuracy of that record. In Iowa, this would be handled by the Court ordering the copy, not the individual. Section 692.5, Code of Iowa, 1979.

When all the foregoing is considered together, including the statutes authorizing dissemination only to criminal justice agencies, and public agencies authorized by the Confidential Records Council, the fact of the Legislature not including an amendment to allow individual certified copies, the federal rules not allowing either a copy of a record or a copy of no record and the intent discussions, then it rather clearly appears that Iowa law does not permit certified copies to be made for an individual either of his record or stating a condition of no record.

Therefore, the answer to your first question is no, and, necessarily, then, the answer to the second question is also no.

Sincerely,



THEODORE R. BOECKER
Assistant Attorney General

TRB:pw

STATE OFFICERS AND DEPARTMENTS: Iowa Board of Pharmacy
Examiners - Chapter 155, Chapter 204, Chapter 152, Chapter 148B,
§234.22, Code of Iowa (1979). Dispensing of prescription
drugs is limited to licensed practitioners who are allowed
by the code to prescribe and to pharmacists. (McGrane &
Blumberg to Johnson, Iowa Board of Pharmacy Examiners, 7/5/79)
#79-7-10(L)

Norman Johnson
Secretary
Iowa Board of Pharmacy Examiners
L O C A L

July 5, 1979

Dear Mr. Johnson:

You have requested an opinion from this office on the
following question:

"Who, other than a person or practitioner
authorized by the Code to prescribe, may
dispense prescription drugs?"

Before answering this question it is necessary to set out the
limits of this opinion. "Dispense" is defined in the Uniform
Controlled Substances Act at §204.101(9), Code of Iowa (1979)
as follows:

"Dispense" means to deliver a controlled
substance to an ultimate user or research subject
by or pursuant to the lawful order of a
practitioner, including the prescribing, adminis-
tering, packaging, labeling, or compounding necessary
to prepare the substance for that delivery.

You have, however, indicated that your question refers only to
dispensing in a narrower sense, that is, the delivery of take-
home dosages of prescription drugs to an ultimate user.

We start out with the assumption that physicians, osteopathic
physicians and surgeons, osteopaths, dentists, podiatrists, and
veterinarians, all of whom are authorized to prescribe, may dispense
prescription drugs. See Code Sections 148.1, 149.5, 150.8, 150A.1,
153.20, 155.2(2), 155.3(2), 155.3(8), 155.3(11), 155.26, Code of
Iowa (1979). These persons may, however, be limited in, or pre-
cluded from, dispensing or prescribing controlled substances under
Chapter 204, Code of Iowa (1979), according to their registration
under the Controlled Substances Act. §§ 204.302(1), 204.302(2),
204.304(2), Code of Iowa (1979). This opinion will not deal with
the variety of limitations that could be put on prescribers by their

registration, and will assume they all have general power to dispense all prescription drugs. Another obvious assumption is that pharmacists may dispense prescription drugs. §§ 155.1, 204.308, Code of Iowa (1979).

Prescription drugs are defined in §155.3(10), Code of Iowa (1979) as follows:

"Prescription drug means (a) any drug or medicine the label of which is required by federal law to bear the statement: 'Caution: federal law prohibits dispensing without a prescription,' (b) any drug or medicine which, because of its toxicity or other potentiality for harmful effect, or the method of its use, is not safe for use except under the supervision of a practitioner licensed by law to prescribe, administer, or dispense such drug or medicine, or (c) a new drug or medicine which is limited under state law to use under the professional supervision of a practitioner licensed by law to prescribe, administer, or dispense such drug or medicine."

These drugs can be categorized more briefly as (a) "federal legend" drugs, (b) controlled substances under Chapter 204 and poisons under Chapter 205 and, (c) new drugs under §203A.11. Federal legend drugs would include most controlled substances, but the converse is not true. The new drugs, unless they are controlled substances, would be handled in the same way as federal legend drugs unless the Pharmacy Board, in approving them for sale, imposed other limitations. §203A.11(2), Code of Iowa (1979). In the discussion of who may dispense, this opinion will deal with the drugs as two categories: Controlled substances under Chapter 204 and other prescription drugs, basically federal legend drugs and poisons under Chapter 205. ¹

We start out with the premise that all possession, manufacture, or delivery of controlled substances under Chapter 204, Code of Iowa (1979) is prohibited unless expressly permitted by the Act.

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1. Controlled substances in Schedule V of the Controlled Substances Act are generally neither legend drugs nor prescription drugs. This opinion will, however, continue to refer to all controlled substances as prescription drugs simply as a matter of convenience.

Section 204.401, Code of Iowa (1979). Therefore, any dispensing must be pursuant to the provisions in the Code of Iowa (1979). We have previously assumed that doctors, dentists, podiatrists, veterinarians and pharmacists may dispense. These persons are practitioners as defined by §204.101(22) and, as such, they are allowed to register under §204.303(3) to dispense controlled substances. Such registration is a prerequisite to any possession or distribution of controlled substances.

As noted above, registered practitioners clearly can dispense controlled substances. Chapter 204 does not explicitly provide for dispensing by any other persons, and if others are allowed to dispense it must be by delegation from these practitioners. The question then is whether dispensing is a delegable function. We conclude that, at least as to controlled substances, it is not.

This office issued an opinion, 1970 O.A.G. 418, which concluded that dispensing was a delegable function. The opinion stated that:

"The act of dispensing drugs, unless prohibited by statute has been considered a function which a medical practitioner may delegate to various persons;
. . . ."

The opinion, however, despite its language indicating that dispensing was inherently delegable, relied on the then existing statutory language to justify such a delegation. Chapter 189, Acts of 62nd G.A., (1967), the statute in issue in the 1970 opinion, governed depressant, stimulant and narcotic drugs. Section 3 of that Act provided an express and general prohibition on any traffic in such drugs. It also contained the following provisions in Section 2:

"Section three (3) of this Act shall not apply to the following

* * *

5. Medical Practitioners acting in the course of their professional practice

* * *

8. An employee or agent of any person described in subsection (1) through six (6) of this section, and a nurse or other medical technician under the supervision of a medical practitioner while such employee, nurse, or medical technician is acting in the course of his employment or occupation and not on his own account. ²

2. On the effect of the change when the statute was repealed, see 1972 O.A.G. 308.

We are not faced with the question of whether the 1970 opinion was correct in indicating that dispensing was inherently delegable, since we have a statutory prohibition in §204.401 which does not contain any explicit exception allowing delegation as existed in §2(8) of Chapter 189, Acts of 62 G.A. (1967). We also believe no implicit exception allowing delegation of dispensing can be read into Chapter 204. We are reinforced in this belief by specific exceptions which are contained in the Controlled Substances Act. Section 204.101(1) provides that "administration," that is, direct application of a single dose of a controlled substance, can be delegated. In §204.302(3)(9) it is provided that an agent of a registered dispenser may "possess" a controlled substance in the course of his employment without registering. Had the legislature intended that there be a similar exception for dispensing, it must be assumed they would have enacted such an exception. The absence of a dispensing exception clearly indicates none was intended.

This is also consistent with previous Iowa drug laws. As noted above, there was a broader exception in Chapter 204A, Code of Iowa (1971) (Chapter 189, Acts of 62nd G.A. (1967)). However the Uniform Narcotic Drug Act, Chapter 204, Code of Iowa (1971), also in effect in 1971, provided:

"204.7 Professional use of narcotic drugs
1. A physician or a dentist, . . . may prescribe on a written prescription, administer, or dispense narcotic drugs or may cause the same to be administered by a nurse or intern under his direction and supervision. [emphasis added]

This statute provided only for the delegation of administration. The same section also required that drugs given by a doctor for administration in his absence were to be returned to him if not used. Both of these provisions are consistent with an interpretation prohibiting dispensing by anyone other than a registered practitioner.

The conclusion, therefore, as far as controlled substances are concerned, is clear; only a registered practitioner can dispense, i.e., deliver take-home dosages of, controlled substances. See Opinion of Attorney General, Dallyn to Reidman, April 30, 1979, #79-4-38. Put in terms of your question, this means that only a person allowed by the Code to prescribe, or a pharmacist, can dispense controlled substances.

The more difficult question is whether "federal legend" prescription drugs which are not controlled substances under Chapter 204 may be dispensed by anyone other than a person or practitioner allowed by the Code to prescribe. With respect to these drugs there is not

as specific a ban on possession and distribution, nor is there a federal registration requirement. We again have our basic assumptions as to physicians, osteopaths, osteopathic physicians and surgeons, dentists, podiatrists, veterinarians, and pharmacists and their authority to dispense. See e.g. §§ 155.2(2), 155.3(8), Code of Iowa (1979).

The determination of who can dispense "legend" drugs must be made basically from Chapters 155, 203, 205, the Code chapters covering specific subjects and professions, and the Iowa Administrative Code.

In §155.6, there is a general prohibition against permitting anyone who is not a licensed pharmacist to fill a prescription of a practitioner. Section 155.26 forbids the possession of a prescription drug unless lawfully dispensed. The latter section includes a specific exception for practitioners, for licensed wholesalers and for nurses. A general exception, upon which we have partially based our assumption that practitioners can dispense, is found in §155.2(2) which provides that persons licensed to practice medicine, dentistry, podiatry or veterinary medicine who dispense as an incident to their practice shall not be deemed to be practicing pharmacy under §155.1, nor illegally in possession of drugs under §155.6. Section 155.3(8) also expressly provides that the Chapter shall not apply to persons listed in 155.2(2). No other exceptions are specifically provided.

We begin to glean from this statute that the intent of the legislature is clearly to keep strict controls on prescription drugs. This intent is implicit in the Legislature's basic enactments requiring prescriptions and pharmacists, and is very explicit in such sections as §§ 155.6, 155.26, 155.30, 203.3 and 205.3, Code of Iowa (1979). Thus, to say that the right to dispense "legend" drugs by persons other than prescribers is implicit in, or can be inferred from, the statutes analyzed immediately above would seem to be contrary to legislative intent. We conclude, therefore, that unless the individual practice acts or specific distribution statutes provide for the right to dispense, it is prohibited except for prescribers and pharmacists. This is consistent with State v. Boston, 226 Iowa 429, 284 N.W. 143 (1939), which states that the entire field of medicine and surgery is open to medical doctors but that the other professions in the healing arts are limited to the functions set out in their professional acts. See e.g. Chapter 151, Code of Iowa (1979), Practice of Chiropractic.

The practice of nursing is controlled by Chapter 152, and is defined in §152.1 in very general terms. We might conclude from

the definition that such phrases as "conduct nursing treatment," "execute regimen," "perform additional acts" or "perform services in the provision of supportive or restorative care" allows dispensing. However, the functions of a nurse also seem to be defined by the definition of what a nurse is not. Section 152.1(1) provides:

"The practice of nursing . . . does not mean any of the following (a) The practice of medicine and surgery as defined in Chapter 148, the osteopathic practice, as defined in chapter 150, the practice of osteopathic medicine and surgery, as defined in chapter 150A, or the practice of pharmacy as defined in chapter 155, except practices which are recognized by the medical and nursing professions and approved by the board as proper to be performed by a registered nurse. [emphasis added]

While this is a definitional section it appears to be substantive in delineating the rights and duties of nurses when read with §152.1(2), which is also a definitional section. Thus, the duties and functions of doctors and pharmacists, (dispensing, for the purposes of this opinion), can only be performed by a nurse if approved "to be performed" by the medical and nursing professions. A resort to the Iowa Administrative Code, Nursing Board 590 and Health 470, Chapter 135, Medical Examiners, reveals no regulations allowing nurses to dispense. We therefore arrive at the conclusion that they cannot.

We arrive at the identical conclusion with respect to physicians' assistants under Chapter 148B, Code of Iowa (1979). Section 148B.4 provides that physicians' assistants may perform "medical services" when performed under a physician's supervision. IAC Health 470, Chapter 136, Section 5, sets out the duties of a physician's assistant. Nowhere in these rules is there a provision which would allow a physician's assistant to dispense. In fact, the indication is to the contrary since many of the duties are described as "routine." ~~Also it is highly unlikely the legislature even intended to deny the right to dispense to nurses but would grant it to physician's assistants, since a nurse is apparently on a higher rung of the medical profession ladder.~~

With one exception to be dealt with later, we find no provisions in the Code which allow any person other than a prescriber to dispense prescription drugs. This means that office personnel or medical technicians, including nurses and physician's assistants are not to dispense, i.e., distribute take-home dosages of, prescription drugs whether controlled or non-controlled substances.

Norman Johnson
Iowa Board of Pharmacy Examiners
Page 7

These medications can be dispensed (per our limited definition of that term) only by the prescriber or a pharmacist.

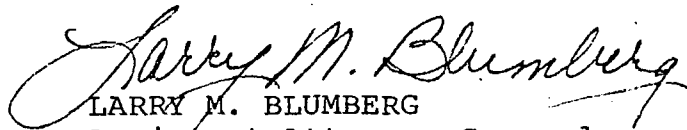
One exception appears in the Code. In §234.22, provision is made for the "distribution" of contraceptive devices, rhythm charts, drugs and medical preparations in connection with family planning services under the aegis of the Iowa Department of Social Services. These drugs and medical preparations can be distributed only after examination of the patient and prescription by a licensed physician. It is our opinion this exception allows distribution of prescription drugs which are not controlled substances by the personnel of the family planning services organized under Chapter 234, and does not require the presence of a doctor or pharmacist. We are led to the conclusion that a pharmacist or physician is not required to be present since the section involved expressly requires that certain functions be performed by a physician, but does not include the distribution of drugs and medication in those functions. We believe this extraordinary provision was enacted to make uncomplicated family planning services available and in the anticipation that the only drugs distributed would be those necessary for family planning or birth control measures. Moreover, these cannot be distributed until after examination by a physician and a prescription by that physician.

Our conclusion therefore is: Only those persons authorized by the Code to prescribe may dispense prescription drugs, except as to the limited authorization in Chapter 234, set out above.

Sincerely,



THOMAS D. McGRANE
Assistant Attorney General



LARRY M. BLUMBERG
Assistant Attorney General

TDM:LMB/cla

Certificate of Need -- Change of Ownership. Sections 135.61(19), 135.61(19)c, 135.63(1), 135.64 and 135.83, Code of Iowa (1979). Sections 135.61 through 135.83, Code of Iowa (1979) do not provide authority to review changes of ownership of institutional health facilities. (Johnson to Pawlewski, Commissioner of Public Health, 7/5/79) #79-7-9(L)

July 5, 1979

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

Dear Commissioner Pawlewski:

We are in receipt of your letter requesting an opinion of the Attorney General on the following question:

Whether or not the certificate of need law, sections 135.61 through 135.83, Code of Iowa (1979) contains authority to review changes of ownership of institutional health facilities?

Iowa's certificate of need law requires that a new institutional health service or changed institutional health service shall not be offered or developed in this state without prior application to the department of health for and receipt of a certificate of need. Section 135.63(1), Code of Iowa (1979). The Legislature chose to limit the certificate of need requirement to new or changed institutional health services. A "new institutional health service" or "changed institutional health service" is defined in section 135.61(19), Code of Iowa (1979):

19. "New institutional health service" or "changed institutional health service" means any of the following:
 - a. The construction, development or other establishment of a new institutional health facility or health maintenance organization.

- b. Relocation of an institutional health facility or a health maintenance organization.
- c. Any expenditure by or on behalf of an institutional health facility or a health maintenance organization in excess of one hundred fifty thousand dollars which, under generally accepted accounting principles consistently applied, is a capital expenditure, or any acquisition by lease or donation to which this subsection would be applicable if the acquisition were made by purchase.
- d. A permanent change in the bed capacity, as determined by the department, of an institutional health facility or a health maintenance organization. For purposes of this paragraph, a change is permanent if it is intended to be effective for one year or more.
- e. Health services which are or will be offered in or through an institutional health facility or a health maintenance organization at a specific time but which were not offered on a regular basis in or through that institutional health facility or health maintenance organization within the twelve-month period prior to that time.
- f. The deletion of one or more health services, previously offered on a regular basis by an institutional health facility or health maintenance organization or the relocation of one or more health services from one physical facility to another.
- g. Any expenditure by or on behalf of an individual health care provider or group of health care providers, in excess of one hundred fifty thousand dollars which:
 - 1) Is made for the purchase or acquisition of a single piece of new equipment which is to be installed and used in a private office or clinic, and for which a certificate of need would be required if the equipment were being purchased or acquired by an institutional health facility or health maintenance organization; and
 - 2) Is, under generally accepted accounting principles consistently applied, a capital expenditure.

Section 135.61(19), Code of Iowa (1979) on its face, does not define a change of ownership of an institutional health facility as a new or changed institutional health service. It might be argued, however, that section 135.61(19)c, Code of Iowa (1979), "any expenditure by or on behalf of an institutional health facility or health maintenance organization in excess of one hundred fifty thousand dollars", could provide the statutory authority to review a change of ownership, but in light of the provisions of section 135.64, Code of Iowa (1979) this argument is not persuasive.

Section 135.64, Code of Iowa (1979) lists the criteria which the state health facilities council and the department of health shall consider when evaluating an application for a certificate of need. These criteria specifically address various types of proposals, for example: new construction, addition of beds, relocation, special needs of health maintenance organizations, special needs of biomedical and behavioral research projects and osteopathic and allopathic services. The criteria do not specially address the change of ownership of an institutional health facility. None of the remaining statutory provisions of sections 135.61 through 135.83, Code of Iowa (1979) directly or indirectly address a change of ownership of an institutional health facility.

Iowa's certificate of need law was drafted in an effort to comply with the provisions of 42 U.S.C. § 300m-2, which requires a State certificate of need program applicable to new institutional health services proposed to be offered or developed within the state. The federal regulations define new institutional health services subject to review in 42 C.F.R. § 122.304. Forty-two C.F.R. § 122.304(a)(2) specifically refers to whether any expenditure by or on behalf of a health care facility or health maintenance organization in excess of \$150,000 includes an acquisition of existing health care facilities and health maintenance organizations:

- 2) Any expenditure by or on behalf of a health care facility or health maintenance organization in excess of \$150,000 (or such lesser amount as the State may specify) which, under generally accepted accounting principles consistently applied, is a capital expenditure, except that this subpart shall not apply to expenditures for (i) site acquisitions; (ii) acquisitions of existing health care facilities and health maintenance organizations; or (iii) expenditures solely for the termination or reduction of beds or of a health service; unless included by the State in its scope of coverage. Where a person makes an acquisition by or on behalf of a health care facility or health maintenance organization under lease or comparable arrangement, or through donation, which would have required review if the acquisition had been by purchase, such acquisition shall be deemed a capital expenditure subject to review. (Emphasis supplied.)

Therefore, it appears that the scope of certificate of need review does not include a change of ownership of an institutional health facility unless specifically included by a State in its scope of coverage. In Iowa, sections 135.61 through 135.83, Code of Iowa (1979) do not include a change of ownership as a reviewable item.

In summary, it is the opinion of this office that sections 135.61 through 135.83, Code of Iowa (1979) do not provide authority to review changes of ownership of institutional health facilities. However, in order for an institutional health facility to receive federal reimbursement under section 1122 of the Social Security Act (42 U.S.C. 1320) for a change in ownership, the facility must be reviewed by the State Health Planning and Development Agency for approval.

Sincerely,



Sara K. Johnson
Assistant Attorney General

TJM:SKJ:crh

MOBILE HOME: MAXIMUM FINANCE CHARGE AND DEFINITION. Section 20 of Chapter 1190, Acts of the 1978 Regular Session of the 67th General Assembly; Sections 135D.1, 321.1 (68) (a), 413.3, 535, 535.2, 537, 537.1301, 562B.7, 1979 Code of Iowa. The maximum finance charges stated in Section 537.2602 apply to mobile home "loans" as defined by the Code of Iowa but do not apply to consumer credit sales of mobile homes which are covered by §537.2201. "Mobile home" means any vehicle without motive power used or so manufactured or constructed as to permit its being used as a conveyance upon the public streets and highways and so designed, constructed, or reconstructed as will permit the vehicle to be used as a place for human habitation by one or more persons but shall also include any such vehicle with motive power not registered as a motor vehicle in Iowa. (Claus to Wilson, Deputy, Industrial Loan Division, Auditor of State, 7/3/79) #79-7-6(L)

July 3, 1979

Mr. Kenneth Wilson, Deputy
Industrial Loan Division
Auditor of State
State Capitol
L O C A L

Dear Mr. Wilson:

Your opinion request of March 7, 1979, has been received. You ask about the effects of Chapter 1190, §20, of the Acts and Joint Resolutions passed during the 1978 Regular Session of the 67th General Assembly. This amending statute was only temporary in nature and expired July 1, 1979. In particular, you ask whether the maximum finance charges set forth in §20 apply to cases where a mobile home retail sales dealer is selling a unit to a consumer for use as a dwelling and is accepting all or partial payment in the form of a consumer credit sales agreement that includes a provision to assign the agreement to a third party financial institution or otherwise.

The provisions of §20 of Chapter 1190 state that:

NEW SECTION. MOBILE HOME LOANS. Notwithstanding the maximum finance charges specified in this chapter of the Code, the maximum finance charge which may be charged for money loaned to a borrower who furnishes as security for all or part of the loan, a mobile home occupied or to be occupied by the borrower as a dwelling shall be as follows: [Emphasis added].

1. For a new mobile home, three percentage points per year above the usury rate in effect under section five hundred thirty-five point two (535.2) of the Code on the day the loan is made, calculated according to the actuarial method, on the unpaid balance of the amount financed.

2. For a used mobile home, five percentage points per year above the usury rate in effect under section five hundred thirty-five point two (535.2) of the Code on the day the loan is made, calculated according to the actuarial method, on the unpaid balance of the amount financed.

The specific language of the amendment in question refers only to "money loaned", which must be read in the limited context of the definition of "loan". Loan is defined at §537.1301 (26), 1979 Code of Iowa, and specifically excludes "the forbearance of debt arising from sale or lease". This exclusion in effect eliminates credit sales transactions contained in Part 2 of Article 2, Chapter 537, 1979 Code of Iowa, since credit sales are transactions involving the sale of goods, services or an interest in land under §35,000. [See §537.1301 (13), 1979 Code of Iowa].

As a consequence, the type of transaction described in your letter would not be subject to the maximum finance charges as set forth in §20 of Chapter 1190. A distinction must be drawn between a credit sale whereby credit is extended from a seller to a buyer which often is accompanied by a subsequent separate commercial transaction consisting of the seller selling the contract or agreement to a third party financial institution on one hand and a lender loaning money to a buyer who in turn pays the seller in full resulting in a loan between the borrower and the lender. The historical distinction between credit sales and loans is clearly drawn in the Iowa Consumer Credit Code, Chapter 537, 1979 Code of Iowa, by treating credit sales in Part 2 and loans in Part 3 of Article 2. This separate treatment is a result of the traditional application of the widely accepted time-price doctrine to credit sales.

Again, reference must be made to the specific language of the statute in question where "loans" only are addressed. Where money is loaned to a borrower by a third party, the finance charges set forth in paragraphs one and two apply to set the maximum rate. However, where a credit sale is involved with a subsequent sale of the paper to a third party, paragraphs one and two do not apply.

This would result in the maximum finance charge being 15% for credit sales of new mobile homes under Chapter 537.2201 and 14% for loans of monies for the purchase of new mobile homes based upon the current usury rate of approximately 11% plus the three points over and above that amount authorized by Chapter 1190, §20 (2). With respect to used mobile homes, the annual percentage rate would be again 15% on credit sales, and 16% or five points over the general usury rate on the loan of money for the acquisition of same pursuant to Chapter 1190, §20(2).

Your second inquiry concerns the definition of a mobile home as it applies to Chapter 1190, §20, Acts of the 67th General Assembly. The statute refers to "mobile homes occupied or to be occupied by the borrower as a dwelling". Dwelling is defined as follows:

1. Dwelling. A "dwelling" is any house or building or portion thereof which is occupied in whole or in part as the home or residence of one or more human beings, either permanently or transiently.

Consequently, the term "mobile home" is best defined in the context of a residence as opposed to a mode of transportation or recreation. Three sections of the Iowa Code define "mobile homes". §§135D.1, 321.1(68)(a), 562B.7, 1979 Code of Iowa. While all are similar, we believe the definition of mobile homes set out in §135D.1, 1979 Code of Iowa, in relation to mobile home parks is most appropriate. It states as follows:

1. "Mobile home" means any vehicle without motive power used or so manufactured or constructed as to permit its being used as a conveyance upon the public streets and highways and so designed, constructed, or reconstructed as will permit the vehicle to be used as a place for human habitation by one or more persons; but shall also include any such vehicle with motive power not registered as a motor vehicle in Iowa.

The terms "mobile home" and "dwelling" when used together provide the necessary language for determining whether a particular loan transaction is controlled by this statute. If the chattel

Mr. Kenneth Wilson, Deputy Auditor

Page 4

falls within the definition of mobile home set out above and is used as a dwelling as defined above and the transaction involves a loan as opposed to a credit sales transaction, Section 20 of Chapter 1190, Acts of the 67th General Assembly, controls.

Sincerely yours,

Robert Clauss

ROBERT CLAUSS (ab)
Assistant Attorney General

COUNTY HOSPITAL - POWERS OF BOARD OF HOSPITAL TRUSTEES. §§347.13(5), 347.14(1) and 347.18, Code of Iowa (1979). A board of trustees of a county hospital may restrict the use of the hospital by a duly licensed and qualified physician pursuant to reasonable rules and regulations and appropriate safeguards. (Johnson to Soldat, Kossuth County Attorney, 7/3/79) #79-7-4(L)

July 3, 1979

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

Dear Mr. Soldat:

We acknowledge receipt of your letter in which you have requested an opinion of the Attorney General in response to the following question:

May a county hospital, by its board of trustees, restrict the use of the hospital by a duly licensed and qualified physician?

This question arose because of a potential conflict of an in pari materia interpretation of sections 347.13(5) and 347.18, Code of Iowa (1979). The latter statute appears to restrict a county hospital's power to prevent a "practitioner of any recognized school of medicine" from practicing in that hospital. However, the former statute appears to give the board the power to "have control and supervision of the physicians . . . and patients in the hospital." Quite naturally, the ultimate power of control and supervision would seem to be exclusion of the physician from any practice in the hospital if his prior conduct merited such an exclusion.

The statutory sections upon which your question is premised are as follows:

Section 347.13 Powers and duties. Said board of hospital trustees shall:

5. Have control and supervision over the physicians, nurses, attendants, and patients in a hospital.

Section 347.18 Discrimination. In the management of such hospital, no discrimination shall be made against the practitioners of any recognized school of medicine; and each patient shall have the right to employ at his expense any physician of his choice; and any such physician, when so employed by the patient, shall have exclusive charge of the care and treatment of the patient; and attending nurses shall be subject to the direction of such physician.

The question you have raised may be answered without making a *pari materia* interpretation. It is a generally recognized principle of statutory construction that unless statutes are in direct conflict, they will be read together and, if possible, harmonized. Hardwick v. Bublitz 253 Iowa 49, 111 N.W.2d 309 (1962). Sections 347.18 and 347.13(5), Code of Iowa (1979) may be read together harmoniously. In our opinion, section 347.18, Code of Iowa (1979) qualifies the implementation or exercise of the powers and duties conferred upon the board of trustees by section 347.13(5), Code of Iowa (1979), but section 347.18, Code of Iowa (1979) does not in and of itself preclude the restriction of the use of the hospital by an individual physician.

Your question is phrased in terms of using the antidiscrimination provision, section 347.18, Code of Iowa (1979) against "a practitioner of any recognized school of medicine." The language of that statutory provision is, however, clear and unambiguous on its face. Section 347.18, Code of Iowa (1979) requires that "In the management of such hospital, no discrimination shall be made against the practitioners of any recognized school of medicine;" (emphasis supplied). Clearly the discrimination the legislature intended to prevent was that directed to practitioners of various schools of medicine as a group, like chiropractors or osteopaths, and not a single practitioner. There have been several prior opinions of the Attorney General which have adopted this reasoning. See 1930 O.A.G. 250, 1938 O.A.G. 321, 1940 O.A.G. 219, 1954 O.A.G. 136 for discussions as to what "the practitioners of any recognized school of medicine" includes.

The analysis now must focus upon whether the board of trustees of a county hospital has the power to restrict the use of such hospital by a duly licensed and qualified physician.

It is generally acknowledged in the field of hospital law that all hospitals have the power to prescribe reasonable rules for the conduct of the institution. The Iowa legislature, in section 347.14(1), Code of Iowa (1979) has provided that the board of trustees may "adopt bylaws and rules for its own guidance and for the government of the hospital." Subject to the qualification that the board of trustees of a county hospital in Iowa must exercise its power within its statutory authority, it may then exercise its discretion in the

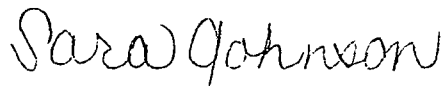
making of reasonable rules and regulations. Accordingly, it is generally recognized that a hospital may prescribe reasonable rules concerning the qualifications of physicians allowed to practice in the hospital. 41 C.J.S. Hospitals §5. These proposed rules could, for instance, address the qualifications of a physician applying for staff membership, the renewal or maintenance of staff membership, types of membership, the use of hospital facilities and restriction in the performance of certain functions such as major surgery or diagnostic radiology. In Koelling v. Board of Trustees of Mary F. Skiff Memorial Hospital, 259 Iowa 1185, 146 N.W.2d 284, 290 (1967), a case involving a municipal hospital, the Supreme Court of Iowa recognized this general principle:

The law is clear that a hospital can prescribe reasonable rules concerning the qualifications of physicians to practice therein and that a license to practice does not give him the right per se to practice in a municipal hospital. (citations omitted)

A public hospital cannot, however, exclude a physician or surgeon from practice therein by rules, regulations or acts of the hospital's governing authorities, which can be described as unreasonable, arbitrary, capricious or discriminatory. The case law on this subject is extensive. An excellent annotation collecting some of the cases in which the courts have treated this problem of a hospital's exclusion of, or discrimination against, a physician or surgeon either applying for or seeking to maintain staff membership or privileges to use hospital facilities is 37 A.L.R.3d 645. It should be mentioned that the procedural aspects of such a restriction or and exclusion from a hospital must comply with procedural due process protections. The Koelling case contains a thorough discussion of many of the procedural aspects of a public hospital's suspension of a physician on its' staff.

In summary, it is the opinion of this office that a board of trustees of a county hospital may restrict the use of the hospital by a duly licensed and qualified physician pursuant to reasonable rules and regulations and appropriate procedural safeguards.

Sincerely,



Sara K. Johnson
Assistant Attorney General

CITIES AND TOWNS: Township Clerk-Chapter 64, §§359.20-.27, The Code 1979. A township clerk is required to execute and file an official bond in an amount, fixed by the county board of supervisors, as public interest may require. (Hyde to Hoth, Des Moines County Attorney, 8/31/79) #79-8-28(L)

August 31, 1979

Mr. Steven S. Hoth
Des Moines County Attorney
200 Jefferson Street
Burlington, Iowa 52601

Dear Mr. Hoth:

You have requested an opinion from this office concerning the operation of Chapter 64, The Code 1979, in connection with bonds for township clerks. Specifically, your questions were: (1) Whether a township clerk may be considered an exempted official under §64.1, The Code 1979, and therefore not required to post a bond under §64.2; and (2) whether the county board of supervisors which approves and sets the amount of the bond under §§64.7 and 64.19(2) could set a bond for the township clerk at \$0 or \$1.

Section 64.1, The Code 1979, specifically exempts only the following public officers from the bond requirements of Chapter 64: "1. Governor; 2. Lieutenant Governor; 3. Members of the General Assembly; 4. Judges of the supreme and district courts and district associate judges; 5. Township trustees; 6. City council members, including city commissioners and aldermen, other than mayors." A township clerk would not be considered an exempt public official under §64.1. Government officers whose duties involve the custody or disbursement of public funds or bring them into controversy with individual citizens are usually required to give sufficient bond, in order to protect the political subdivision from loss by negligence

Mr. Steven S. Hoth
Des Moines County Attorney
Page Two

or dishonesty and the citizens from unlawful interference with their persons or property. 56 Am.Jur.2d Municipal Corporations §291 (1971). While there is no specific statutory requirement that township clerks give bond,¹ several sections in Chapter 64 deal with the procedural aspects of bonding of township clerks. Section 64.12 provides: "All bonds required of the township clerk shall be furnished and paid for by the township." Section 64.19 provides specifically that the county board of supervisors shall approve the bond of the township clerk. Section 64.23(3) establishes custody of the bonds and official oaths of township officers with the county auditor. Finally, §64.24(2) directs the county auditor to record the official bonds of all county officers, elective and appointive, and township clerks, indexed under the title of the office, showing the name of each principal, the sureties, and the date of filing of the bond. These sections evince clear legislative intent to require a bond from a township clerk.

No amount or minimum amount is fixed by statute for the official bond of a township clerk, and in that case, §64.7 provides that: "the approving officer or board shall fix the bond at such amount as public interest may require."² Under its general powers pursuant to county home rule, Article III [Section 39A] of the Iowa Constitution, the county governing body need no longer seek express statutory authority for each exercise of governmental power in the determination of local affairs, where such exercise is not inconsistent with state law. See 1979 O.A.G. (Miller and Hagen to Danker, et al., April 6, 1979). There is nothing in the statute that prohibits a board of supervisors from fixing an official bond for a township clerk at \$1. The board of supervisors is directed only to fix bond "at such amount as public interest may require."

Thus, while setting a bond at \$1 is not expressly forbidden, the board of supervisors should consider the nature of the duties carried out by the township clerk and the purposes behind bonding requirements in fixing the amount of the bond required. Under §§359.20-.27, The Code 1979, these duties include the receipt, collection and disbursement of all funds belonging to the township, the custody of the official record of

¹Section 360.7, The Code 1979, does provide for a specific bond to be executed by the township clerk in a certain limited circumstance.

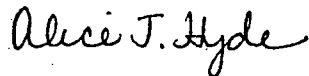
"When a tax is voted as provided in this chapter [to erect a township hall], the township clerk shall, before drawing any of said tax from the treasury of the county, execute a bond, with penalty double the amount of said tax, which bond shall be approved by the board of supervisors." This limited requirement would not suffice to bind the sureties in the case of loss or defalcation in carrying out ordinary duties.

²Since we believe the statute requires some bond for a township clerk, the board of supervisors would be prohibited from fixing the bond at \$0, which would be the equivalent of no bond.

Mr. Steven S. Hoth
Des Moines County Attorney
Page Three

township business and official oaths of some public officers, and the notification to the county auditor of the election of officers in the township. Section 666.1, The Code 1979, provides that an official bond runs not to the authorizing body, but: "The official bond of a public officer is to be construed as a security to the body politic or civil corporation of which he is an officer, and to all members, thereof, severally, who are intended to be secured thereby." See Scott v. Feilschmidt, 191 Iowa 347, 182 N.W. 382 (1921). The board of supervisors would want to ensure that an adequate bond existed to protect the intended beneficiaries, i.e., the public generally, from which "any corporation, public or private, or person injured or sustaining loss," may bring an action to redress injury. Section 64.18. See Iowa R.C.P. 3.

Very truly yours,



Alice J. Hyde
Assistant Attorney General

AJH:kbs

COUNTIES: Part-time County Attorney -- §§332.62, 332.63 and 340.9, The Code 1979. When the position of County Attorney is changed to part-time, the Board of Supervisors initially sets the salary. Thereafter, it is the responsibility of the compensation board.
(Blumberg to Robbins, Boone County Attorney, 8/24/79) #79-8-26 (L)

Mr. Jim Robbins
Boone County Attorney
Boone County Courthouse
Boone, Iowa 50036

August 24, 1979

Dear Mr. Robbins:

We have your opinion request of July 27, 1979, regarding a change in status of a county attorney. In your letter you indicated that you now hold the position of county attorney on a full-time basis. However, you wish to have that changed to a part-time status. The County Compensation Board set a salary for a part-time county attorney last December. You ask whether that salary set by the compensation board is applicable, or whether the Board of Supervisors sets the salary.

In an earlier opinion of March 23, 1979, No. 79-3-7, to which you referred in your letter, we faced a similar question with regard to full-time county attorneys. There, we held pursuant to §332.62, The Code 1979, that the Board of Supervisors sets the initial salary of the full-time county attorney. We did not have occasion to reach that question as to part-time county attorneys.

Section 332.63 provides:

1. The board of supervisors of a county may change the status of a full-time county attorney to a part-time county attorney by following the same procedures as provided in section 332.62. If the incumbent county attorney objects to the change in status, the change shall be delayed until January 1 following the next election of a county attorney.

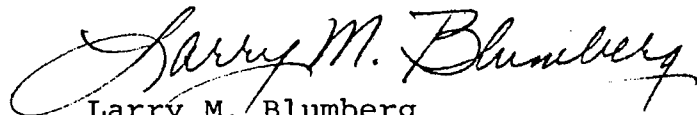
2. The resolution changing the status of a full-time county attorney to a part-time county attorney shall state the annual salary to be paid to the part-time county attorney.

It is interesting to note that while subsection two of this section provides, as does §332.62(2), that the resolution shall contain the salary, it does not contain the words "notwithstanding section 340A.6". We interpreted those words in our previous opinion to mean that the Board of Supervisors initially sets the salary of the full-time county attorney. We cannot, however, ascertain legislative intent as to the omission of such words from §332.63(2).

Section 340.9 provides that the salary of county attorneys shall be determined as provided in §340A.6. Generally, that is how such salaries are to be determined. However, §332.62 and 332.63 are special statutes concerning the status of county attorneys. It appears from a reading of those sections that the Board of Supervisors initially sets the salaries for both full-time and part-time county attorneys. There does not appear to be any logical basis for distinguishing between full-time and part-time county attorneys regarding who sets their salaries. Additionally, a circumstance may arise where the status is changed before the compensation board has set a salary for a part-time county attorney.

Accordingly, it is our opinion that when the status of a county attorney is changed to part-time, the Board of Supervisors initially sets the salaries. Thereafter, it is the responsibility of the compensation boards.

Very truly yours,



Larry M. Blumberg
Assistant Attorney General

LMB:jkt

TAXATION: PROPERTY TAX: INTEREST ON REDEMPTION FROM TAX SALE. Section 447.1, Code of Iowa, 1979 as amended by S.F. 321, Acts of 68th G.A., First Session (1979). The applicable rate of interest to be paid upon redemption from tax sale should be governed by the law in effect at the date of sale. County Auditors should calculate tax sale redemption interest on a day by day basis. (Price to Briles and Kudart, 8/20/79) #79-8-22(CL)

August 20, 1979

Senator James Briles
821 Benton
Corning, IA 50841

Senator Arthur Kudart
602 Dows Building
Cedar Rapids, IA 52401

Gentlemen:

In your recent letters, you have requested an opinion of the Attorney General regarding the rate of interest to be applied on property sold at a tax sale. Specifically, your letters pose the following questions:

- 1) When redemption from a tax sale is made, should the rate of interest be charged as provided by §447.1 Code of Iowa, 1979 or as provided by its Amendment S.F. 321, Acts of 68th G.A., First Session (1979) which became effective July 1, 1979?
- 2) In consideration of the change in language of §447.1, Code of Iowa, 1979 as amended by S.F. 321, which increased the amount of interest from six percent per

per annum to three-quarters percent per month, should county auditors now calculate tax sale redemption interest by the month by month method from the date of sale or the day by day method from the date of sale?

Section 447.1, Code of Iowa, 1979, as amended by S.F. 321 reads as follows:

"Section 1. Section four hundred forty-seven point one (447.1), Code 1979, is amended to read as follows:

"447.1 REDEMPTION - TERMS. Real estate sold under the provisions of this chapter and chapter 446 may be redeemed at any time before the right of redemption is cut off, by the payment to the auditor, to be held by the auditor subject to the order of the purchaser, of the amount for which the same was sold and four percent of the amount added as a penalty, with three-quarters percent interest per month on the sale price plus the penalty from the date of sale, and the amount of all taxes, interest, and costs paid by the purchaser or the purchaser's assignee for any subsequent year, with a similar penalty added as before on the amount of the payment for each subsequent year, and three-quarters percent per month on the whole of such amount from the date of payment."

Senate File 321 increases the interest rate payable to a purchaser at a tax sale, in order to redeem real estate sold for delinquent taxes from six percent per annum to three-quarters percent per month. Senate File 321 became effective July 1, 1979.

A prior Attorney General's Opinion is relevant to the first question posed by your letters. In 1936 O.A.G. 118, the Attorney General opined:

". . . (T)hat if the property was sold at tax sale prior to the enactment of Chapter 132 of the Acts of the 45th General Assembly, then the rate of interest and penalty should be charged according to the law that was in force at the time the property was sold, for the reason that that lawsuit was a part of the purchaser's contract and he is

entitled to receive his interest and penalty according to the law that was in force at that time. However, if the tax sale was held after the taking effect of Chapter 132 of the Acts of the 45th General Assembly, then the interest and penalty, if a penalty should be collected on subsequent tax, would be as provided by the amendment." 1936 O.A.G.118-119.

Chapter 132 of the Acts of the 45th G.A. (referred to in 1936 O.A.G.118) was an Act amending §7272, Code of Iowa, 1931 by reducing the amount of interest and penalty to be paid upon redemption of property from a tax sale. Section 7272 was the predecessor of current §447.1, Code of Iowa, 1979 as amended by S.F. 321.

Although there are no Iowa cases on point, ample authority provides that an amendment reducing the rate of interest or penalty payable by the redeeming party has no effect on tax sales held prior to the effective date of the amendment. These authorities appear to support 1936 O.A.G.118. See 111 A.L.R. 237; 72 Am.Jur 2d, State and Local Taxation, §1024; 85 C.J.S. Taxation, §872(b).

A case supportive of the contention that an amendment reducing the rate of interest payable by a redeeming party has no effect on tax sales held prior to the effective date of the amendment is Lockie v. Hinnerstrom, 269 N.W.507, 222 Iowa 451 (1936). This case dealt with the effect an amendment shortening the time in which redemption may occur had on tax sales made before its effective date. The Iowa Supreme Court noted that the law in being at the time of sale governed the right of redemption.

No Iowa cases were found which dealt with an amendment increasing the rate of interest to be applied in order to redeem real estate sold for delinquent taxes.

However, it has generally been accepted that the right of redemption from tax sale and the laws under which it is claimed will be liberally construed in favor of the party entitled to redeem. Smith v. Huber, 277 N.W.557, 224 Iowa 817, (1938); Murphy v. Hatter, 290 N.W.695, 227 Iowa 1286 (1940); Modern Heat & Power Co. v. Bishop Steamtor Corp. 34 N.W.2d 581 (Iowa 1948).

A liberal construction of §447.1 in favor of the redeeming party would result in applying S.F. 321 to tax sales initiated on or after July 1, 1979. Such a result would favor the redeeming party by restricting the interest payable in order to redeem the real estate sold at a tax sale to that provided for by the law in effect

Senator James Briles
Senator Arthur Kudart

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at the time of the tax sale. Such construction would also be consistent with 1936 O.A.G. 118.

It is therefore the opinion of this office that the applicable rate of interest to be paid upon redemption from tax sale should be governed by the law in effect at the date of sale.

The second question posed by your letters may be resolved by reference to the general policy which provides that the right of redemption from tax sale and the laws under which it is claimed will be liberally construed in favor of the party entitled to redeem.

In §4.1(11), Code of Iowa, 1979, the word "month" is defined as meaning a calendar month. As such, any reference to what period of time constitutes a month must be done by referring to the calendar. This calendar period will consist of 28, 29, 30, or 31 days depending on the length of time between anniversary dates. In the case of redemption from tax sale the anniversary date would be the same date in the following months as the date of the tax sale. For example, if property was sold at a tax sale on June 18, 1979, the anniversary date would be the 18th day of each subsequent month.

Since a calendar month varies in its length of days, it would not be in the favor of the redeeming party to charge a set 31 day month rate. In keeping with the general policy of liberally construing the redemption statute and the law thereunder, it would be a better policy to apply the interest on a day-by-day basis rather than month-by-month. Such a policy has two advantages: (1) the redeeming party only incurs interest for the exact period in which the property remains unredeemed and (2) the purchaser of the property at the tax sale gets exactly what he or she is entitled to receive under the redemption statute. Thus, neither party is subject to any impairment. If the legislature intended that a month-to-month basis be used, it should have clearly said so.

Additionally, a day by day method of computing interest appears to comport with the legislative intent. For example, the legislature could have provided in S.F. 321 that fractions of a month should be counted as an entire month. Such language was used in §422.25(3), Code of Iowa, 1979. Since no such language was used in S.F. 321, it appears that the legislature intended fractions of a month to be counted as their exact length in days.

Senator James Briles
Senator Arthur Kudart

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Therefore, it is the opinion of this office that county auditors should calculate tax sale redemption interest on a day-by-day basis.

Very truly yours,

L. Joseph Price

L. Joseph Price
Assistant Attorney General

COUNTIES; COURTS; MENTAL HEALTH: Power of counties to contract with third parties for the care of a mentally ill person. Article III, Section 39A, Constitution of the State of Iowa, Sections 229.13, 230.1, 230.15, 230.23, 332.1, 444.12, 444.12(3)(a), Code of Iowa. If a county and a third party wish to enter into a contract whereby the third party agrees to assume part of the liability imposed on the county for the care of a mentally ill person at a private facility, they may do so. The district court has the authority to commit to a private facility. While the court has no authority to compel such a contract, there is no reason why the court cannot take the proposed contractual arrangement into consideration prior to making a placement decision. (Fortney to Morrison, Hamilton County Attorney, 8/20/79) #79-8-21(L)

August 20, 1979

Mr. Lonny T. Morrison
Hamilton County Attorney
P. O. Box 186
817 1/2 Des Moines Street
Webster City, Iowa 50595

Dear Mr. Morrison:

You have requested an Attorney General's Opinion regarding the cost of the care and treatment of an adult committed to a state mental health institute. Specifically, you pose the question:

Can a district court order a county to enter into a contract with the parents of a mentally-ill adult for whom the parents have no legal responsibility to provide any support, but who wish to place the mentally-ill adult in a private institution and assume whatever cost there might be which would be above those costs paid by the county if the mentally-ill adult were placed in a public institution and the costs were assumed by the county?

You have indicated the following fact situation. The person committed was a 27-year old male who had been living with his parents but who was not under any conservatorship or guardianship nor did the parents have any power of attorney. The parents

requested the district court to send the patient to Lutheran Hospital in Des Moines where they felt he would receive better care and treatment than at the Mental Health Institute at Cherokee where the patient had been previously committed on two different occasions. The Honorable Russell J. Hill declined to encumber the County with the cost of a private facility and issued his order committing the patient to the Mental Health Institute at Cherokee, Iowa.

Subsequently, the parents have inquired if it was possible for them to pick up the difference in cost between the private facility in Des Moines and Cherokee. What they have proposed is that the county pay what would be the normal daily cost at the Mental Health Institute at Cherokee, Iowa and that they, the parents, would pay any additional cost if the patient was placed in a private facility in Des Moines, Iowa. They also requested this of Judge Hill at the hearing and he denied the request because he was not sure he had a foundation in law to grant it.

There appears to be no statutory prohibition which would bar the county from entering into the contract with the parents. However, there is also no authority for the court to compel either the county or the parents to so contract.

The general powers of counties are set out in Section 332.1, Code of Iowa (1979), as follows:

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.

The 1978 "Counties home rule" amendment to the Iowa Constitution (1857) essentially grants counties the power to do any act to determine their local affairs and government which is not forbidden by law. The amendment provides:

Counties or joint county-municipal corporation governments are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly.

* * *

The proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only those powers granted in express words is not a part of the law of this state.

This amendment expressly overrules such cases as Mandicino v. Kelley, 158 N. W. 2d 754, 760 (Iowa, 1968), in which the Iowa Supreme Court held that counties have only those powers which are expressly conferred by statute or which are necessarily implied from the powers conferred by statute.

Section 230.1, Code of Iowa (1979), makes the county of a mentally ill person's legal settlement liable for "the necessary and legal costs and expenses attending the taking into custody, care, investigation, admission, commitment, and support of a mentally ill person admitted or committed to a state hospital." Section 230.23, Code of Iowa (1979), provides that these expenses are to be paid by the county from the county mental health and institutions fund. Section 444.12(3)(a) also requires the county to pay the costs of the care and treatment of patients placed in a private facility in lieu of admission or commitment to a state mental health institute.

In 1976 O. A. G. 878, this office opined that the charges incurred when a district court judge ordered drug abuse treatment at a private facility were chargeable to the county health and institutions fund.

Although a district court has authority to order commitment to a private facility and the patient's county of legal settlement is financially chargeable for all commitment costs, those persons legally liable for the patient's support remain so and are ultimately liable to the county for reimbursement. Section 230.15, Code of Iowa (1979), provides in relevant part:

Mentally ill persons and persons legally liable for their support shall remain liable for the support of such mentally ill. Persons legally liable for the support of a mentally ill person shall include . . . , any person, firm, or corporation bound by contract for support of the mentally ill person, and,

with respect to mentally ill persons
under 18 years of age only, the father
and mother of the mentally ill person
. . . (Emphasis added.)

Since the patient in question is twenty-seven years old and is not under the conservatorship or guardianship of his parents, his parents are not liable for commitment costs. It is clear, however, that Code § 230.15 contemplates the existence of a contractual relationship with the parents which could give rise to such a liability. Furthermore, Code § 230.15 also provides:

Nothing in this section shall be construed to prevent a relative or other person from voluntarily paying the full actual cost of the care and treatment of any mentally ill person as established by the department of social services.

In addition, Code § 444.12 provides in relevant part:

Nothing in this section or any other statute shall be construed to prohibit parents or other persons from voluntarily reimbursing the county or state for the reasonable cost of caring for an individual while he was a patient or inmate in the county hospital, county home, mental health institute, hospital-school, training school, or home for children.

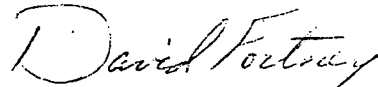
It is apparent from Code Sections 230.15 and 444.12 that the legislature intends that parents or others may contract to assume the liability for the payment of the costs of care and treatment at a state institution.

The county is liable for the costs of the care and treatment of mentally ill patients in private facilities under Section 444.12(3) Code of Iowa (1979), and has the power to enter into contracts under Section 332.1, Code of Iowa (1979). It would be a logical conclusion from the county's liability, and from its power to contract, that the county could contract with the parents of a mentally ill adult for the parents to assume the county's liability for the additional costs of the care and treatment at a private hospital rather than at a state mental health institute. This

conclusion is consistent with the broad authority given to the counties by the county home rule amendment to manage their local affairs and consistent with the express statutory authorization of Sections 230.15 and 444.12, Code of Iowa (1979), for individuals to contract to become liable for the costs of the care and treatment of a mentally ill patient in a state institution. This conclusion is also consistent with the apparent legislative intent in making counties or the state liable for the care and treatment of mentally ill patients to ensure that no mentally ill patient should lack care and treatment because he or she cannot pay the costs..

In summary, if a county and the parents wish to enter into a contract whereby the parents agree to assume part of the liability imposed on the county by Section 444.12(3)(a), they may do so. The district court already has the authority under Section 229.13 to commit to a private facility. There is no reason why the court cannot take the proposed contractual arrangement into consideration prior to making a placement decision.

Yours truly,



David Fortney
Assistant Attorney General

DF/jam

MUNICIPALITIES: Zoning Board of Adjustment: §414.8, The Code 1979; 1979 Session, 68th G.A., H.F. 174, §1. The restrictive language in the amendment to §414.8 regarding purchasing or selling real estate applies only to a majority of the board. The term "persons representing the public at large" refers to occupations. (Blumberg to Rush, State Senator, 8/17/79) #79-8-20(L)

August 17, 1979

The Honorable Bob Rush
State Senator
830 Higley Building
Cedar Rapids, Iowa 52401

Dear Senator Rush:

You have requested an official opinion regarding a recent amendment changing the qualifications of the members of a municipal zoning board of adjustment. The Amendment in question, 1979 Session, 68th G.A., H.F. 174, §1, added, in part, the following language to §414.8, The Code 1979: "A majority of the members of the board of adjustment shall be persons representing the public at large and shall not be involved in the business of purchasing or selling real estate." Your questions are:

1. What is the meaning of the phrase "be involved in the business of purchasing or selling real estate" as it relates to the prohibition stated in the quoted section of House File 174?
2. Does the prohibition extend to all members of the board of adjustment or only to a majority of the members?
3. Does the phrase "persons representing the public at large" refer to the occupations of those persons or to some other criteria?

The sentence in question refers only to a majority of the board. Nothing in that sentence, or in any other part of §414.8, as amended, appears to make those requirements, or as you put them, prohibitions, applicable to each

member of the board. Thus, where there is a five member board, three of the members shall be from the public at large and not be in the business of purchasing or selling real estate. With a seven member board the number of such members would be four.

From the construction of the sentence at issue, it is apparent that the Legislature used the terms "from the public at large" and "the business of purchasing or selling real estate" to indicate a difference between the two. In other words, those not in the business of purchasing or selling real estate are persons representing the public at large. Thus, those terms refer to occupations.

This leads us to the question of what is meant by "the business of purchasing or selling real estate". We do not believe that this can be limited solely to real estate agencies and agents, for many businesses regularly buy or sell real estate. Nor do we think that a person who is merely an employee of such a business on a low level of authority falls within the prohibition.

In Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969), the Court set forth a rule which we feel is applicable here. There, §403.16, a conflict of interests statute, was at issue. It was alleged that a council member had violated that provision based upon his employment. The Court held (165 N.W.2d at 821-822, 823):

Councilman Hickerson's situation is quite different. His disqualification is based entirely upon his employment by the University of Iowa, which owned real estate in the area and was vitally interested in the project. University officials had publicly urged the city to proceed with urban renewal. The University was to have exclusive right to purchase some of the land after the city acquired it by condemnation. Mr. Hickerson had held various positions of responsibility and trust with the University. At the time he became a member of the council he was director of the alumni office. Soon after his election he was made director of community relations for the University, a newly

created position. We believe the record fairly shows no one was more openly in favor of the urban renewal plans than the University nor would anyone be more beneficially affected by them. While this is understandable and perhaps even desirable, it nevertheless posed serious problems for Mr. Hickerson, who is now the mayor.

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How does this affect Mr. Hickerson's status? We agree with the trial court his was a disqualifying personal interest under the statute.

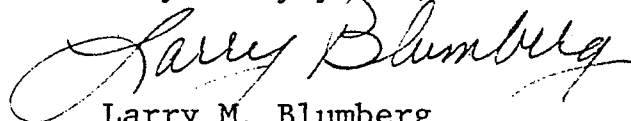
We do not say every University employee would be deprived of a voice in urban renewal proceedings by reason of such employment. Here, however, we have an employee in a position of influence as director of community relations, the very department with which the city would deal in case of matters of mutual interest to the University and the city. In addition we have unusual and direct interest on the part of the University in the outcome of urban renewal proceedings.

Although the case is distinguishable from your facts because of the different subject matters, the above quoted discussion appears to be an answer to your question. Therefore, a person who purchases or sells real estate as his or her occupation, or an employee of a business which purchases or sells real estate who is either actively engaged in the same or is in a position of influence with that business is one who is "involved in the business of purchasing or selling of real estate".

Accordingly, we are of the opinion that the requirements, or prohibitions contained in the amendment to §414.8, refer only to the majority of the board of adjustment. In other words, the minority membership of that board can be involved in the business of purchasing or selling real estate. The term "representing the public at large" refers to occupation.

That is, not involved in the business of purchasing or selling real estate. The term "involved in the business of purchasing or selling real estate" includes one whose occupation is the purchasing or sale of real estate, or an employee of a business which purchases or sells real estate who is in a position of influence with that business.

Very truly yours,

A handwritten signature in cursive script that reads "Larry Blumberg". The signature is written in dark ink and is positioned above the typed name and title.

Larry M. Blumberg
Assistant Attorney General

LMB:rcp

MENTAL HEALTH: Transfer of proceedings under Chapter 229, Code of Iowa. §§ 229.6, 229.12, 229.14-16, 229.49, Supreme Court Rules of Civil Procedure, Rules 167-175. Rule 16 of the Supreme Court Rules under § 229.40, Code of Iowa, does not authorize transfer of involuntary hospitalization proceedings from one county to another after a hearing at which it was found that Respondent is seriously mentally impaired. Where transfer of an involuntary hospitalization proceeding is found, prior to hearing, to be in the best interests of Respondent, the judge or referee is not restricted to transferring the proceedings to the county of residence or the county where respondent is found. (Golden to Kiple, Judicial Hospitalization Referee, 8/17/79) #79-8-19(L)

August 17, 1979

Mr. James L. Kiple
Judicial Hospitalization Referee
Ottumwa, Iowa 52501

Dear Mr. Kiple:

You requested advice concerning the authority of a District Judge or Judicial Hospitalization Referee to change the venue of an involuntary hospitalization proceeding after a hearing at which the respondent was found seriously mentally impaired. You referred to a case where a matter was transferred to the county of respondent's residence, after a hearing in the county where the respondent was found. The Judicial Hospitalization Referee in the county of respondent's residence was to receive the medical officer's report required by Iowa Code § 229.14, order treatment, receive periodic reports, and make all further orders required by Iowa Code §§ 229.14, 229.15 and 229.16.

Evaluation of Iowa venue law, Iowa Code Chapter 229, and the Supreme Court Rules issued under Iowa Code § 229.40, suggests that there is no authority for such a post-hearing transfer. The proceedings may only be transferred, "in the best interests of the respondent" prior to hearing.

Under Iowa Code § 229.6 an involuntary hospitalization proceeding may be commenced either in the county of respondent's residence, or where the respondent is found. Venue in either court is proper and not subject to change under Iowa Rules of Civil Procedure, Rule 167. It would only be possible to get a change of venue under Rule 167 if other grounds such as mutual consent of the parties or prejudice were present.

Rule 16 of the Supreme Court Rules under § 229.40 provides:

[T]he hearing provided in Section 229.12, the Code, shall be held in the County where the application was filed unless the judge or referee finds that the best interests of the respondent would be served by transferring the proceedings to a different location.

This provision specifically refers to hearing transfer. The question is whether it authorizes a post hearing transfer.

Iowa cases construing venue rules, which permit transferring the place of trial from one county to another, have consistently held that the power to transfer place of trial does not authorize a change after trial. For example, in Neddermayer v. Crawford County, 190 Iowa 883, 175 N. W. 339 (1919), a trial was commenced and completed despite the existence of grounds for a change of venue. After the judge neglected to set damages, and a retrial was required, a change of venue was sought. The change request was rejected on the grounds that venue should not be changed after the original trial, unless new grounds for change arise. Another example is Maton v. Chicago Milwaukee Co., 67 Iowa 226, 25 N. W. 144 (1885), which denied a request for change of venue on a post-trial motion to change the trial record.

Iowa has also refused to recognize a claimed court power to change venue on the court's own motion for reasons of justice or expediency.

In Bennett v. Carey, 57 Iowa 221, 10 N. W. 634 (1881) a court sought to transfer venue of a case brought before it on the grounds that the case was part of another case which had been transferred already. The Iowa Supreme Court held that a court has no power to transfer venue of its own motion.

Further doubt that Supreme Court Rule 16 under § 229.40 authorizes post hearing transfer is raised by the provisions of §§ 229.13 - 15 concerning the medical officer's report and the periodic reports. The statute requires that the medical officer's report be given to the court and forwarded to the judge who issued the hospitalization order. See Iowa Code § 229.14, and 229.10, subsection 2. It is difficult to see how this scheme of giving the reports to the court issuing the hospitalization order is consistent with changing venue to another court after hearing.

Furthermore, these provisions concerning the reports are supported by sound policy, and do not appear to have been accidental. A Judge or referee who has attended the hearing at which the Respondent was found mentally impaired is likely to be better able to decide on future treatment orders after receiving the medical officer's report and the periodic reports, than a judge who must rely solely on the written record. It is difficult to reproduce demeanor or anxiety through a record.

Finally, there is little justification for construing Rule 16 to permit post-hearing transfer. Professor Randall P. Bezanson of the University of Iowa College of Law, a member of the Iowa Bar Association's Special Committee on Law and the Behavioral Sciences, and the joint Iowa Bar Association/Iowa Medical Association Committee on Civil Commitment Legislation, which assisted in the preparation of Chapter 229, was chairman of the advisory committee which drafted the Supreme Court Rules under § 229.40. In an article written by Professor Bezanson shortly after enactment of Chapter 229, Bezanson emphasized the linkage of the hearing and the later reports and orders. See Bezanson, "Involuntary Treatment of the Mentally Ill in Iowa, the 1975 Legislation," 61 Ia. L. Rev., 261, 347, 367, 371. This is strong evidence of the policy underlying Rule 16. Furthermore, the statutory rule on construction of statutes requires that where possible different enactments should be construed to avoid inconsistencies. See Iowa Code § 4.7. This suggests that Rule 16 should be construed to allow only prehearing transfers and should not be construed to allow separation of the hearing from the reports.

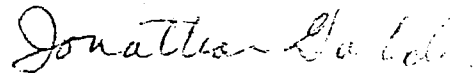
You also requested an opinion concerning where counties proceedings may be transferred. Even though matters can only be transferred prior to hearing, this question is still important. Rule 16 sets no limit as to where proceedings can be transferred, so long as the transfer would serve the best interests of the respondent. It might be argued that to the extent that this rule permits transfer to places other than the county of residence or the county where the respondent is found, it is inconsistent with § 229.6 which refers only to those two locations. This is probably incorrect. Section 229.6 refers to the place where the action is commenced and not to where it is heard. Under the venue transfer rule, Rule 171 of the Iowa Rules of Civil Procedure, courts are given broad discretion to choose new forums. Rule 171 states "[I]t shall order the trial held in a convenient county in the judicial district, or if the ground [for change of venue] applies to all such counties then of another judicial district . . ." Logic suggests that a similar flexible rule applies under Rule 16 of the Supreme Court Rules under § 229.40. There are numerous reasons a respondent might desire a hearing in another county. These could include the convenience of respondent's physician, possible prejudice, or publicity. Courts should be given discretion in transferring proceedings based on the reasons for the transfer. The judge should not be limited to the counties named in § 229.6.

Mr. James L. Kiple

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A final question is what a judge or referee can do when presented with an urgent involuntary hospitalization request which he feels should be handled in another county. Under such circumstances there is nothing in the statute or rules to prevent the judge or referee from issuing an emergency hospitalization order under § 229.11. Thereafter he could order transfer of the proceedings for hearing.

Yours truly,

A handwritten signature in cursive script that reads "Jonathan Golden".

Jonathan Golden
Assistant Attorney General

JG/jam

MONEY AND INTEREST: Chapter 1190, §12(3), 67th G.A., 1978 Reg. Session; §§535.4, §§535.8 (3), Loan charges limited. Lenders, Mortgages, Pledged Savings accounts. A Lender may not, as a condition of making a loan, require a borrower to place money or other income - producing assets on deposit with or in the possession or control of the lender or some other person if the effect is to increase the yield to the lender with respect to that loan. (Hagen to Pringle, Acting Supervisor, Savings and Loan Association, State Auditor's Office, 8/17/79) #79-8-18 (L)

August 17, 1979

Mr. John A. Pringle, Acting Supervisor
Savings and Loan Association
State Auditor's Office
L O C A L

Dear Mr. Pringle:

You have requested an opinion of this office concerning the effects of Chapter 1190, Section 12(3) of the Acts and Joint Resolutions passed during the 1978 Regular Session of the 67th General Assembly. In particular, you ask whether pledged saving accounts are prohibited by this new statute.

The provisions of §12(3) of Chapter 1190, now permanently enacted as §535.8(3), The Code 1979, as of July 1, 1979, by Senate File 158, 1979 Session, Section 20 et seq., state that:

3. A lender shall not, as a condition of making a loan as defined in this section, ¹ require the borrower to place money, or to place property other than that which is given as security for the loan, on deposit with or in the possession or control of the lender or some other person if the effect is to increase the yield to the lender with respect to that loan; provided that this subsection shall not prohibit a lender from requiring the borrower to deposit money without interest with the lender in an escrow account for the payment of insurance premiums, property taxes and special assessments payable by the borrower to third persons. Any lender who requires an escrow account shall not violate the provisions of paragraph a of subsection 1 of section 507B.5.

The legislature's clear intent, by increasing the usury rate, was to limit lenders from receiving more than that permissible under the new increased rate. Section 535.4 provides:

No person shall, directly or indirectly, receive in money or in any other thing, or in any manner, any greater sum or value for the loan of money, or upon contract founded upon any sale or loan of real or personal property, than is in this chapter prescribed.

A lender may require some types of property to be pledged by the borrower as additional security or as a condition for making a mortgage loan for a single or two-family dwelling to be occupied by the borrower. If the pledged assets are of the type that generate additional yields to the lender, the practice is prohibited. ²

¹ Senate File 158, section twenty-two (22) amended §535.8(1) effective July 1, 1979 to read:

1. As used in this section, the term "loan" means a loan of money which is wholly or in part to be used for the purpose of purchasing real property which is a single-family or a two-family dwelling occupied or to be occupied by the borrower. "Loan" includes the refinancing of a contract of sale, and the refinancing of a prior loan, whether or not the borrower also was the borrower under the prior loan, and the assumption of a prior loan.

² A limited exception is contained in sections 4-6 of House File 658, Acts of the 68th General Assembly, 1979 Session, which specifically authorizes pledged funds or savings accounts in the case of "Graduated Payment Mortgages" as defined in §4 of the Act.

It is immaterial that the lender requires a pledged deposit solely for the purpose of additional security, with no intent to increase the yield from the loan itself. Only non-liquid property that would not result in additional yields to the lender can be pledged to the lender as additional security for a loan.

You cite three specific examples in which the lender appears to require the borrower directly, or another party interested in the loan transaction, to place money on deposit with the lender as a condition precedent to closing the loan.

(1) The borrower obtains a conventional mortgage loan. Because of a high loan-to-value ratio, the lender may require the borrower to pledge a savings account as security for the mortgage loan.

The effect of the pledged savings account would be to increase the yield to the lender with respect to that loan, and this would be prohibited.

(2) The borrower requests a conventional mortgage loan. His income-to-loan-payment ratio is not within an acceptable range as established by the lender. The lender may utilize the "FLIP" mortgage payment method to underwrite this loan. This method, in essence, is based upon an agreement between the parties whereby a portion of the down-payment is set up in a pledged savings account to supplement the borrower's payment over a specific time period, [e.g.], five years. At the end of five years, it is assumed the borrower's income will support the total loan payment. Consequently, it would be necessary to increase the initial loan amount to compensate for that portion of the down-payment deposited to the pledged savings account.

Under this arrangement, the lender imposes a condition of making the loan by requiring the seller of the property to pledge a portion of the down-payment from the borrower, and increasing the amount loaned to the borrower-buyer in compensation. The buyer-borrower must agree to the pledge of a portion of the down-payment and borrow a greater amount than that required to purchase the property. The effect of this arrangement is clearly to increase the yield to the lender. The lender cannot circumvent the strictures of the statute by reversing the parties, and technically requiring the pledged account from the seller. Under §§535.4 and 535.8(3), this practice would be prohibited.

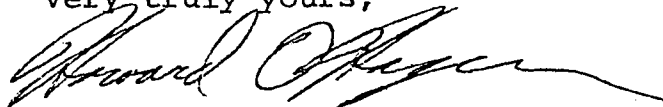
Mr. John A. Pringle, Acting Supervisor
Savings and Loan Association
State Auditor's Office

Page 4

3. Similar to that mentioned in number 2, is an arrangement whereby the seller pledges a savings account to supplement the borrower's payment for a specific period of time until, hopefully, the borrower's income has increased. It would be difficult to establish that the savings pledged by the seller was not the result of a higher sales price.

Again, the lender, while technically requiring the pledged savings from the seller, is in essence requiring the deposit from the borrower (as reflected in the higher sales price) as a condition to make the loan, The effect would be to increase the yield to the lender, and this practice would be prohibited.

Very truly yours,



HOWARD O. HAGEN
Assistant Attorney General

HOH:ms

COUNTY AND COUNTY OFFICERS: Hospital Trustees - Chapter 347, Code 1979. Chapter 347 does not preclude the operation of a county health care facility in the absence of a county public hospital. Such a facility may receive a tax levy under § 347.7. The county board of hospital trustees may supervise the operation of such a facility. (Bennett to Kintigh, Wapello County Attorney 8/17/79) #79-8-17(L)

August 17, 1979

Thomas F. Kintigh
County Attorney
Wapello County Court House
Ottumwa, Iowa 52501

Dear Mr. Kintigh:

Reference is made to your request for an opinion concerning the supervision and financing of the Sunnyslope Care Center of Ottumwa, Iowa.

The questions which you presented are:

1. "May Sunnyslope receive a tax levy under Section 347.7 of the Iowa Code where it is no longer operated as a tuberculosis sanatorium?"
2. "May Sunnyslope continue to operate under the supervision of the Wapello County Board of Trustees pursuant to Section 347.7 of the Iowa Code?"

Chapter 347 of the Iowa Code gives any county in the state the authority to establish a county public hospital. Section 347.7 provides for a tax to be levied for the erection and equipment of the hospital and also for an additional levy to be used for the improvement, maintenance and replacements of same. Section 347.14(6) allows the board of hospital trustees to elect to operate the hospital as a tuberculosis sanatorium which is what they opted to do in this particular instance. Sunnyslope was operated as a sanatorium until 1966 when it was converted to an extended care facility. Sunnyslope is currently licensed by the Iowa State Department of Health as an Intermediate Care Facility.

Thomas F. Kintigh Letter

Page 2

Section 347.14(2) of the Code gives the board of hospital trustees the power to "operate a health care facility as defined in section 135C.1 in conjunction with the hospital." More specifically, § 347.26 provides that:

"in any county where there is a county hospital in existence, a health care facility as defined in section 135C.1 may be established to be operated in conjunction therewith and all of the provisions of this chapter and all the proceedings authorized thereby relating to the hospital buildings and additions thereto, shall apply to erecting, equipping, and procuring sites for such facilities and additions thereto, as well as for improvements, maintenance, and replacements of such facilities."

It may be contended that the abovementioned sections of the law prohibit the use of tax levies for the operation and financing of a health care facility unless a county hospital is concurrently in existence. One might argue that the legislature intended that a health care facility could not exist in the absence of a county hospital if a strict interpretation of the phrase "in conjunction with" is made. That particular question arose in 1970 when an opinion was requested concerning the operation of the Dubuque County Nursing Home. In response to that request this office held in an opinion dated October 30, 1970 that the use of the phrase "in conjunction with the hospital" in § 347.14(12) "does not preclude the trustees from using the hospital building as a nursing home, when, for one reason or another the operation of the hospital has ceased." 1970 Op. Att'y. Gen. 468.

The legislature has been aware for almost a decade of this office's interpretation of the phrase "in conjunction with the hospital" and has not acted to change that law. Because legislation was not enacted to prohibit the operation of a county health care facility in absence of a county public hospital it is apparent the legislature agreed with the interpretation made.

Because the operation of Sunnyslope as an Intermediate Care Facility has been determined to be a proper exercise of an optional power granted the board of trustees, Sunnyslope may receive a tax levy under § 347.7 of the Code.

In answer to your second question, the board of trustees would be the proper supervisory body for Sunnyslope. The trustees are

Thomas F. Kintigh Letter

Page 3

given broad powers and duties by Chapter 347 and among such powers is that of establishing a county health care facility as defined in Chapter 135C. That Chapter also gives the board the power to operate and manage such a facility.

Both questions that you posed in your opinion request must thus be answered in the affirmative.

The October 30, 1970, Attorney General's Opinion is enclosed for your convenience.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Barbara Bennett", with a long horizontal flourish extending to the right.

Barbara Bennett
Assistant Attorney General

BB/css
Enclosure

COUNTIES AND COUNTY OFFICERS: Article III [§39A] of the Iowa Constitution, §§19A.3, 20.7(6), 79.1, 332.3(10) and 340.4, The Code 1979. County boards of supervisors have authority to establish sick leave policy for county employees. (Hyde to Kane, Jackson County Attorney, 8/16/79) #79-8-16(L)

August 16, 1979

Mr. Mike Kane
Jackson County Attorney
108 1/2 West Platt Street
Maquoketa, Iowa 52060

Dear Mr. Kane:

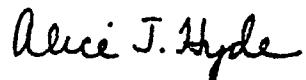
You have requested an opinion of this office as to the legality of the sick leave policy currently applicable to Jackson County employees. As factual background, you informed us that under this policy, county employees accrue sick leave at the rate of two days per month for each full month of service to a maximum of ninety (90) days. After an employee has accrued ninety (90) days, the county pays the employee, at his or her regular rate of pay, one-half of the sick leave time accumulated in excess of ninety days. The policy is not the result of any collective bargaining agreement.

County boards of supervisors are empowered by §332.3(10), The Code 1979, "[t]o fix the compensation for all services of county and township officers not otherwise provided by law", and by §340.4, to ". . . fix all compensation for extra help and clerks." The fixing of compensation includes the power to determine salary and benefits, including vacation and sick leave, earned by an employee.

Under Chapter 20, The Code 1979, the Iowa Public Employment Relations Act, the county board of supervisors, as the governing body which determines the policies for the operation of the political subdivision "public employer", has exclusive authority under §20.7(6), in addition to all powers, duties and rights established by constitutional provision, statute, ordinance, charter or special act, to "[d]etermine and implement methods, means, assignments and personnel by which the public employer's operations are to be conducted." Resolution of the county board of supervisors setting sick leave policy for county employees would be within the authority of the board pursuant to its general powers. See McMurry v. Board of Supervisors of Lee County, 261 N.W.2d 688,691(Iowa 1978).

With the 1978 adoption of the County Home Rule Amendment, Article III [Section 39A] of the Iowa Constitution, however, counties need no longer seek express statutory authority for each exercise of governmental power in the determination of local affairs, where such exercise is not inconsistent with state law. See 1979 O.A.G. (Miller and Hagen to Danker, et al., April 6, 1979). The setting of sick leave policy for county employees is a determination of local affairs. County employees do not come within the purview of the state merit employment system created by Chapter 19A, The Code 1979, which is limited in its application "to all employees of the state" with certain enumerated exceptions, §19A.3. Section 79.1, delineating sick leave policy for state employees, is further limited in application to "permanent full-time employees of state departments, boards, agencies, and commissions". There appears to be no statutory prohibition restricting the county board of supervisors from establishing a sick leave policy currently in use in Jackson County. See 1970 O.A.G. 462.

Very truly yours,



ALICE J. HYDE
Assistant Attorney General

AJH:sh

SOCIAL SERVICES: AFDC BENEFITS: Unemployed Parents Program: §§ 239.2(4), 17A.4(2), 17A.5(2), Code of Iowa, 1979; § 407 Social Security Act, 42 U.S.C. § 607. The controlling federal statute, 42 U.S.C. § 607 relating to eligibility for AFDC benefits for unemployed fathers is based on gender and is not substantially related to the achievement of any important governmental interest. It was declared unconstitutional by the U.S. Supreme Court. In view of the fact that the Department of Social Services cannot, because of federal policy continue the unemployed fathers program, the Department may extend the program to all families made needy by the unemployment of a parent. (Robinson to Williams, Acting Director, Department of Social Services, 8/16/79) #79-8-14(L)

August 16, 1979

Mrs. Catherine G. Williams
Acting Commissioner
Iowa Department of Social Services
Fifth Floor, Hoover Building

L O C A L

Dear Mrs. Williams:

You recently wrote our office and asked the following question:

On July 11, 1979, we received Action Transmittal SSA-AT-79-26(OFA), dated July 3, 1979, in which HEW communicated the Supreme Court Decision in Califano vs. Westcott. See attached copy.

The Supreme Court decision extended benefits of the AFDC - Unemployed Father program to similarly situated unemployed mothers, removing the gender distinction. On page two of this transmittal is the statement that "state implementation of the Court ruling may not be delayed".

In view of the fact that the Code of Iowa, Chapter 239.2, provides only for Aid to Dependent Children - Unemployed Father, can Iowa legally extend ADC benefits to similarly situated unemployed mothers?

It is clear that Iowa can no longer receive federal funds for that part of its AFDC program relating to unemployed parents unless the benefits which have been provided to families made needy by the unemployment of the father are provided in the same amounts and under the same standards to families made needy by the unemployment of the mother. Califano v. Westcott,

1979, ___ U.S. ___, 99 S.Ct. 2655, 2659-2660, ___ L.Ed.2d ___. This action was brought by two unemployed mothers challenging Section 407 of the Social Security Act, 42 U.S.C. § 607, which provides benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father but does not provide such benefits when the mother becomes unemployed. The plaintiffs commenced their action in the United States District Court for the District of Massachusetts, naming as defendants the Secretary of HEW and the Commissioner of the Massachusetts Department of Public Welfare. They alleged that the statute and regulations discriminated against them on the basis of their gender in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The District Court certified the case as a class action and found that the gender qualification of the statute was not substantially related to the achievement of any important governmental interest and accordingly declared it unconstitutional. The United States Supreme Court affirmed the District Court decision. As a remedy, the Court extended the benefits of the AFDC-Unemployed Father's program to similarly situated unemployed mothers and thereby removed the gender distinction. With regard to the extension power of the Court, the United States Supreme Court stated at pages 2663-2664 of 99 S.Ct.:

'Where a statute is defective because of underinclusiveness,' Mr. Justice Harlan noted, 'there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.' Welsh v. United States, 398 U.S. 333, 361, 90 S.Ct. 1792, 1807-1808, 26 L.Ed.2d 308 (1970) (concurring opinion). In previous cases involving equal protection challenges to underinclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course. See e.g., Jiminez v. Weinberger, 417 U.S. 628, 637-638, 94 S.Ct. 2496, 2502-2503, 41 L.Ed.2d 363 (1974); Frontiero v. Richardson, 411 U.S. 677, 691, and n. 25, 93 S.Ct. 1764, 1772, and n. 25, 36 L.Ed.2d 583 (1973) (plurality opinion). Indeed, this Court regularly has affirmed district court judgments ordering that welfare benefits be paid to members of an unconstitutionally excluded class. [citations omitted]

The District Court ordered extension rather than invalidation by way of remedy here, and equitable considerations surely support its choice. Approximately 300,000 needy children currently receive AFDC-UF benefits, see 42 Soc.Sec.Bull. 78 (Jan. 1979), and an injunction suspending the program's operation would impose hardship on beneficiaries whom Congress plainly meant to protect. The presence in the Social Security Act of a strong severability clause, 42 U.S.C. § 1303,⁸ likewise counsels against nullification, for it evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse. [footnote omitted]

In view of the fact that the Department cannot, because of controlling federal policy, continue the program as it has been operating, your question becomes whether you should extend the program to all families made needy by the unemployment of a parent or whether you should discontinue the program altogether. The question is primarily one of legislative intent.

Section 239.2(4), as written, provided benefits only for families made needy by the unemployment of a father. As we have noted, that provision cannot be implemented. The status quo is not an available option.¹ It, therefore, becomes necessary to determine whether the legislature has manifested a preference for an extended program or for no program. For the same reasons that the United States Supreme Court concluded that Congress would have preferred an extended program, set

¹In our opinion, the gender-based distinction in 239.2(4) is identical to the provision challenged in Westcott and is plainly unconstitutional. However, neither this office nor the Commissioner of Social Services can authoritatively declare a statute unconstitutional. Only a court can do that. Ordinarily an agency cannot act inconsistently with a statutory limitation or mandate because the agency or this office concludes the statute is unconstitutional. See OAG # 79-3-13 (Iowa franchise tax unconstitutional but Department of Revenue lacks authority to issue refunds absent a judicial declaration of invalidity). Here, however, because federal funds will not be available to maintain the status quo, the agency is forced to elect between two alternatives to the status quo. Thus, the Department of Social Services faces a very different situation from that confronted by the Department of Revenue with respect to the franchise tax.

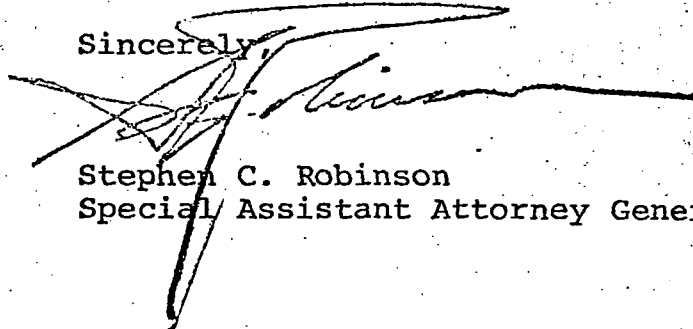
for the above, we conclude that the Iowa legislature would prefer an extended program. Indeed, because the Iowa legislature was simply deciding whether to cooperate in a federal program that contained the gender-based limitation, rather than making an explicit choice on its own initiative to so limit the program, it seems even more appropriate to conclude the Iowa legislature would have preferred extension to no program.²

We have reviewed Action Transmittal SSA-AT-79-26 (OFA) July 3, 1979 and the Department's action should comply with this directive. At pp. 3-4, we find the following which is significant:

Consistent with the Supreme Court's decision, the Department [HEW] considers all State AFDC-UF plans to be amended -- effective June 25, 1979 -- to provide for an AFDC-Unemployed Parents program in accordance with this Program Instruction.

Because the Department is acting under direction from HEW based on an authoritative Supreme Court case, public notice and participation in implementing rules would appear unnecessary and contrary to the public interest in that federal funding could be jeopardized if the normal rulemaking process were followed. Therefore, it would appear that implementing rules may be filed without notice and hearing under § 17A.4(2). Since the rules confer a benefit on the public or some segment thereof, they may become effective immediately upon filing with the administrative rules coordinator, § 17A.5(2).

Sincerely,



Stephen C. Robinson
Special Assistant Attorney General

SCR/tjb

²The State of Iowa is not, of course, obligated to participate in the AFDC-Unemployed Parent program and the legislature may reconsider its earlier action at any time.

STATE OFFICERS AND DEPARTMENT: State Historical Department and its Division of Historical Museum and Archives is authorized to administer a federally funded project concerning county and municipal records and may provide assistance to local political subdivisions or private institutions in the area of record preservation and archival functions. Chapter 303, Code of Iowa, 1979. (Hagen to Musgrove, Director, Division of Historical Museum and Archives, State Historical Department, 8/15/79) #79-8-13(L)

August 15, 1979

Mr. Jack W. Musgrove, Director
Historical Museum and Archives Division
State Historical Department
L O C A L

Dear Mr. Musgrove:

We have received your letter of June 7, 1979, requesting an opinion of this office regarding the authority of the Director ("Director") of the Division of Historical Museum and Archives ("Division") of the State Historical Department ("Department") with respect to county and municipal records. As background you informed us that on May 22, 1979, the State Historical Board ("Board") transferred authority to administer a federally funded municipal records survey to the Division from the Division of State Historical Society. The one-year project, to begin July 1, 1980, will be supported entirely by a grant from the National Historical Publications and Records Commission. Your specific questions concerning the effect of provisions of Chapter 303, The Code 1979, and its relationship to local records surveys and projects were as follows:

1. Does §303.12 limit the authority of the Director in administration of any grant project dealing specifically with county and municipal records? Does the Department have any statutory authority over records of any local political subdivision in Iowa not voluntarily deposited with the Director in the state archives?
2. What effect does County and Municipal Home Rule have on administration by the Department of federally funded projects concerning local records?
3. Does the Director or any division of the Department have authority to administer grant programs designed for local political subdivisions?
4. Does Chapter 303 limit the Division from providing technical or professional advice or assistance in the form of seminars or workshops to interested local political subdivisions or private institutions in the area of records preservation and archival functions?

Section 303.12, The Code 1979, defines archives as "those documents, books, papers, photographs, sound recordings, or similar material produced or received pursuant to law in connection with official government business" which are no longer needed and which have been appraised by the Director as having value to warrant preservation. Section 303.12 continues:

The director of the division of historical museum and archives is the trustee and the custodian of the archives of Iowa, except that archives do not include county or municipal archives unless they are voluntarily deposited with the director with the written consent of the director.

While this section should be construed as primarily benefitting the Director by limiting the power of local government to transfer its old records, documents, etc. to the Director without his consent, and appraisal of their value and proper classification, it does specifically state that county or municipal records that could be defined as archives under the statute do not automatically come into custody of the Director, but must be "voluntarily deposited." Thus, if administration of the federally funded project requires the Director to take custody or possession of the local archives, it would be necessary for the local political subdivision to grant its permission, i. e., volun-

tarily deposit the archives upon written consent of the Director. The Director would have the power to administer a project that would not require custody of local records. See §303.6(3), which empowers the Director to "[c]ollect, preserve, organize, arrange, and classify works of art, books, maps, charts, public documents, manuscripts, newspapers, and other objects and materials; [emphasis added]; Section 303.6(9), "[p]erform such other duties as may be imposed by law or prescribed by the rules of the board."

Further authority over county and municipal archives could be extended to the Director by the Board under its powers established in §303.5:

- (1) Establish policy for the division of historical museum and archives, the division of the state historical society, and the division of historic preservation, eliminating duplication of services whenever possible.
- (6) Coordinate activities of the department with federal, state, and local agencies.
- (12) Promulgate rules for the effective and efficient operation of the department subject to the provisions of Chapter 17A.
- (14) May enter into agreements . . . to establish multicounty area research centers, which are in addition to but do not duplicate archives as defined in Section 303.12. An area research center shall serve as the depository for the archives of counties and municipalities and for other unpublished original resource material of a given area to be designated in the agreement.

Short of requiring local governments to turn over archives, the Board and Director could review, study, survey, classify or otherwise use local records or archives.

The Municipal Home Rule Amendment, Article III [Section 38A] and County Home Rule Amendment, Article III [Section 39A] of the Iowa Constitution, while negating the need for county and municipal governments to seek express statutory authority for each exercise of governmental power, limit such exercise to those that are a determination of local affairs, and not inconsistent with state law.

See 1979 O.A.G. (Miller and Hagen to Danker, et al. April 6, 1979). Chapter 303 extends powers to and imposes duties upon the Board and Department providing for extensive state involvement in the creation and implementation of policy and programs concerning the history of the state. The Board is specifically directed to coordinate the activities of any local agency with other federal and state agencies and the Department. Section 303.5(6). The broad and comprehensive language of Chapter 303 in creating and regulating the Department evinces legislative intent that local legislation not expressly authorized by statute which would impinge upon the authority and activities of the Department, and would be deemed inconsistent with the state law, would be invalid.

The Board is divided into three divisions pursuant to §303.3, and is directed to establish policy for each division, eliminating duplication of services whenever possible. Section 303.5(1). Each division director "shall have [his/her] powers and duties, under the direction of the board", and shall specifically "perform such other duties as may be imposed by law or prescribed by the rules of the board". Sections 303.6, 303.7, 303.8. The authority of the Board to determine the appropriate division to administer a grant or project does not appear to be restricted by the statutory delineation of division functions.

Finally, we can find no prohibition or limitation upon the Division preventing the provision of technical or professional advice or assistance in the form of seminars or workshops concerning records preservation and archival functions to interested local political subdivisions or private institutions. Authority for such an undertaking would come under the direction of the Board, and the Division's power to perform duties prescribed by them. Section 303.6(9).

In conclusion:

1. The Director has authority to administer a federally funded project pertaining to county and municipal archives, but will have to secure permission from local governments to take custody of local records;
2. Municipal and County Home Rule would not affect the authority of the Department;
3. The Board may grant authority to any division to administer grants or projects, whether or not that division or any division is so authorized by statute;

4. The Division is not limited from providing assistance or advice in the form of seminars or workshops on records preservation and archival functions.

Very truly yours,



HOWARD O. HAGEN
Assistant Attorney General

HOH:sh

STATE OFFICERS AND DEPARTMENTS: BOARD OF REGENTS: Section 720-1.5 (262) IAC. Where the liability for damage caused by a motor vehicle accident involving a student and a regents institution vehicle has not been established by consent or legal process, no authority exists for the institution to withhold official transcripts of the student. (Hagen to Angrick, Citizens' Aide/Ombudsman, 8/15/79) #79-8-12(L)

August 15, 1979

Mr. William P. Angrick II
Citizens' Aide/Ombudsman
Statehouse
L O C A L

Dear Mr. Angrick:

You have re-submitted a request for an Attorney General opinion which you had made in March 1976. The questions you propound are as follows:

"1. Where a student is involved in a motor vehicle accident with a regents' institution vehicle, and there has been no adjudication or admission of liability, can the institution add the amount of damage to the regents' vehicle to the student's account and later withhold official transcripts if the amount is not paid?

"2. If the answer to the above questions is 'yes', would the institution first be required to conduct a hearing on this issue, if requested by the student, before adding the amount to the account?"

It is our opinion that in the specific factual situation you describe, the answer to your first question is no. If a student is involved in a motor vehicle accident with a regents' institution vehicle, the liability for damage must be established in the same way as that of any other motor vehicle accident.

You mention a portion of a regents rule that "A state board of regents institution may withhold official transcripts of the

William P. Angrick, II
Citizens' Aide/Ombudsman
Page 2

academic record of a person until any delinquent accounts owed by the person to an institution or any affiliated organization for which an institution acts as fiscal agent has been paid". Section 720-1.5(262) Iowa Administration Code.

Where liability for damage caused by a motor vehicle accident had not been established by consent or legal process, no "delinquent account" or other obligation would exist and there would be no ground upon which the institution could withhold transcripts. We issue this opinion on the very narrow factual situation you describe and do not intend to cast doubt upon the portion of the regent's rule quoted above in its normal application.

Because the answer to your first question is no, a response to the second is unnecessary.

Very truly yours,



HOWARD O. HAGEN
Assistant Attorney General

HOH/nay

STATE OFFICERS AND DEPARTMENTS: Commission on the Aging. 42 U.S.C. § 3001 et. seq.; 42 U.S.C. §§ 3025(a)(1)(C) and 3026(a); 45 CFR §§ 1321.13(a)(7), 1321.34, and 1321.51(a); §§ 25A.2(a) and 249B.4(2), 1979 Code of Iowa; §§ 20-1.2(2)(c), 20-1.2(2)(e), 20-1.2(2)(i), 20-1.2(2)(j), and 20-1.8(3), Iowa Administrative Code; 1978 OAG Blumberg to Bowles (February 2,); 1979 OAG, McDonald to Bowles (April 3).

Area agencies on aging are subject to the direct control and supervision of the Commission on the Aging with respect to program planning and execution of the area plans.

The Commission on the Aging also exercises indirect supervision of the administration of the area agencies through the Commission's role in the planning process, and through its evaluation of the execution of the area plans. The Commission on the Aging should not attempt to control day-by-day administration of the area agencies. Although area agencies on aging should not be regarded as "state agencies" per se, the area agencies will often be bound by laws prescribing restrictions for state agencies.

This result occurs by virtue of the fact that the Commission on the Aging is a "state agency" and must heed laws that bind state agencies while it coordinates the activities of the area agencies. (McDonald to Bowles, Iowa Commission on the Aging, 8/3/79) #79-8-2(L)

Mr. Glenn R. Bowles, Executive Director
Iowa Commission on the Aging

August 3, 1979

LOCAL

Dear Mr. Bowles:

We have received your letter of May 11, 1979, which requests further clarification of an opinion dated April 3, 1979, to the Commission on the Aging from this office. You have posited two questions for clarification, as follows:

1. Does the Commission on the Aging have direct supervision and control over all activities of area agencies on aging, including administration, program planning and execution?
2. Are the area agencies on aging state agencies, thereby requiring them to function as substate agencies of the Commission?

The Commission on the Aging is responsible for the coordination of all state activities related to the purposes of the Older Americans Act (42 U.S.C. §3001, et. seq.). See 42 U.S.C. § 3025(a)(1)(C); §249B.4(2), 1979 Code of Iowa; § 20-1.2(2)(c), Iowa Administrative Code. Such coordination naturally includes coordination of the administration of all such activities. See also 45 CFR § 1321.34.

The coordination of the activities of the area agencies by the Commission on the Aging begins by requiring the area agencies to submit a plan for delivery of services to be approved by the Commission. See 42 U.S.C. § 3026(a); § 20-1.2(2)(i), Iowa Administrative Code. The Commission then monitors and assesses the implementation of each area plan. See

45 CFR § 1321.13(a)(7); 45 CFR § 1321.51(a). As a result of this ongoing monitoring, area agencies are subject to quarterly evaluations by the Commission on the Aging. See § 20-1.8(3), Iowa Administrative Code.

The Commission on the Aging is directed to make recommendations to the area agencies for the purposes of coordinating the area agencies' activities. See § 249B.4(2), 1979 Code of Iowa; § 20-1.2(2)(e), Iowa Administrative Code. Such recommendations are enforceable through the Commission's authority to distribute or withhold funds for the area agencies. See § 20-1.2(2)(j), Iowa Administrative Code.

Therefore, area agencies on aging are subject to supervision and control by the Commission on the Aging with respect to all activities related to the purposes of the Older Americans Act. The Commission supervises area agency program planning by approving the area plan. The Commission also supervises the execution of the area plan by monitoring and evaluating such execution.

However, the role of the Commission on the Aging should not be interpreted as granting the Commission authority to control the day-to-day administration of the area agencies. The role of the Commission is rather to coordinate the execution of the area plans to insure that the area agencies are effectuating the provisions of the area plans, and the provisions of the Older Americans Act.

Therefore, the Commission on the Aging exercises indirect control and supervision of the administration of the area agencies through its role in the planning process, and through its evaluation of the execution of the area plans. In contrast, the responsibility for the day-to-day administration is vested in the area agencies.

Area agencies function as quasi-state agencies. The definition of "state agency" is found in § 25A.2(1), 1979 Code of Iowa, and reads as follows:

1. "State agency" includes all executive departments, agencies, boards, bureaus, and commissions of the state of Iowa, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the state of Iowa, whether or not authorized to sue and be sued in their own names. This definition shall not be construed to include any contractor with the state of Iowa.

Mr. Glenn R. Bowles

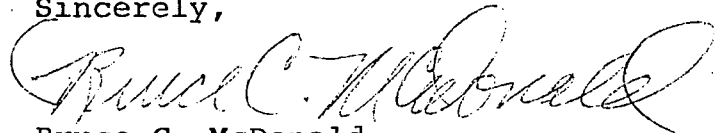
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Because the relationship of the Commission on the Aging and the area agencies is contractual in nature, area agencies on aging are not "state agencies" within the meaning of Chapter 25A of the Code of Iowa. Furthermore, in a former opinion of the Attorney General issued to you (Blumberg to Bowles, February 2, 1978), we stated that area agencies were not "state agencies" within the meaning of Chapter 25A.

However, because the law states that the area agencies are subject to the supervision and control of the Commission on the Aging, and because the commission is a "state agency", the area agencies may often find themselves bound by restrictions prescribed in laws affecting state agencies. This situation arises because the Commission coordinates fiscal and programming policy for the area agencies, and the Commission must abide by statutes that bind state agencies. (i.e., reimbursement for mileage expenses; see OAG, McDonald to Bowles, April 3, 1979).

In summary, area agencies on aging are subject to the direct control and supervision of the Commission on the Aging with respect to program planning and execution of the area plans. The Commission on the Aging also exercises indirect supervision of the administration of the area agencies through the Commission's role in the planning process, and through its evaluation of the execution of the area plans. The Commission on the Aging should not attempt to control day-by-day administration of the area agencies. Although area agencies on aging should not be regarded as "state agencies" per se, the area agencies will often be bound by laws prescribing restrictions for state agencies. This result occurs by virtue of the fact that the Commission on the Aging is a "state agency" and must heed laws that bind state agencies while it coordinates the activities of the area agencies.

Sincerely,



Bruce C. McDonald
Assistant Attorney General

BCM/tjb

An Official Opinion
 From the Office of
 THOMAS J. MILLER
 Attorney General of Iowa

September 28, 1979

STATE OFFICERS AND DEPARTMENTS: Interpretation of substance abuse department appropriation. 1979 Session, 68th G.A., H.F. 765. Monies transferred over to the general fund from the military service tax credit fund under §2 of 1979 Session, 68th G.A., H.F. 765, must be applied to the funding of substance abuse programs. The monies so transferred are to be used to satisfy the appropriation in §1 of the same act for such programs. However, the monies so transferred may not be used to fund such programs after June 30, 1981, absent future authorization by the legislature. (Haskins to Carr, State Senator, 9-28-79) #79-9-27

The Honorable Robert Carr, State Senator: You have asked our opinion regarding 1979 Session, 68th G.A., H.F. 765 (hereafter the "Act"). The Act provides:

Section 1. There is appropriated from the general fund of the state to the Iowa department of substance abuse for each fiscal year of the fiscal biennium beginning July 1, 1979 and ending June 30, 1981 the following amounts, or so much thereof as is necessary, to be used for the purposes designated:

	1979-1980 Fiscal Year	1980-1981 Fiscal Year
1. For salaries and support of not more than twenty-seven point six full-time equivalent positions in the fiscal year beginning July 1, 1979 and not more than twenty-six point eight full-time equivalent positions in the fiscal year beginning July 1, 1980, maintenance and miscellaneous purposes	\$ 142,680	\$ 128,713
2. For substance abuse program grants ..	\$ 2,265,000	\$ 2,265,000

Sec. 2. The state comptroller shall on July 1, 1979 transfer to and deposit in the general fund of the state four million five hundred thousand (4,500,000) dollars from the military service tax credit fund created in section four hundred twenty-six A point one (426A.1) of the Code. The state comptroller shall on July 1, 1980 transfer to and deposit in the general fund of the state two million (2,000,000) dollars from the military service tax credit fund created in section four hundred twenty-six A point one (426A.1) of the Code. It is the intent of the general assembly that funds transferred under this section be used to fund substance abuse programs under section one (1) of this Act.

Sec. 3. Federal grants to and federal receipts of the Iowa department of substance abuse are appropriated for the purposes set forth in the federal grants or receipts.

As can be seen, §1 of the Act appropriates from the general fund certain sums to the Iowa Department of Substance Abuse (hereafter the "department") over a period of two fiscal years, from July 1, 1979, to June 30, 1981. Section 2 of the Act obligates the Comptroller to transfer to the general fund certain sums from the military service tax credit fund and contains a statement of intent that funds so transferred are to be used by the department to fund substance abuse programs.

You ask whether the funds appropriated by §1 of the Act to the department are in addition to those which the department will receive by virtue of §2 of the Act for its substance abuse programs, or whether the funds appropriated in §1(2) for substance abuse programs are to be satisfied out of those brought over to the general fund under §2 from the tax credit fund for such programs. We believe that the legislature intended the latter, namely, that funding under §1(2) for substance abuse programs is to be made from monies brought over from the

general fund under §2. Monies allocated under §2 for substance abuse programs are not in addition to the appropriation for such programs in §1(2). Hence the appropriation of §1(2) must be satisfied out of the funds made available by §2.

The above conclusion assumes the answer to another of your questions, viz., whether the money so brought over from the military service tax credit fund must be allocated by the comptroller to the department for substance abuse programs, as opposed to other purposes. We believe that §2 of the Act is clear that monies brought over by virtue of §2 must be applied to substance abuse programs of the department. The language of §2 evinces that the comptroller has no choice in this matter. The statement of the legislature as to its intent is equivalent to direct statutory language in this context. *Cf. Welden v. Ray*, 229 N.W.2d 706, 710 (Iowa 1975) (legislature may specify purposes for which money is spent).

You further ask whether the monies brought over to the general fund from the military service tax credit fund by virtue of §2 are available for funding of substance abuse programs after the expiration of the period of the two fiscal years set forth in §1. As indicated, those fiscal years end on June 30, 1981. The statement of intent in §2 provides that the money brought over is to be for substance abuse programs "under Section one (1) of this Act." However, the programs under §1 are funded only for the two fiscal years provided therein, that is, until June 30, 1981. This implies that the monies available in the general fund by virtue of §2 are not to be used to fund substance abuse programs after the expiration of those two fiscal years on June 30, 1981. Of course, this does not preclude the legislature in the future from making those monies available for such programs after that date.

To recapitulate, monies transferred over to the general fund from the military service tax credit fund under §2 of the Act must be applied to the funding of substance abuse programs. The monies so transferred are to be used to satisfy the appropriation in §1 of the Act for such programs. However, the monies so transferred may not be used to fund such programs after June 30, 1981, absent future authorization from the legislature.

MUNICIPALITIES: Fire Protection--§ 364.16, § 368.20(2) and § 28E.4, The Code 1979. A city has a duty to provide fire protection for all areas within its corporate limits. (Mueller to Welsh, State Representative, 9/28/79) #79-9-26(L)

September 28, 1979

Mr. Joe Welsh
State Representative
Twenty-First District
Rural Route 2, Box 37
Dubuque, Iowa 52001

Dear Representative Welsh:

You recently requested an opinion of the Attorney General concerning a situation where a rural area, subscribing to fire protection from a community volunteer fire department, was annexed and you ask the following questions:

- (1) If a fire breaks out in this newly-annexed area, which department is responsible for controlling it?
- (2) Is the community volunteer unit obliged to respond to a fire suffered by one of its subscribers even though the subscriber now resides within the city of Dubuque which has its own fire protection service?
- (3) Would the community volunteer unit be legally liable for injuries or damages caused by the unit's failure to respond to a fire call by a subscriber residing within the annexed area, even if the city fire department responded?

These questions are discussed together in the following opinion.

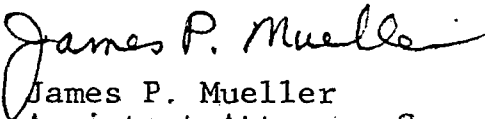
Section 364.16, The Code 1979, provides: "Each city shall provide for the protection of life and property against fire A city may provide conditions upon which the fire department will answer calls outside the corporate limits" Therefore, a city has an affirmative duty to provide fire protection for all areas within its corporate limits. See 1976 Op. Att'y Gen. 550-51.

After completion of the annexation requirements, a territory becomes a part of the city. Section 368.20, The Code 1979. Thus, pursuant to § 364.16, the city is then responsible for fire protection for that new area. See Johnson City v. Clinchfield R. Co., 43 S.W.2d 386, 388, 163 Tenn. 332 (1931).

At the point where the city becomes responsible for fire protection, any duty and liability placed upon the volunteer unit by a previous agreement would cease. However, none of the above precludes the city from contracting with the volunteer unit to continue to provide fire protection for this annexed area. See, § 28E.4, The Code 1979. Any liabilities or responsibilities owed by the residents of the rural area to the volunteer unit under the previous agreement are assumed by the city. Peterson v. Swan, 231 Iowa 745, 2 N.W.2d 70, 73 (1942).

In conclusion, once an area is annexed, the city is responsible for fire protection and the volunteer unit is no longer obligated under the previous agreement to respond nor could the volunteers be held liable for failure to respond.

Sincerely yours,



James P. Mueller
Assistant Attorney General

JPM:rcp

DEPARTMENT OF SOCIAL SERVICES: Subrogation Rights: § 249A.6, The Code 1979, 42 U.S.C. § 1396a(a)(25). The Department of Social Services is entitled to subrogation rights under § 249A.6, The Code 1979, to major medical coverage provided by Blue Cross and Blue Shield. Payments made to the Department pursuant to these subrogation rights discharge Blue Cross and Blue Shield from further liability to their subscriber. (Robinson to Reagen, Commissioner, Department of Social Services, 9/27/79) #79-9-25(CL)

September 27, 1979

Mr. Michael V. Reagen, Ph.D.
Commissioner
Iowa Department of Social Services
Fifth Floor, Hoover Building

L O C A L

Dear Mr. Reagen:

You have asked for an opinion of the Attorney General as to whether or not the Department of Social Services is entitled to subrogation rights under § 249A.6, The Code 1979, to major medical coverage provided by Blue Cross and Blue Shield of Iowa. If the answer is in the affirmative, you asked whether payments to the Department of Social Services under its subrogation rights discharge Blue Cross and Blue Shield from any further liability to their subscriber. The answer to both questions is yes.

Historically, the Department of Social Services was entitled to subrogation under common law, Glancy v. Ragsdale, 251 Iowa 793, 802, 102 N.W.2d 890 (1960); Baker v. American Surety Co., 181 Iowa 634, 159 N.W. 1044 (1916). Learning of the existence of these claims and then recovering on them, however, was quite another matter. There were numerous cases where repayment was not made, or recoveries by recipients were invested in resources which would not affect their ongoing eligibility for Medicaid, often at the urging of the lawyers who helped them obtain the funds. Against this pattern, § 249A.6, The Code 1979, was enacted in 1978 by the general assembly at the urging of the Iowa Department of Social Services.¹ The purpose was to reduce costs resulting from Medicaid recipients not

¹The statute not only spells out the existence of the Department's subrogation rights, but it also includes reporting requirements for the client, health care providers, and attorneys representing recipients of assistance in § 249A.6(2)(a)(b)(c), The Code 1979.

reimbursing the department after receiving payment from third parties for medical bills the department had paid through its medical assistance (Medicaid) plan. This is consistent with federal law. See 42 U.S.C. § 1396a(a)(25) and 42 C.F.R. § 450.31 (1978).

The subrogation rights are clearly established in the opening subsection, § 249A.6(1), The Code 1979, as follows:

1. When payment is made by the Department for medical care or expenses through the medical assistance program on behalf of any recipient, the department shall be subrogated to the extent of those payments, to all monetary claims which the recipient may have against third parties as a result of the medical care or expenses received or incurred. No compromise, including but not limited to a settlement, waiver or release, of any claim to which the department is subrogated under this section shall defeat the department's right of recovery except pursuant to the written agreement of the commissioner or commissioner's designee.

The impact of the department's subrogation rights on an insurer is outlined in § 249A.6(3), The Code 1979:

3. The subrogation rights of the department shall be valid and binding on an insurer or other third party only upon notice by the department or unless the insurer or third party has actual notice that the recipient is receiving medical assistance from the department and only to the extent to which such insurer or third party has not made payment to the recipient or an assignee of the recipient prior to such notice. Payment of benefits by an insurer or third party pursuant to subrogation rights hereunder shall discharge such insurer or third party from liability to the recipient or the recipient's assignee to the extent of such payment to the department.

Clearly this statute contemplates that any insurer or third party that has received notice of the department's claim yet makes payment to the recipient of assistance, instead of the department, will still have to pay the Department of Social Services despite any payments to the recipient.

As your question deals with the liability of "third parties", we point out how broad the definition of that phrase is in the statute. Section 249A.6(5), The Code 1979, provides:

[T]he term "third party" includes any individual, institution, corporation, or public or private agency which is or may be liable to pay part or all of the medical costs incurred as a result of injury, disease or disability by or on behalf of an applicant for or recipient of assistance under the medical assistance program.

Blue Cross and Blue Shield are manifestly third parties. Under the very language of the statute, the Department of Social Services is entitled to subrogation rights against Blue Cross and Blue Shield for all monetary claims which the recipient may have against Blue Cross and Blue Shield. However, Blue Cross and Blue Shield has advised you that in cases where an individual has major medical coverage, they may not reimburse the department without an assignment of that claim to the department, signed by the recipient--subscriber. Their position is based on paragraph VII-D of their major medical certificate, which reads as follows:

The plans shall discharge their liability under this Contract by payment to the Member. In the event the Member is under legal disability of any kind, the Plans may discharge their liability by making payment to the Subscriber. Payment will not be made to any other person or persons except as agreed to by The Plans in writing. (Emphasis added)

Section 249A.6, The Code 1979, is to be interpreted liberally so that the evils and mischiefs sought to be remedied will be reached by the statute.² Under the clear language of the statute, the Department of Social Services has subrogation rights to this

²The polestar in interpretation of a statute is the legislative intent, and as stated in Doe v. Ray, 251 N.W.2d 496, 500-501 (Iowa 1977):

In searching for legislative intent we consider the objects sought to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. (Citations omitted)

major medical policy, and if Blue Cross and Blue Shield would pay their subscriber, they could still be liable to the Department of Social Services for the same payments.

In Selken v. Northland Ins. Co., 249 Iowa 1046, 1052, 90 N.W.2d 29, 32 (1958) we find:

[3,4] II. It is basic that the provisions of insurance policies issued in the state of Iowa cannot be contrary to statutory provisions. If the provisions of the policy are contrary to statute they will not be effective. If they need clarification same will be made in accordance with intent of the statute. Marden v. Hotel Owner Ins. Co., 85 Iowa 584, 42 N.W. 509, 39 Am. St. Rep. 316; Harrington v. Bremer County Farmers Mut. F. Ins. Assn., 1926, 203 Iowa 282, 285, 211 N.W. 383, 385; Salmon v. Farm Property Mut. Ins. Assn., 168 Iowa 521, 528, 150 N.W. 680, 682; Artificial Ice Co. v. Reciprocal Exchange, 1921, 192 Iowa 1133, 184 N.W. 756; Federal Land Bank of Omaha v. Farmers Mutual Ins. Assn. (Adams and Adjoining Counties), 217 Iowa 1098, 253 N.W. 52; Galkin v. Lincoln Mutual Casualty Co., 279 Mich. 327, 272 N.W. 694.

Thus, the insurance policy cannot contain a provision which would defeat the department's subrogation rights.

We would also like to point out that this problem should not even arise. Blue Cross and Blue Shield of Iowa process claims by health care providers for Medicaid reimbursement as the "intermediary" or "carrier" for the Department of Social Services. See § 249A.4(5), The Code 1979. Blue Cross and Blue Shield also provide the private health care coverage to some recipients of Medicaid, including major medical coverage, which has been mentioned above.

The federal regulations provide at 42 C.F.R. § 450.31(a)2 (1978):

The State or local agency, in determining whether medical assistance is payable will treat any third party liability as a current resource when such liability is found to exist and payment by the third party has been made or will be made within a reasonable time.

Mr. Michael V. Reagan

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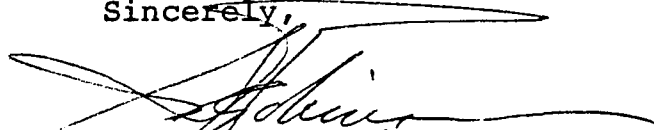
When Blue Cross and Blue Shield provides primary health care coverage and major medical coverage and is also acting as intermediary for the department, they should pay as Medicaid carrier for only those expenses not covered by their private plans. The question of reimbursement suggests a failure by Blue Cross and Blue Shield to use their own coverage first. The responsibility is on Blue Cross and Blue Shield to consider any current resources. When the same company provides the coverage and also acts as agent for the Department of Social Services, it cannot escape this responsibility. It more than anyone else is on "notice" as provided in § 249A.6(3), The Code 1979, cited above.

Your second question was whether or not payment to the Department of Social Services would discharge Blue Cross and Blue Shield from liability to their subscriber. That question is also answered directly by § 249A.6(3), The Code 1979, which reads in part as follows:

Payment of benefits by an insurer or third party pursuant to the subrogation rights hereunder shall discharge such insurer or third party from liability to the recipient or the recipient's assignee to the extent of such payment to the Department.

The answer, therefore, is clearly "yes". Payment to the department does satisfy the obligation of Blue Cross and Blue Shield to its subscribers.

Sincerely,



Stephen C. Robinson
Assistant Attorney General

SCR/tjb

COUNTIES: Domestic Animal Fund. §§ 351.6, 352.1, 352.3, The Code 1979. A Board of Supervisors acting upon a claim to the Domestic Animal Fund may neither defer its decision nor deny compensation in the event a claimant's damages are covered in whole or in part by insurance. (Benton to Smith, Assistant Clinton County Attorney, 9/26/79) #79-9-19(L)

September 26, 1979

Mr. Lauren Ashley Smith
Assistant Clinton County Attorney
306 Court House
Clinton, Iowa 52732

Dear Mr. Smith:

Your opinion request of July 19, 1979 concerns the Domestic Animal Fund, established pursuant to Chapter 352, The Code 1979. In your letter you describe the factual situation in which farmers with claims against the fund are also protected by insurance coverage providing for payment of losses to the extent they are not paid by the county through the fund. Insurance carriers in this situation often apparently wait for the county to take action on the claim and then, to the extent of the coverage, pay the balance of the claim not paid by the county. Your question asks whether it is proper for the county to defer making payments from the Domestic Animal Fund in the instance where a claimant has insurance coverage which would cover his loss, but the insurance carrier declines to pay until the county acts upon the claim.

As your letter notes, our office has discussed issues concerning the Domestic Animal Fund in the following opinions: 1959 Op.Att'y.Gen. 57, 1959 Op.Att'y.Gen. 136, and 1960 Op.Att'y.Gen. 137. The latter opinion describes three rules governing the recovery of damages for injury to domestic animals from the Domestic Animal Fund. According to the opinion these rules are:

1. The fact that the claimant for damages against the county fund has covered his damages claim by insurance, is not a bar by itself from recovery of damages from the county fund.
2. However, if the claimant has been paid in part or in full from any source either by insurance, or from the owner causing the damage or otherwise, then he has no recourse

against the fund, and damages from the county fund will be denied.

3. Any insurance covering claimant's damage over and above what he may have recovered from the county fund is permissible, and possession of such policy or recovery thereunder will not bar his recovery upon his insurance policy.

These rules evolved from the earlier two opinions alluded to above. 1959 Op.Att'y.Gen. 57 addressed the question of whether a claimant could be reimbursed from the Domestic Animal Fund for his injuries or loss of domestic animals after recovering his damages from a private insurance carrier, and whether the insurance carrier is subrogated to the rights of the claimant to the Domestic Animal Fund. Relying on Hodges v. Tama County, 91 Iowa 578, 580, 60 N.W. 185 (1894) and Ellis v. Oliphant, 159 Iowa 514, 519-520, 141 N.W. 45 (1913) our office concluded that under these circumstances the claimant could not recover damages from the fund and the insurance company was not entitled to assert any subrogation right against the fund. Later, in 1959 Op.Att'y.Gen. 136, we concluded that after partial payment of a loss by a county through the Domestic Animal Fund the excess could be claimed under a policy of insurance even though any tort claim against the owner of the dog inflicting the damage would be extinguished. This opinion reassured that although Hodges precluded any claim against the dog owner after reimbursement from the fund, payment from the insurance company would be based on contract rather than tort and therefore the owner could recover the amount not paid by the county from the insurer. Your request raises a different issue concerning the situation where a claimant is insured, and that is whether the Board of Supervisors may defer or actually deny payments to a claimant whose damages are covered in whole or in part by insurance.

The Domestic Animal Fund is funded through the annual license fee for dogs assessed pursuant to § 351.6, The Code 1979. Section 352.1, The Code 1979, categorizes claimants against the fund as follows:

1. 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 damages.

2. Any person injured by a dog or wolf not owned by such person which resulted in the need for medical care or rabies prevention treatment, may, within sixty days from the time of such injury, file with the county auditor of the county

a claim for the payment of the costs of such medical care or treatment.

Section 352.3, The Code 1979 provides:

The board shall act on such claims within a reasonable time, and allow such part thereof as it may deem just. When a claim is allowed, the cost of such medical treatment or the value of each animal or fowl killed or injured shall be entered of record. [emphasis supplied]

As you will note, the first sentence of § 352.3 uses the term "shall". The term "shall" connotes a mandatory obligation and excludes any notion of discretion. Schmidt v. Abbott, 261 Iowa 886, 890, 156 N.W.2d 649 (1968). There is no ambiguity in this provision which would require the employment of statutory construction. When statutory language is plain and unambiguous, there is no room for statutory construction. In Re Johnson's Estate, 213 N.W.2d 536, 539 (Iowa 1974). On its face, § 352.3 compels county boards to consider and act upon claims even if the claimant's insurer has stayed its hand.

This conclusion is buttressed by the holding in Wisdom v. Board, 236 Iowa 669, 19 N.W.2d 602 (1945). In Wisdom at 678, the Court discussed the Domestic Animal Fund in the following terms:

This fund is primarily created as a fund to which claimants for injuries to domestic animals are to resort. In passing upon claims, the Board's inquiry should ordinarily be directed to the following:

- 1) Was the claimant the owner of the domestic animals killed or injured?
- 2) Were they injured or killed by wolves or by dogs, not owned by the claimant, within ten days from the date of the filing of the claim (or the date the owner or his agent had knowledge of such injury or killing)?
- 3) What was the extent of the damages based upon the value of the animals injured or killed?

While we hold the board's inquiry is circumscribed by statute, we do not hold that the manner of conducting the inquiry is bound by the rules of evidence in cases in court. The board or its members can act upon their own knowledge, upon their independent investigation, or upon the statements in the claim, supported by affidavits and their reasonable

Lauren Ashley Smith
Assistant Clinton County Attorney
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conclusion based upon such an inquiry will
not be reviewed.

Under this holding, it is clear that the board may not consider the extent of a claimant's insurance in passing upon his claim. In answer to your question, it must follow that under the Wisdom case, the board can neither delay its decision nor deny compensation when a claimant's damages are covered in whole or in part by insurance.

Sincerely,

Timothy D. Benton
TIMOTHY D. BENTON
Assistant Attorney General
Farm Division

TDB/nay

COUNTIES: §§ 441.5-441.8, The Code 1979. An incumbent county assessor originally screened by the examining board and appointed by the county conference board would not be required to undergo an examination or screening process to be reappointed. (Hyde to Martens, Iowa County Attorney. 9/26/79) #79-9-18

September 26, 1979

Kenneth R. Martens
Iowa County Attorney
1060 Court Avenue
Marengo, Iowa 52301

Dear Mr. Martens:

You have requested clarification of an opinion issued from this office concerning the appointment of county assessors. Op. Atty. Gen #79-4-8. That opinion concluded that, pursuant to the amendments to §§ 441.5-441.8, The Code 1979, enacted by the 1978 Session, 67th G.A., ch. 1150, county assessors whose terms expire prior to December 31, 1979, need not take an examination and obtain certification under § 441.5 in order to be reappointed for a six-year term, commencing January 1, 1980 (the effective date of the amendment). You have asked us to clarify the following matters:

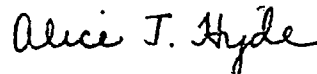
1. If an incumbent assessor was appointed by the county conference board after screening by the examining board, is it necessary that said assessor be screened by the examining board and passed on by the conference board in the same manner as his original appointment pursuant to § 441.8, The Code 1979, which reads: "Appointment for each succeeding term shall be made in the same manner as the original appointment"?"

2. Pursuant to § 441.6, The Code 1979, if the incumbent assessor is required to be screened by the examining board, may said examining board consider other applicants in accordance with this section for appointment as county assessor?

We believe the language of § 441.8 providing: "The term of office for an assessor appointed under this chapter shall be for six years. Appointments for each succeeding term shall be made in the same manner as the original appointment . . ." logically refers to the appointment of a succeeding, non-incumbent assessor only. When referring to an incumbent, the language used in § 441.8 is exclusively "reappointment". An assessor originally screened by the examining board and appointed by the county conference board would not need to undergo examination or screening during the process of reappointment.

After the complete implementation of continuing education for assessors effective January 1, 1980, an incumbent assessor may be reappointed, however, only after satisfactory completion of that program. Pursuant to § 441.8, the county conference board can determine not to reappoint an incumbent assessor at a meeting held not less than ninety days before the expiration of the incumbent's term. If the board decided not to reappoint the incumbent assessor to a new term, it would then be able to consider other applicants for the position.

Very truly yours,



ALICE J. HYDE
Assistant Attorney General

AJH:sh

STATE OFFICERS AND DEPARTMENTS: IPERS--§§97B.41, 97B.49, and 97B.53, The Code 1979; 1979 Session, 68th G.A., S.F. 489, §7; 370 IAC §8.13. Members of IPERS who have terminated prior to retirement and leave their accumulated contributions in the system for a future retirement, are entitled to a benefit as set forth in §97B.49 or §97B.50. (Blumberg to Longnecker, Director, State Retirement Systems, 9/25/79) #79-9-16(L)

September 25, 1979

Mr. Ed Longnecker
Director
State Retirement Systems
L O C A L

Dear Mr. Longnecker:

You have requested an opinion regarding Chapter 97B, The Code, 1979, and recent amendments to it. The request concerns the percentage to be used in calculating the benefits for vested, as opposed to the active member. You stated:

1. Regarding the percentage to be used on accounts which became vested before January 1, 1976. Section 97B.49-1, which makes reference to such accounts, has remained unchanged since it was incorporated in the Law effective January 1, 1976. Yet, Section 97B.49-5, to which section 97B.49-1 refers us, was amended to provide for the change to 44% effective July 1, 1978 and amended again effective July 1, 1979 to add the 46% and eliminate mention of the original 40%.
2. Regarding the percentage to be used on accounts which have

become vested in the years 1976 through 1978 and which will become vested in 1979 and in future years. Neither Section 97B.49-1 nor Section 97B.49-5 makes reference to such accounts.

In discussion which took place within the Legislative study committees and the State Government committees when the various formula changes were being considered, it was concluded that the formula change would not apply to the vested members as of the date of change. The new formulas were not applicable to retirees, thus in all fairness, it was felt the member who terminated and was vested should receive benefits under the benefit formula in effect at the time of termination of employment just the same as if application had been made for retirement benefits.

Your opinion as to whether the following is the correct application of the formulas as per our two questions above.

A. For the 40% formula

- (1) The last covered earnings were prior to 1978 (in which case the first month of entitlement (FME) could have been as early as January, 1976 when the high five formula took effect, or any time thereafter, even July, 1978

Or

- (2) The last covered wages were in 1978, but the FME was prior to July, 1978

B. For the 44% formula which became effective July, 1978, the member

- (1) Must have had covered earnings in 1978 or later, and
 - (2) The first month of entitlement (FME) must have been July, 1978 or later
- C. For the 46% formula, which becomes effective July 1, 1979, the member while vested or active
- (1) Must have had covered earnings in 1979, or later and
 - (2) The FME must be July, 1979 or later

Your question concerns those members who have terminated and left their contributions in the system for a retirement benefit in the future. In effect, you are asking whether benefits of such members are determined at the time of termination or at the time the retirement benefits are requested.

Section 97B.49, The Code 1979, subsections one and five, as amended by 1979 Session, 68th G.A., S.F. 489, §7, provide:

Each member shall, upon retirement on or after his normal retirement date, be entitled to receive a monthly retirement allowance determined under this section.

1. For each active member employed before January 1, 1976, and retiring on or after January 1, 1976, and for each member who became vested before January 1, 1976, with four or more complete years of service, a formula benefit shall be determined equal to the larger of the benefit determined under this subsection and subsection 3

of this section as applicable, or the benefit determined under subsection 5 of this section. The amount of the monthly formula benefit for each such active member who retired on or after January 1, 1976, shall be equal to one-twelfth of one and fifty-seven hundredths percent per year of membership service multiplied by his average annual covered wages; but in no case shall the amount of monthly formula benefit accrued for membership service prior to July 1, 1967, be less than the monthly annuity at the normal retirement date determined by applying the sum of the member's accumulated contributions on or before June 30, 1967, and any retirement dividends standing to his credit on or before December 31, 1966, to the annuity tables in use by the department with due regard to the benefits payable from such accumulated contributions under sections 97B.52 and 97B.53.

. . . .

5. For each active member retiring between July 1, 1978 and June 30, 1979, with four or more complete years of service, a monthly benefit shall be computed which is equal to one-twelfth of an amount equal to forty-four percent of the five-year average covered wage multiplied by a fraction of years of service. For each active member retiring on or after July 1, 1979 the monthly benefit computed under this subsection shall be equal to one-twelfth of an amount equal to forty-six percent of the five-year average covered wage multiplied by a fraction of years of service. For the purposes of this subsection,

"fraction of years of service" means a number, not to exceed one, equal to the sum of the years of membership service and the number of years of prior service divided by thirty years.

If benefits under this subsection commence on an early retirement date, the amount of benefit shall be reduced in accordance with section 97B.50.

This section has been amended each legislative session for the past few years. In the 1975 Code, subsection five did not exist. Subsection one provided that an active member retiring after July 1, 1973, with four or more years of service, shall receive a benefit equal to one-twelfth of one and fifty-seven hundredths percent per year of membership service, multiplied by the average annual covered wages.

This section was amended by 1975 Session, 66th G.A., Ch. 50, §18 by changing the dates, and including subsection five. Thereafter, in the 1977 Code the language of subsection one was similar to what it now provides. Subsection five provided that each active member retiring on or after January 1, 1976, with four or more years of service, would receive a benefit computed by using a forty percent figure. The section was again amended by 1978 Session, 67th G.A., Ch. 1060, §33, so that subsection five in the 1979 Code provided that an active member retiring between January 1, 1976 and June 30, 1978 would receive a benefit computed with a forty percent figure, and those retiring after July 1, 1978 would use a forty-four percent figure.

It is evident that the Legislature is increasing the benefits each session dependent upon when an active member retires. What is puzzling about this section in relation to your questions is the lack of any specific language regarding a member who terminates before retirement.

You have attempted to rectify this by rule. See, 370 IAC §8.13. Rule 8.13(4) provides:

Members employed before January 1, 1976 and retiring after January 1, 1976, with four or more complete years of membership service shall be eligible to receive the larger of a monthly formula benefit equal to the member's total covered wages multiplied by one-twelfth of one and fifty-seven hundredths per cent, multiplied by the percentage calculated in 8.13(2), if applicable, or a benefit as calculated in 8.13(6). See Code section 97B.49(1).

Rule 8.13(6), the notice of which was published in the June 13, 1979, issue of the Iowa Administrative Bulletin, provides:

a. Members who leave employment after completing four or more years of service and claim benefits to be paid for January 1976, or later, will qualify to have benefits computed using the final average covered wage.

b. For members whose last covered earnings were before 1978, or whose last covered earnings were in 1978, and whose first month of entitlement was before July 1978, the monthly benefit will equal one-twelfth of forty per cent of the five year average covered wage was multiplied by a fraction of years of service.

c. For members who had covered earnings in 1978 or 1979 and whose first month of entitlement was between July 1978 and June 1979, inclusive, the monthly benefit will equal one-twelfth of forty-four per cent of the five year average covered wage multiplied by a fraction of years of service.

d. For members who had covered earnings in 1979 or later, and first month of entitlement is July 1979, or later, the monthly benefit will equal one-twelfth of forty-six per cent of the five year average covered wage multiplied by a fraction of years of service.

These new rules cover four separate situations for either active members or members who have terminated. Subsection "a" concerns those whose benefits start in January, 1976 or later. Subsection "b" concerns those who worked any time up to 1978 and those who worked in 1978 and whose benefits began before July, 1978. Subsection "c" applies to those who worked in 1978 or 1979 and whose benefits began between July 1978 and June 1979. The final subsection applies to those who worked in 1979 or later and whose benefits began in July 1979, or later. What these rules do, is provide that the percentage used to determine the benefit is based upon the date of the retirement, not termination.

There can be no doubt that the Legislature intended the members who have terminated to be able to receive a pension. Section 97B.53 provides, in pertinent part:

All rights to all benefits under the retirement system will cease upon a member's termination of employment with the employer prior to his retirement, other than by death, except as provided hereafter:

1. Upon the termination of employment with the employer prior to retirement other than by death of a member, the accumulated contributions by the member at the date of such termination will be paid to such member, except as may be provided in subsection 2, subsection 5 and subsection 6 of this section.

2. If the employment with the employer of a member is terminated prior to the member's retirement, other than by death, but after

the member has either

a. Completed at least four years of service, or

b. Has attained the age of fifty-five, the member shall receive a monthly retirement allowance commencing on the first day of the month in which the member attains the age of sixty-five years, if the member is then alive, or, if the member so elects in accordance with section 97B.47, commencing on the first day of the month in which the member attains the age of fifty-five and any month thereafter prior to the date the member attains the age of sixty-five years, and continuing on the first day of each month thereafter during the member's lifetime, provided the member does not receive prior to the date the member's retirement allowance is to commence a refund of accumulated contributions under any of the provisions of this chapter. The amount of each such monthly retirement allowance shall be determined as provided in either section 97B.49 or in section 97B.50, whichever is applicable.

Thus, a member who has terminated at age fifty-five or with four or more years of service, and who leaves the accumulated contributions in the system, is entitled to a retirement benefit as provided in §97B.49 or 97B.50. Again, the problem is that neither of those sections contains language concerning the terminated member.

You have stated that §97B.49(1) makes reference to those terminated members. The key language is found on the third line: "and for each member who became

vested before January 1, 1976" "Member who became vested" is an undefined term in that chapter. The word "vest" or "vested" is not even defined. What is defined is the term "vested member" in §97B.41(11). That term is defined to mean a member who has terminated employment prior to July 1, 1973 with at least eight years of service; after July 1, 1973, with at least four years of service; or being at least fifty-five years old. The term "vested member" is used in §97B.49(2). Because the Legislature defined it and used it in other sections, it could have easily used it in 97B.49(1). The fact that it did not use that term could indicate an oversight on the part of the Legislature, or it could mean that the Legislature intended something else in that section. We cannot ascertain any legislative intent. Even assuming that the Legislature intended to cover vested members in subsection one, that reference would only have application to those terminating prior to January 1, 1976.

Section 97B.53 provides that those members who have terminated shall receive a pension pursuant to §§97B.49 or 97B.50. Section 97B.49(1) provides that the member shall receive the larger of the benefit determined by that subsection or subsection five. Subsection one computes the benefit on a percentage of the average annual covered wages. Subsection five determines the benefit on a percentage of the five year average covered wage, which is the average for the highest five consecutive years of service. See, §97B.41(20).

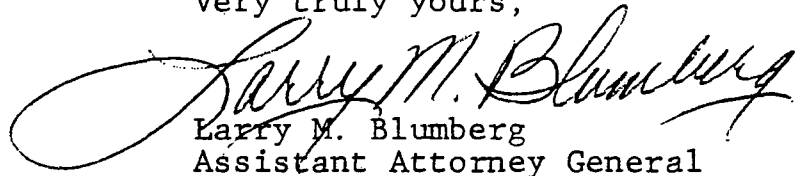
Although it is questionable whether §97B.49(1) concerns terminated members, and §97B.49(5), by its language, only covers active members¹, it is apparent from the language of §§97B.49(2) and 97B.53 that the terminated members receive benefits determined by those sections. Thus, the Legislature is directing you to, in effect, insert in those subsections the terms "vested member" or "inactive member" and compute a retirement benefit as if such a member was active. Since an active member, pursuant to §97B.49(5), receives a benefit determined by the date of retirement, so must the terminated member. There is no other indication in

¹ "Active member" is defined in §97B.41(9) as one who has, during a calendar year, made contributions to the system, and has not commenced receiving a benefit, nor has filed for a refund of accumulated contributions.

that chapter on the computation of retirement benefits, and we must conclude that those computations are applicable to all who retire and receive a benefit. Of course, early retirement pursuant to §97B.50 will require a further adjustment.

The history of this chapter, set forth above, indicates a piecemeal process of amendment which has resulted in an ambiguous and confusing system that is incomplete in its language. Only by further clarification, specifically stating the Legislative intent relative to these terminated members, can certainty be achieved. Until that time arrives, some method of computing benefits to which these members are entitled must be devised. The applicable language of the chapter, although somewhat unclear, leads us to the conclusion that members of IPERS who terminate before retirement pursuant to §97B.53(2), and leave their accumulated contributions in the system for future retirement are entitled to a benefit which is the larger of that under §§97B.49(1) and 97B.49(5). The benefit under §97B.49(5) is to be determined on the date of retirement--that is, when the terminated member files a claim for benefits.

Very truly yours,


Larry M. Blumberg
Assistant Attorney General

LMB:rcp

COUNTIES AND COUNTY OFFICERS: Incompatibility--§234.11, The Code 1979. The positions of Chairperson of the County Board of Social Welfare and County Conservator are not incompatible, assuming that they have no interaction. (Blumberg to Knuth, Jones County Attorney, 9/17/79) #79-9-14 (L)

September 17, 1979

Mr. Adrian Knuth
Jones County Attorney
212 1st Avenue West
Cascade, Iowa 52033

Dear Mr. Knuth:

We have your opinion request concerning a possible conflict of interest. Under your facts, the Chairperson of the County Board of Social Welfare is also the County Conservator. The position of County Conservator was created by the Board of Supervisors to have a person manage the financial affairs of persons who do not have relatives, friends or other persons to do so. The duties of the County Conservator, as set forth by you, are:

- (1) Serving as "protective payee" of Social Security payments for residents of Jones County who are unable to manage their own financial affairs. As "protective payee" the County Conservator receives the Social Security checks, endorses same, deposits same in appropriate bank accounts and thereafter disburses the funds in accordance with need.
- (2) Service as Court appointed Conservator for other County residents not necessarily limited to Social Security recipients.

We can find no statute speaking to a county conservator. However, pursuant to Home Rule, it is apparent that the creation of such a position is not in conflict with any statute. Accordingly, we must presume that the counties have the power to create such a position. See Op.Att'y Gen. #79-4-7.

Sections 234.9 through 234.11, The Code 1979, establish the County Board of Social Welfare. The duties of the Board, as set forth in §234.11, are:

The county board shall be vested with the authority to direct emergency relief with only such powers and duties as are prescribed in the laws relating thereto and shall determine the allocation of funds to child care centers pursuant to sections 237A.14 to 237A.18. The board shall act in an advisory capacity on programs within the jurisdiction of the department of social services. The board shall review policies and procedures of the local departments of social services and make recommendations for changes to insure that effective services are provided in their respective communities. The county board may also make recommendations for new programs which it is believed would meet needs in the community. The state department shall establish a procedure to insure that county board recommendations receive appropriate review at the level of policy determination.

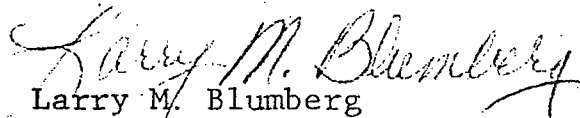
Although you couched your request in terms of a conflict of interest, we feel that the real question is one of incompatibility of offices. A conflict of interest may arise at any given point in time and does not necessarily mean that one person cannot simultaneously hold two offices. Because a conflict of interest in your situation would be based solely on any facts that may arise in the future, we are unable to render any opinion on such a conflict.

There are two leading cases on incompatibilities of offices. See State ex rel. Crawford v. Anderson, 155 Iowa 271, 136 N.W. 128 (1912) and State ex rel. LeBuhn v. White, 257 Iowa 660, 133 N.W.2d 903 (1965). Pursuant to those cases, incompatibility is determined upon a consideration of the duties of each with regard to the public interest. Thus, the courts look to any inconsistencies in the functions of the offices, such as one being subordinate to the other and subject in some degree to its supervisory power or power of review. The courts also consider whether the offices are

inherently inconsistent and repugnant, or whether the nature and duties of both render it improper from consideration of public policy for the same person to retain both.

The duties of the County Board of Social Welfare, set forth in §234.11, are general. Thus, it is difficult to ascertain whether an actual incompatibility exists. In Op.Att'yGen. #79-6-5, we stated that the application of the incompatibility doctrine can be invoked only when two offices are involved. There we cited to State v. Taylor, 260 Iowa 634, 144 N.W.2d 289 (1967) for the incidents of an office. We do not believe it is necessary to determine whether the County Conservator is an office pursuant to that case, since the duties of the two offices in question do not appear to be inconsistent, repugnant or against public policy. Assuming, under your facts, that the County Board of Social Welfare and the County Conservator have no interaction, we cannot state that an incompatibility exists.

Very truly yours,


Larry M. Blumberg
Assistant Attorney General

LMB:rcp

CITIES AND TOWNS: COUNTIES: LIENS: Unpaid charges for sewer and solid waste services furnished by a city - \$384.84, Chapters 445 and 446, Code of Iowa 1979. A city has a lien against real property thereby served for charges for sewer and solid waste services furnished by the city when such charges become delinquent. Upon certification of unpaid charges by a city, the county auditor is required to implement procedures leading to collection of such unpaid charges by the county treasurer "in the same manner as taxes," including appropriate listing to achieve collection which may be effected by listing in the special assessment book along with other special charges against real property. (Peterson to Shepard, Butler County Attorney, 9/13/79) #79-9-10(C)

Mr. Gene W. Shepard
Butler County Attorney
Butler County Courthouse
Allison, Iowa 50602

September 13, 1979

Dear Mr. Shepard:

You have requested the opinion of the Attorney General with regard to the lien established in Section 384.84 of the 1979 Code of Iowa, as follows:

When does this lien attach, (1) When not paid to the City, (2) When the Auditor receives the certification, or (3) When spread upon the Treasurer's records for collection as taxes? Also, where does the Auditor post the certification referred to?

The lien referred to is established in the last sentence of the first full paragraph of §384.84, which paragraph, in pertinent part, provides as follows:

1. The governing body of a city utility . . . city enterprise, . . . may establish, impose, adjust, and provide for the collection of rates to produce gross revenues at least sufficient to pay the expenses of operation and maintenance of the city utility . . . city enterprise, . . . Rates must be established by ordinance of the council or by resolution of the trustees, published in the same manner as an ordinance. All rates or charges for the services of sewer systems, sewage treatment, solid waste collection, solid waste disposal, or any of these, if not paid as provided by ordinance of council, or resolution of trustees,

shall constitute a lien upon the premises served by any of these services and may be certified to the county auditor and collected in the same manner as taxes. (Emphasis supplied)

Section 384.24 defines "city enterprise" as including "f. solid waste collections systems and disposal systems." As used in the City Code of Iowa (including chapter 384), "city utility" means all or part of a waterworks, gasworks, sanitary sewage system, electric light and power plant and system, or heating plant, any of which are owned by a city. §362.2(22).

A "lien" has been defined as a charge or security or encumbrance upon property for payment of some debt, obligation or duty. Black's Law Dictionary 1072, 4th ed., and cases cited.

In considering any legislative enactment, what the statute says is the interpretation that must be given to it. Simmons Warehouse Co. v. Board of Review of Sioux City, 1940, 229 Iowa 191, 294 N.W. 286. Only if there are ambiguities must other considerations such as legislative intent expressed in consideration of the bill before enactment be considered. Jones v. Thompson, 1949, 240 Iowa 1024, 38 N.W.2d 672; Miller Oil Co. v. Abrahamson, 1961, 252 Iowa 1058, 109 N.W.2d 610.

Here the legislature has clearly and unambiguously provided in §384.84 that rates or charges not paid as provided by ordinance or resolution shall constitute a lien on the premises served. We therefore conclude that the lien arises when the charge is not paid as provided by ordinance. The lien may thus predate certification to the Auditor or the posting of the certification by the Auditor. So construed, the statute authorizes a "secret lien." We believe that the statute is constitutional as construed.

The legislature has undoubted authority to specify the circumstances under which a lien will come into existence. 51 Am.Jur.2d, Liens §7, at page 148, citing Phlipo's Estate v. Mercantile National Bank, 123 Ind. App. 332, 111 N.E. 93; Dutt v. Marion Air Conditioning Sales, Inc., 159 Ohio St. 290; 112 N.E.2d 32, See also Re. Frentress' Estate, 249 Iowa 783, 89 N.W.2d 367.

In McQuillin, Municipal Corporations (3rd Ed.), Vol. 11 at page 230, it is stated that "The municipality may fix fees, rents, charges and rates for making connections with and for using its sewers and drains . . . and may, by law, have a lien upon the property therefor . . . Generally speaking, sewer charges are laid against the property as to which the sewer is accessible or useful, without regard to ownership."

In Dunbar v. City of New York, 1920, 251 U.S. 516, 67L.Ed. 384, 40 S.Ct. 250, the owner of a building leased it to a tenant who was subsequently adjudged bankrupt at which time it owed the City for water. The purchaser of the real property from the bankrupt brought action to cancel the water charge as a lien on the real property and to enjoin the enforcement of the lien on the grounds that the lien and charges deprived the owner of property without due process of law. The Court held that the imposition of a lien under charter provisions operative when the lease was made did not deprive the owner of property without due process of law.

The court stated at page 518 of U.S. Reports that:

. . . in the water charge in controversy, it was imposed and made a lien on plaintiff's property by the charter of the city and therefore . . . the consent of the plaintiff could be implied, and any other conclusion would have been impossible. A city without water would be a desolate place and if plaintiff's property was in such situation it would partake of the desolation. And as a supply of water is necessary it is only an ordinary and legal extension of government to provide means for its compulsory compensation.

Provident Institution for Savings v. Mayor & Alderman of Jersey City, 113 U.S. 506, 28 L.Ed. 1102, 5 S.Ct. 612, involved an act of the legislature which made water rents a charge upon lands in a municipality with a lien prior to all encumbrances in the same manner as taxes and assessments, giving them priority over mortgages on such lands made after passage of the act, whether the water was introduced on the lot mortgaged before or after the giving of the mortgage. The court found the act not violative of due process, suggesting that such liens may have priority over mortgages in existence when the act was passed. See also Loring v. Comm. of Public Works, 264 Mass. 460, 163 N.E. 82, and Bucyrus v. Sears, 34 Ohio App. 450, 171 N.E. 256.

Federal courts have also considered whether the filing of liens or attachments against real property without notice are violative of the due process requirements of the Fourteenth Amendment to the U. S. Constitution. In Spielman-Fond, Inc. v. Hanson's, Inc., 379 Fed. Supp. 997 (D. Ariz. 1973) (3 judge ct.), aff'd. 417 U.S. 901, 94 S.Ct. 2596, 41 L.Ed.2d 208 (1974), the court held that an Arizona statute permitting the filing of a mechanic's lien against real estate without prior notice or hearing was not violative of constitutional due process requirements since such filing only affects alienability and not

possession of the real estate. See also In the Matter of Northwest Homes of Chehalis, Inc., et al. v. Weyerhaeuser Company, 526 Fed.2d 505 (9 Cir. 1975), cert. den. 425 U.S. 907, 96 S.Ct. 1501, 47 L.Ed.2d 758 (1976), for a similar holding with respect to an attachment of real property as security for any judgment the Plaintiff might recover on suit for goods sold and delivered.

In Patton on Titles (2nd Ed.) at page 617, it is stated:

. . . matters in pais which may constitute encumbrances upon real property are items as to which there is nothing to charge a purchaser with notice, but as to which nevertheless he must as his peril take knowledge. Most prominent among these is the lien for labor or material of which, in most states, no record need be made and no notice need be given other than that provided by the improvements themselves for a period of thirty to ninety days from the time the last item is furnished. In some states this is true even though none is filed till long after the expiration of said periods so that the failure of a claimant to file his statement within the prescribed period merely causes him to lose his priority over a purchaser or encumbrance whose rights accrue subsequent to the time when the statement is directed to be filed and who has no actual notice of the claim.

Citing Wood v. Hall, 194 Iowa 50, 188 N.W. 888; Lee v. Hoyt, 101 Iowa, 70 N.W. 95; Noe v. Temple, 12 Iowa 276.

The Iowa Supreme Court, construing Iowa law with respect to mechanics liens (now codified as Chapter 572, Code 1979) in Maryland Casualty Company v. Des Moines City Evangelization Union et al., 184 Iowa 246, 167 N.W. 695, stated at page 252 of the Iowa Reports:

Taking all these provisions together, it will be seen that the contractor or subcontractor contributing to the building or improvement has a lien for his payment from the instant the labor is performed or the material furnished, although there be nothing yet placed upon or filed of record. The provisions which follow, with reference to the filing of a proper statement and the giving of notice, are not essential to the creation or existence of the lien, as between the subcontractor, contractor and owner. Section 3092 (now §§572.9 and 572.18) expressly provides that the failure to file the statement for a lien shall not operate to defeat it, except in the interest of 'purchasers or encumbrances in good faith, without notice'

whose rights accrued after the expiration of the prescribed period for filing. Section 3094 (now §572.10, Code 1979) is clearly intended to continue the subcontractor's right to a lien without filing a statement beyond the 30 (now 60) days limits, and at the same time provide protection of the property owner, who might otherwise, in the absence of notice, be unable to make final settlement with the principal contractor without risk of loss.

Section 384.84 is silent as to the duration and any priority of liens established thereunder and questions relating thereto are beyond the scope of your question and this opinion.

The lien established under §384.84 may be enforced by certifying same to the county auditor for collection "in the same manner as taxes". The phrase "in the same manner" has a well-understood meaning in legislation, and that meaning is not one of restriction or limitation, but of procedure. It means by similar proceedings, so far as such proceedings are applicable to the subject matter. Wilders S.S. Co. v. Low, 112 F. 161, 50 C.C.A. 473; LaMonica v. Krauss, 76 N.Y.S.2d 520, 191 Mrsc. 589; Viculin v. Department of Civil Service, 192 N.W.2d 449, 386 Mich. 375. The phrase is applicable not to substance; but only to procedure, and it is the equivalent of "by similar proceedings, so far as applicable to the subject matter". Com. v. Hildebrand, 11 A.2d 688, 138 PaSuper., 304.

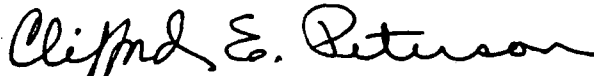
The statute thus impliedly requires the county auditor, with respect to the delinquent charges thus certified, to perform the normal procedural functions of that office in the collection of taxes without any specific guidance or direction as to the particular manner of entering same in the county records.

The Polk County Auditor advises that the charges thus certified are listed in the special assessment book required by §445.11 to be kept by his office. Similar charges incident to weed control and sidewalk snow removal, as well as the usual special assessment levies, are also entered in the Polk County special assessment book and the special assessment tax list prepared therefrom is delivered to the county treasurer. Unpaid special assessments from the prior year are entered by the treasurer on the current general tax list against the real property affected and are collected by tax sale conducted by the county treasurer, thereby fully implementing §384.84 with respect to unpaid charges for sewer and solid waste services. Though other means of posting such unpaid charges doubtless could be devised

Gene W. Shepard
Page Six

(e.g., creation of a special book or list therefor) which would also lead to the collection thereof "in the same manner as taxes", listing such charges in the auditor's special assessment book along with other special charges against the real property would seem to be a reasonable and proper means of implementing §384.84 according to its requirements. Notice of the unpaid charges thus would be readily available to abstracters and others with an interest in title to affected real estate and, if not paid, the charges could be collected by sale pursuant to Chapters 445 and 446 of the Code.

Sincerely,



CLIFFORD E. PETERSON
Assistant Attorney General

CEP/bje

FUNERAL DIRECTORS, SALE OF LIFE INSURANCE: Under Chapters 156, 147, 258A, The Code 1979, it is not a ground for license revocation when funeral homes market life insurance policies issued by an insurance company licensed to do business in Iowa, so long as no commission or gratuity is paid by the funeral director. Commissions paid by the issuing insurance company from premiums are not prohibited by section 156.12, The Code 1979, since the funeral director is not involved in the payment. (Lindebak to Pawlewski, Commissioner, State Department of Health, 9/13/79) #79-9-9(L)

September 13, 1979

Norman L. Pawlewski
Commissioner of Public Health
Department of Health
L O C A L

Dear Mr. Pawlewski:

Your question to the Attorney General's office was whether the marketing of life insurance under certain circumstances by a funeral home constitutes grounds for the revocation of the funeral director's license.

In answering your question, the assumption was made that the sellers were licensed agents; that the policy was issued by an insurance company licensed to transact business in Iowa; the policy would be sold by the funeral director, another employee of the funeral home or by an independent insurance agent; the policy would be sold both at the funeral home and by solicitation; a pre-need arrangement would be agreed upon in order to determine how much insurance should be purchased; the buyer would be the owner of the policy; the funeral home would be the primary beneficiary, and another individual would be the secondary beneficiary; the buyer could change beneficiaries at any time; the salesman would receive a commission from the first year's premium.

The selling or issuing of burial contracts in anticipation of a person's death is a ground for the revocation of a funeral director's license under §156.9(3), The Code 1979. That prohibition, however, does not apply to contracts "made in conjunction with the sale of any life insurance policy issued by a life insurance company licensed to transact business in Iowa."

It is therefore the clear language of the statute that funeral directors be allowed to sell life insurance if the policy is issued by an Iowa company.

Section 156.9(4), The Code 1979, provides that a license may be revoked for "[a]ny of the applicable grounds for revocation or suspension of a license provided in Chapters 147 and 258A." Neither Chapter 147 nor Chapter 158A, The Code 1979, nor the rules promulgated thereunder, can be read to prohibit the selling of life insurance by funeral directors.

Chapter 147, The Code 1979, which provides regulations for the practice of professions, enumerates grounds for the revocation of professional licenses:

147.55 Grounds. A license to practice a profession shall be revoked or suspended when the licensee is guilty of any of the following acts or offenses:

1. Fraud in procuring a license.
2. Professional incompetency.
3. Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of a profession or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.
4. Habitual intoxication or addiction to the use of drugs.
5. Conviction of a felony related to the profession or occupation of the licensee or the conviction of any felony that would affect his or her ability to practice within a profession. A copy of the record of conviction or plea of guilty shall be conclusive evidence.
6. Fraud in representations as to skill or ability.
7. Use of untruthful or improbable statements in advertisements.
8. Willful or repeated violations of this Act.*

* Chapter 258A probably intended (footnote in original).

Chapter 258A, The Code 1979, provides almost identical grounds and provides authority for additional grounds to be promulgated as rules.

Section 156.12, however, prohibits a funeral director from paying a commission to anyone for soliciting business for his home. The section also prohibits anyone from receiving a commission from a funeral director for solicitation activity:

Every funeral director or any person acting in their behalf, who pays or causes to be paid any money or any other thing of value as a commission or gratuity for the securing of business for such funeral director, and every person who accepts or offers to accept any money or other things as a commission or gratuity from a funeral director in order to secure business for him or her shall be deemed guilty of a simple misdemeanor. This section shall not be construed as prohibiting any person, firm, cooperative burial association or corporation, subject to the provisions of this chapter, from using legitimate and honest advertising.

The Iowa Supreme Court interpreted this section in Cedar Memorial Park Cemetery Association v. Personnel Association, Inc., 178 N.W. 2d 343 (Iowa 1970). The court held that the section prohibited the funeral director from "paying anything of value for the securing of business in all cases without exception." Id. at 350. [Emphasis in original]. "Section 156.9(4) [now (3)] must be construed in light of this prohibition. It permits the sale of pre-need contracts under the conditions there stated, but not in violation of section 156.12". Id.

The Iowa Supreme Court gave a strict construction of the phrase "securing of business." An insurance policy making the funeral home the primary beneficiary would have the effect of securing business for the home, since there will be financial benefit to the family of the buyer to take business to that home where insurance benefits will cover the cost of the funeral. Although the buyer may change the beneficiary, in most cases that would not be expected to happen.

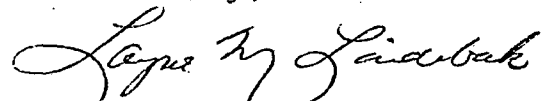
Chapter 147 and Chapter 258A, the rules promulgated under Chapter 258A, provide ground for revocation only in cases of a felony related to the profession. In addition, neither Chapters 147 or 258A refer to a violation of any provision of Chapter 156 as grounds to revoke the license.

Chapter 147.55(3) provides for the revocation of a license for "engaging in unethical conduct or practice harmful or detrimental to the public." The issue is thereby raised whether a violation of the solicitation law, section 156.12, can be deemed to be unethical conduct prohibited by Chapter 147.55(3), Chapter 258A.10(3) and I.A.C. 470--147.212(1)(c).

Section 156.12 does not intend to prohibit the funeral director from actively seeking business. No prohibition against solicitation of business, per se, can be found. What is prohibited by section 156.12 is the payment of a commission or gratuity by a funeral director for the securing of business. By prohibiting the receipt or payment of commissions for the solicitation of business, the legislature has put the mortuarial science profession on notice that commissions for solicitation have no proper place in the profession. The legislature has gone so far as to provide criminal penalties for the activity. From that, a persuasive argument can be made that such commissions are the type of unethical conduct to which sections 147.55 and 258A.10 refer.

It remains to be discussed whether the receipt of insurance commissions are prohibited under section 156.12. That section prohibits the funeral director from paying a commission or gratuity to anyone who secures business for him. It also prohibits anyone from accepting a gratuity or commission from the funeral director. It is the customary practice of life insurance salespersons to receive a commission from premiums paid to the company and that was the situation posed in the question to the Attorney General. Since that is the case, no money is being paid by the funeral director, nor are commissions being paid from monies to which the funeral director would be otherwise entitled. Since the commissions received from insurance companies for the sale of their policies do not come under the prohibition found in section 156.12, the receipt of such commissions is not unethical conduct prohibited by sections 147.55(3), 258A.10(3) and I.A.C. 470--147.212(1)(c). The conclusion is thus reached that the receipt of commissions paid by an insurance company to the funeral director or his employees does not constitute sufficient ground for the revocation of the funeral director's or embalmer's license to practice mortuary science.

Sincerely,



LAYNE M. LINDEBAK

Assistant Attorney General

LML:crh

STATE OFFICERS AND DEPARTMENTS. Natural Resources Council. 1909 Session, 33rd G.A., Ch. 266, Chapter 455A, Code of Iowa 1979; Section 109.15, Code of Iowa 1979; 580 I.A.C. §§5.3(455A), 7.2(109). 1909 act which gives the city of Emmetsburg certain powers over Five Island Lake does not exempt the city from compliance with Natural Resources Council regulations. (Ovrom to Wertepny, Deputy Director, Iowa Natural Resources Council, 9/12/79) #79-9-7(L)

September 12, 1979

Mr. Alan D. Wertepny, Deputy Director
Iowa Natural Resources Council
Wallace Building
L O C A L

Dear Mr. Wertepny:

You requested our opinion concerning the following question:

What is the effect of Chapter 455A, Code of Iowa, which places the waters of Iowa under the jurisdiction of the Iowa Natural Resources Council and subject to its regulations, on a 1909 Legislative act which gave the city of Emmetsburg jurisdiction over, and power to make improvements on, a lake in the city?

The 1909 act, a copy of which is attached, was passed by the 33rd. General Assembly, Chapter 266, House File No. 7, and is called "Preservation and Improvement of Medium Lake". The act dedicates Medium Lake (now known as Five Island Lake) to the use of the people of the state for use as a park. It includes the lake under the jurisdiction of the city of Emmetsburg "as if the [lake] were a part of the streets, public grounds and parks of said city," and authorizes the city to deepen and dredge and make improvements on the lake. 1909 Session, 33rd. G.A., Ch. 266, §§ 2, 3. The act was never put into the Code of Iowa.

In 1949 the Legislature enacted Chapter 455A, which puts the public and private waters of the state under the jurisdiction of the Iowa Natural Resources Council. Section 455A.18, Code of Iowa 1979. The council, under

Chapter 455A, has promulgated rules requiring council approval for operation and maintenance of dams and impounding structures. See 580 I.A.C. §5.3 (455A). The same 1949 act also amended Code Section 109.15 to require written approval of the Natural Resources Council before the owner of a dam alters it to lower the water level. 580 I.A.C. §7.2(109), Iowa Administrative Code, governs temporary lowering of a water level.

The city of Emmetsburg now wants to make improvements on Five Island Lake which would involve deepening and dredging or temporarily lowering the water level of the lake. The Emmetsburg city attorney has asked the Natural Resources Council whether the city can proceed to do so under the authority granted it in the 1909 act without complying with Chapter 455A, Section 109.15, Code of Iowa, and 580 I.A.C. §§5.3 (455A) and 7.2(109).

The goals of Chapter 455A are flood control, orderly development, wise use and conservation of water resources. Section 455A.2, Code of Iowa 1979. To achieve these goals the powers of the state are vested in the Iowa Natural Resources Council, which has "the duty and authority to establish and enforce a comprehensive state-wide plan for the control, utilization and protection of the surface and ground-water resources of the state". Section 455A.2. Water occurring in any basin or watercourse (which includes lakes) is declared to be "public waters and public wealth of the people of the state of Iowa and subject to use in accordance with the provisions of this chapter. . . ." Section 455A.2, Code of Iowa 1979. Lakes in city parks are not exempted from the provisions of Chapter 455A and are therefore subject to use in accordance with the provisions of that statute and regulations promulgated thereunder.

There are two basic provisions of the 1909 act which must be examined against the 1949 legislation (codified in Chapter 455A and Section 109.15, Code of Iowa) to determine what effect, if any, the later legislation has upon the earlier.

The first of these gives jurisdiction over the lake to the city of Emmetsburg as if it were "a part of the streets, public grounds and parks of said city." 1909 Session, 33rd. G.A., Ch. 266, §2. On the other hand,

Chapter 455A gives the Natural Resources Council jurisdiction over the public and private waters of the state necessary to carry out the provisions of that chapter. Section 455A.18, Code of Iowa 1979. There is no inconsistency between the jurisdictional provisions of the 1909 act and Chapter 455A. The 1909 act gives Emmetsburg jurisdiction over the lake as if it were a part of the parks of the city. Chapter 455A gives the Natural Resources Council jurisdiction over all waters of the state necessary to carry out the provisions of Chapter 455A. Since lakes in city parks do fall under the jurisdiction of the Iowa Natural Resources Council under Chapter 455A, the lake which is under the jurisdiction of Emmetsburg as if it were a city park should also be under the jurisdiction of the Natural Resources Council.

The second question is whether Section 3 of the 1909 act is inconsistent with the 1949 legislation. Section 3 of the 1909 act authorizes the city of Emmetsburg to make improvements and to deepen and dredge Five Island Lake. At issue is whether this provision allows the city to make improvements or to deepen and dredge without obtaining approval of the Natural Resources Council as required in Section 109.15, Code of Iowa 1979, and 580 I.A.C. §§5.3(455A) and 7.2(109).

When construing two statutes dealing with the same subject matter, the general rule is that if by any fair and reasonable construction they can be reconciled, both shall stand. Board of Trustees of Farmers Drainage District v. Iowa Natural Resources Council, 247 Iowa 1244, 1251, 78 N.W.2d 798 (1956) (Statute authorizing drainage district to make repairs on a drainage ditch not in conflict with Chapter 455A, so that both could stand.) In light of this policy, we think that a fair and reasonable construction of these two acts shows them to be consistent. Several reasons support this conclusion.

First, the 1909 act makes it clear that the lake is property of the state and dedicated to the public for use as a park and recreation ground. 1909 Session, 33rd. G.A., Ch. 266, §1. The power granted to the city to make improvements and to deepen and dredge therefore does not make the city the owner of Five Island Lake, but merely clarifies that the city can make improvements on it. It is unlikely that the Legislature, merely by putting the lake

under city management, intended to make Five Island Lake exempt from any later enacted laws applicable to deepening and dredging on all Iowa lakes.

Second, nothing in the purpose of the 1909 act indicates that Five Island Lake is exempt from Iowa Natural Resources Council regulations. The 1909 act was passed long before Iowa adopted a home rule amendment to its constitution. At that time an Iowa city was able to perform an act only if the Legislature had expressly granted it the power to do so or if the authority were clearly implied in state law. Scheidler, Implementation of Constitutional Home Rule in Iowa, 22 Drake L. Rev. 294, 295-96 (1973). The purpose of the 1909 act therefore was apparently to give the city of Emmetsburg power, which it otherwise would not have had, to spend money to make improvements on Five Island Lake and to manage the lake as a public park. Requiring compliance with Iowa Natural Resources Council regulations is not inconsistent with this purpose. The city would still have the power to spend money to improve the lake and to manage it as a public park; and, as any other city which makes improvements on a park, it should comply with the regulations of the Iowa Natural Resources Council.

Last, the terms of the 1909 act itself indicate that the Legislature did not intend that Five Island Lake be exempt from the state's general conservation laws. Section 3 of the 1909 act states: "Nothing herein contained shall be construed as excepting said lake from the operation of the general fish and game laws of the state". At the time the act was passed the Natural Resources Council had not been created, so of course the Legislature could not have expressly made the lake subject to council regulation. However, the provision quoted above does strongly indicate that the Legislature, when it gave Emmetsburg power to make improvements on the lake, did not intend to exempt it from other laws dealing with watercourses.

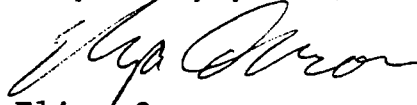
In conclusion, we find that the jurisdictional provisions of the 1909 act and the 1949 legislation are not in conflict. Similarly, a fair and reasonable construction of the other provisions of the two acts shows them to be consistent with each other. That is, the city can make improvements or deepen and dredge the lake under the authority granted it

Mr. Alan D. Wertepny

Page 5

in the 1909 act. However, before doing so it must obtain approval of the Iowa Natural Resources Council as required in the 1949 legislation and council regulations.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Eliza Ovrorn".

Eliza Ovrorn
Assistant Attorney General

EO:rcp

SCHOOLS: Experimental Laboratory, Schools:
Fourteenth Amendment to Constitution of United States, § 2 U.S.C. § 2000d, §265.4, The Code 1979, Chapter 273, The Code 1979. 1) Past admissions policy of Malcolm Price Laboratory School of the University of Northern Iowa, wherein only Black students from Waterloo are admitted for up to 100 seats in the school raises a serious question of equal protection and might be found to violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, but could also be sustained depending on standard of review applied and whether less race-conscious alternatives are available to accomplish program goals. Given the prospect of legal challenge, state agencies are generally advised to avoid admissions or other benefit programs in which race is an exclusive criteria unless the activities are designed to remedy the effects of identifiable past discrimination. Even if a legal violation has occurred, it is doubted that a court of equity would order a radical retrospective remedy. 2) A policy of admitting all children of a family once one child has been admitted is not unlawful. 3) The admissions program at Malcolm Price Laboratory School does not appear to discriminate unlawfully against the handicapped. (Appel to Lind, State Representative, 9/5/79) #79-9-4(L)

September 5, 1979

The Honorable Thomas A. Lind
State Representative
111 Frederic Avenue
Waterloo, Iowa 50701

Dear Representative Lind:

You have requested an opinion of the Attorney General as to the legality of the policies utilized in admitting students to the Malcolm Price Laboratory School of the University of Northern Iowa, Cedar Falls (hereinafter referred to as Price Lab School). Specifically, you have requested an opinion on the following questions in light of the United States Supreme Court decision of Regents of the University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed. 750(1978).

(1) Is Price Lab School's admission policy of admitting up to 100 Black students from Waterloo illegal?

(2) Is Price Lab School's admission policy of allowing all children of a family to attend the school once one of the siblings has been admitted illegal?

(3) Does Price Lab School's admission policy discriminate against ability-handicapped children?

A brief factual background is necessary to place your questions in the appropriate context.

I.

Price Lab School is affiliated with the University of Northern Iowa and is located on the institution's campus in Cedar Falls. It is operated by the University's Department of Teaching and is fully accredited. Enrollment policies at Price Lab School provide a multi-cultural student body of approximately 740 elementary and secondary students drawn from the Waterloo-Cedar Falls metropolitan area. Hence, a cross-section of the area population is achieved consisting of representatives from urban and rural areas and minority groups. Provisions are also made for the admission of handicapped children.

The Price Lab School concept was initiated by University officials in 1968 in direct response to the recognized need to expose teaching degree candidates to a broad range of pupils. As a result, a program emerged which has contributed significantly to the University's teacher education program.

Student teachers and faculty are allowed to conduct experimentation with content methods and instruction materials. Moreover, the school provides a multi-cultural environment on the University campus where education students can gain direct experience in an integrated school. Hence, the stated goals of the program are first, to produce teachers who can effectively cope with the problems of teaching minority and disadvantaged children and second, to provide a setting from which to analyze one of the critical educational problems of our day--race relations.

Most of the students at Price Lab School attend pursuant to a contract with Cedar Falls Public Schools. This contract establishes two geographic "zones", "basic" and "buffer", which outline the main attendance areas within the city limits. The "basic attendance zone" consists of the geographic area directly surrounding Price Lab School. Children who reside within this area are given first consideration for admission.

The geographic area adjacent to the designated "basic attendance zone", is the "buffer attendance zone". Children residing in this area may also apply for admission to the school and are admitted on a "first come, first served" basis as space permits.

The goal of the zoning mechanism is to obtain a valid cross-section of the community. Therefore, the physical outline of the zones is drawn to include the greatest degree of pupil diversity.

The result has been the creation of a student body consisting of children from high, middle, and low income families, whose parents are, inter alia, professionals, laborers, farmers and welfare recipients.

The Cedar Falls contract serves to supply children from families of varying socio-economic backgrounds, including representatives from East Asian, American Indian, Iranian, Vietnamese and Hispanic groups. However, the contract yields no Black students. Therefore, in 1969, Price Lab School officials contracted with the Waterloo School District to admit up to 100 Black students each year in order to achieve a full racial mix.

A selection committee, composed of Black citizens from Waterloo and representatives from various Waterloo schools, selected the pupils for admission, with the presence of a sibling already enrolled in the school considered one factor in the selection process. However, only Black students were considered for admission.

In June of 1978, the Waterloo Board of Education voted to phase out the Price Lab School contingent and to permit only those Black students enrolled for the 1978-1979 academic year and their younger siblings to continue their elementary and secondary education at Price Lab School. No other new pupils are allowed to enroll as of that date.

Section 265.4, The Code 1979, provides that "the state Board of Regents and the board of directors of any school district in the State of Iowa may enter into contracts for the laboratory schools to furnish instruction to pupils of such school district . . .". The section clearly authorizes the Board of Regents, and through them the Price Lab School, to make contracts for students with "any school district in the state of Iowa". It does not say they must draw all of their students from one district. Section 265.4 authorizes the appropriate officials to enter into contracts "with any school district", and hence, with any number of districts desired. This would also authorize them to contract with a particular district for the operation of a particular program and allow them to use any otherwise lawful method deemed appropriate for selecting students from the district. Therefore, the mere fact that Price Lab School officials contracted with the Waterloo Board of Education to admit students into the program, would not, standing alone, invalidate the admissions program. Once offered, however, public education must be dispersed within applicable constitutional and federal statutory limits.

II.

While the action of the Waterloo School Board in phasing out the program significantly alters the present situation, your opinion request asks whether the past policy of setting aside 100 places solely for Black students is unlawful. Since analysis of

the legality of past action may provide guidance for future action by Malcolm Price and state agencies generally, we will consider the legal questions presented in some detail.

The key case considering the validity of race-conscious admission standards in public education is Regents of the University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed. 2d 750 (1978). In that case, a severely fragmented Supreme Court struck down by the narrowest majority an admissions program at the University of California's Davis Medical School which set aside a specific number of positions for which only members of racial minorities could compete.

It cannot be overemphasized, however, that the Bakke case does not authoritatively answer every legal question involving racial classifications. In Bakke, a majority of the Court could not agree on the proper legal analysis of the questions presented. Justice Stevens, joined by three Justices, declined to reach the question of whether the Davis program violated the equal protection clause of the United States Constitution and narrowly concluded that it violated the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Justice Brennan, also joined by three colleagues, found that the Davis program was constitutionally and statutorily permissible since it created a "benign" rather than an invidious classification designed to stigmatize members of racial minorities. Only one member of the Court, Justice Powell, reached the conclusion that the Davis admissions program violated the equal protection clause of the Fourteenth Amendment. Thus, there is no opinion subscribed to by a majority of the Court entitled to precedential respect. Given the lack of coherent approach in the Bakke case, academic writers have questioned its authoritative value. See Blasi, Bakke as Precedent: Does Justice Powell Have a Theory?, 67 Cal.L.Rev. 21(1979); O'Neil, Bakke in Balance, Some Preliminary Thoughts, 67 Cal.L.Rev. 143 (1979); Tribe, Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice, 92 Harv.L.Rev. 864(1979).

A. Equal Protection

The Fourteenth Amendment to the U. S. Constitution provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." One approach to equal protection in the area of race-conscious admissions programs, not necessarily embraced by any other member of the Court, was offered in Bakke by Justice Powell.

Under Justice Powell's opinion, at least some race-conscious admissions programs are invalid unless it can be shown that the state's interest is permissible and substantial and that the program is "necessary to the accomplishment of its purpose.", 438 U.S. at 305, 98 S.Ct. at 2757, 57 L.Ed.2d 781. Unlike in Bakke, the Price program was not designed to alleviate the disabling effects of past discrimination. It did, however, seek to attain a diverse student body. The stated purpose of achieving diversity appears to be twofold:

- a) providing student teachers with a multi-racial, multi-cultural environment where they can gain direct experience with the problems of an integrated school; and
- b) providing a laboratory for the study of race relations.

In addition, it would appear that the existence of a multi-cultural atmosphere benefits the students themselves by broadening their life perspectives.

We think it likely that the above interests are sufficiently weighty to satisfy the first prong of Justice Powell's strict scrutiny equal protection test. The Supreme Court has recognized that substantial benefits flow to both Whites and Blacks from interracial association, Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155(1977). And, the state has a strong interest in educating teachers with understanding of race relations and in establishing a setting in which obstacles to establishing better interracial understanding can be studied and explored.

We are uncertain, however, whether the former Malcolm Price admissions program could be characterized as "necessary to the accomplishment" of the above purposes as Justice Powell would require. In order to achieve the goals of the Malcolm Price program, it is obvious that a proper mix of students from various backgrounds, including representatives of the Black minority, must be maintained. If the racial composition of the student body becomes imbalanced, diverse, interracial association would be impaired and the goals of the program seriously undermined. The question thus becomes whether the setting aside of a certain number of places in the school for members of a specific racial minority to the exclusion of others is necessary to achieve the satisfactory mix of students, or whether a less restrictive, less race-conscious alternative can achieve the same result. Apparently, Malcolm Price's contract with Cedar Falls has produced members of non-Black minority groups without setting aside a specific number of seats for which they exclusively qualify. Whether such an alternative exists with respect to Black students is a question of fact for a trial court to decide and cannot be determined in the context of a legal opinion of the Attorney General.

On the other hand, if the approach used by the four members of the Court led by Justice Brennan were applied, the program would be sustainable. Under the Brennan approach, courts less critically examine race-conscious programs where the policy "does not stigmatize any discrete group or individual." 438 U.S. at 373, 98 S.Ct. 2791, 57 L.Ed.2d 823. Under the Brennan analysis, a racial classification "designed to further benign purposes" must serve important governmental objectives, 438 U.S. at 359, 98 S.Ct. 2784, 57 L.Ed.2d 814. While an admissions policy that sets aside 100 places exclusively for minority members may not be strictly necessary to achieve the desired results,

such a program is clearly substantially related to achievement of the objective. The policy on its face insures enrollment of Blacks thereby promoting the purposes which lay behind providing a diverse student body for students and teachers alike.

As indicated above, it is possible that Malcolm Price's past admissions scheme could survive constitutional attack under Justice Powell's Bakke approach if the structure is required to achieve program goals. Even if such a demonstration could not be made, the admissions approach would not be constitutionally defective if Justice Brennan's approach were applied. Here, however, a White applicant's choice to pursue a profession is not impaired, nor is the applicant's ability to obtain an education seriously hampered. Indeed, given the environment of compulsory school attendance, the state is obliged to provide educational benefits to all rejected applicants, albeit not at Malcolm Price School. See Bakke, supra., 438 U.S.300, 98 S.Ct. 2733, 57 L.Ed.2d 750, n. 39, where Justice Powell observes, "Respondent's position is wholly dissimilar to that of a pupil bussed from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school . . . ; instead, it denied him admission and may have deprived him altogether of a medical education." See also Johnson v. Chicago Board of Education, 48 U.S.L.W. 2148(7th Cir., decided July 13, 1979) (school board's voluntary imposition of racial quotas on student enrollment in two high schools in order to prevent de facto segregation resulting from "white flight" does not violate equal protection clause).

We cannot with confidence predict whether these factual differences would affect the judgment of the Supreme Court. There is some reason to believe, however, that the factual differences may be constitutionally significant to some members of the Court. Indeed, Justice Powell expressly noted that in Bakke, "some individuals are excluded from enjoyment of a state-provided benefit -- admission to the medical school -- they otherwise would receive", 438 U.S. at 305, 98 S.Ct. 2757, 57 L.Ed.2d 781. And, there is reason to believe that the Supreme Court may not be as philosophically rigid on race relations questions in the wake of Bakke as some commentators feared or hoped. See United Steelworkers v. Weber, 47 U.S.L.W. 4851(June 27, 1979) (upholding voluntary race-conscious affirmative action programs by private employers).

In sum, it cannot be definitely stated that the Supreme Court would find that the Price admissions policy violates the equal protection clause. The goals of the program and the interests at stake sharply contrast with those in Bakke. These differences may affect the proper standard of judicial review under the equal protection clause. Even if the traditional strict scrutiny approach of Justice Powell were followed, it is possible that the program could be sustained if it could be factually demonstrated that the admissions policy is necessary to achieve the school's goals.

We wish to stress, however, that the Malcolm Price Laboratory School offers a highly unusual context for equal protection analysis. In our view, it is generally desirable for state agencies to avoid admissions or benefit programs in which race is an exclusive criteria unless the activities are designed to remedy the effects of identifiable past discrimination or unless abandonment of racial exclusive means inevitably defeats compelling program purposes. Any less cautious approach could lead to protracted legal battles that might yield unfavorable results.

B. Civil Rights Act of 1964

In addition to equal protection, it could be argued that the Malcolm Price admissions policy violates the Civil Rights Act of 1964, which provides, in relevant part:

No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance, 42 U.S.C. § 2000d.

In Bakke, four members of the Supreme Court, in an opinion written by Justice Stevens, declined to reach the constitutional question discussed in Section II.A above and instead concluded that the above provision of the Civil Rights Act of 1964 established a "color blind" standard for the operation of programs or activities receiving federal funds, 438 U.S. 416, 98 S.Ct. 2813, L.Ed. 850. Applying this rigid standard, the four members of the Supreme Court, subscribing to the Stevens opinion, found the Davis admissions program violative of the Civil Rights Act. While all the remaining members of the Supreme Court expressly rejected the "color blind" approach to the Civil Rights Act, Justice Powell (who concluded that the protections of the equal protection clause of the Constitution and the Civil Rights Act were coextensive) also held the Davis program violated the Civil Rights Act. Thus, notwithstanding differences in theory, a five-member majority of the Supreme Court held the Davis program invalid on statutory grounds. There are, however, at least three serious legal problems in applying Bakke's tenuous majority result with regard to the Civil Rights Act to the Malcolm Price former admissions program.

First, while the important differences between the Davis and Price settings in terms of goals and interests at stake, discussed in Section II.A above, would probably not affect the judgment of the four members of the Court who subscribed to the Stevens opinion, it is not wholly clear how the remaining members of the Court would evaluate the fundamentally different situation. As stated above, the fact that prospective non-Black Waterloo applicants are not denied comparable educational opportunity, may be legally significant.

Second, the Supreme Court has not yet authoritatively determined whether the Civil Rights Act of 1964 is applicable to all activities and programs of an entity that receives federal funds, or only to those programs that receive direct or indirect federal financial assistance. The majority view, and in our opinion a better approach, indicates that no such nexus is necessary, Bob Jones University v. Johnson, 396 F.Supp. 597, aff'd. 529 F.2d 514(4th Cir.1975) (where students receive veterans benefits, Title VI applies to college), United States v. El Camino Community College, 454 F.Supp. 825 (C.D. Calif. 1978) (Title VI requirements not limited to federally assisted programs). The rationale in these cases is that given the clearly remedial purposes of the Civil Rights Act, its provisions should be given broad construction. At least one case, however, seems to suggest that the strictures of the Civil Rights Act apply only to programs or activities supported by them, Johnson v. City of Arcadia, 450 F.Supp. 1363(M.D. Fla.1978).

Finally, even assuming the Civil Rights Act of 1964 is applicable, the Supreme Court has not authoritatively determined that a private individual could bring a lawsuit to compel compliance. The Stevens opinion in Bakke seems to have taken no definitive view on the question, noting that the University of California did not raise the issue at trial. "Because petitioner questions the availability of a private cause of action for the first time in this Court," wrote Justice Stevens, "the question is not properly before us", 438 U.S. at 419, 98 S.Ct. 2814, 57 L.Ed.2d 851. Then, however, Justice Stevens observes that a private cause of action is "in accord with the federal Court's consistent interpretation of the Act" and that "a fair consideration of the petitioner's tardy attack on the propriety under Title VI requires that it be rejected", 438 U.S. 420-21, 98 S.Ct. 2814-5, 57 L.Ed.2d 852-53.

While these comments plainly suggest predisposition of four members of the Court, no precedent entitled to stare decisis has been established since a majority of the Court did not subscribe to the position and since resolution of the question was not necessary to the result. Three members of the Supreme Court who joined Justice Brennan's opinion, along with Justice Powell, expressly found it unnecessary to reach the question and declined to engage in similar speculation. Only one member of the Supreme Court, Justice White, considered the question directly. He concluded, based on principles of statutory interpretation and relevant legislative history, that a private cause of action did not exist, 438 U.S. 379, 98 S.Ct. 2794, 57 L.Ed.2d 827.

It is therefore not entirely clear that an admissions program similar to that formerly in use at Malcolm Price provides the basis for a lawsuit by a private litigant under the Civil Rights Act of 1964. Again, however, we advise that state agencies generally not use racially exclusive criteria in their programs unless they are designed to eliminate identifiable past discrimination or unless abandonment inevitably defeats compelling program purposes.

C. Remedy

As was stated in the introduction to this opinion, the Waterloo School Board is phasing out the Blacks only admissions program to Malcolm Price School. Assuming a constitutional or statutory violation has occurred, however, the question remains whether a court would order a retroactive remedy that would substantially alter the makeup of the present student body at Malcolm Price. Specifically, the question is whether a court would dislodge presently enrolled students who had been admitted under the special program in previous years.

Fashioning the proper remedy to correct a violation of law rests in the sound discretion of the trial judge. No rigid standards apply. As the Supreme Court observed in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 14-5, 91 S.Ct. 1267, 1280, 28 L.Ed. 566 (1971):

The essence of equity jurisdiction has been the power of the chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it . . .

Citing Hecht v. Bowles, 321 U.S. 321, 229-30, 64 S.Ct. 587, 592, 88 L.Ed. 754 (1944). As was further stated in Swann, the task is to correct by balancing of individual and collective interests, the condition that offends the Constitution, Id.

Applying these principles to the circumstances presented here, we think a court would be reluctant to uproot presently enrolled students from Malcolm Price. Unlike the vast majority of the school desegregation cases, we doubt that a putative litigant could demonstrate that any class of persons have been deprived of a meaningful education or that a psychological "stigma" affecting minority group members is being perpetuated, Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). And, unlike in the school desegregation cases, it cannot be shown that officials over the years persistently avoided implementation of the law of the land as interpreted by the Supreme Court of the United States, see Swann v. Mecklenburg Board of Education, supra., and its progeny. Indeed, if nothing else, the previous discussion demonstrates how nebulous the law is in this difficult area. The interest in providing educational continuity for presently enrolled students would thus appear to outweigh the merely theoretical benefits that would accrue from their displacement. While we thus conclude that the immediate phasing out of the program in light of potential legal challenges may be prudent, we do not think a more radical retrospective policy change is required.

III.

The second question presented to us asks whether Price Lab School's policy of allowing all children of a family to attend the school once one of the siblings has been admitted is unlawful. We conclude that it is not. Under the equal protection clause of the Fourteenth Amendment, absent a classification interfering with the exercise of a fundamental right or operating to the peculiar disadvantage of a suspect class, a state's conduct need only bear a reasonable relationship to some proper object. Mass. Board of Retirement v. Murgia, 427 U.S. 307,312(1976); Royster Guano Co. v. Virginia, 253 U.S. 412,415(1925). The "right" here affected--to attend this experimental public school rather than some other--is not a "fundamental" right such as would warrant strict judicial scrutiny of the classificatory criteria. San Antonio Independent School District v. Rodriguez, 411 U.S. 1(1973). Nor is there any indication that this admissions policy works to the disadvantage of a class of persons to which courts have given special protection, such as a racial group. Brown v. Board of Education, 347 U.S. 483,494(1954). By admitting siblings of families belonging to all racial groups previously admitted, the policy discriminates against no particular racial group. Instead, it simply preserves family cohesiveness that is otherwise impaired when children attend different schools. This feature of admissions policy encourages parents to allow their children to attend a non-neighborhood school. Surely this is a reasonable basis for the classification. Consequently, we find no fault with Price Lab School's policy regarding siblings of previously admitted students.

IV.

The final question raised asks whether Price Lab School unlawfully discriminates against ability-handicapped children. While handicapped persons share many of the characteristics that qualify such classifications as race as suspect, i.e., "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process", San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 16-17, this classification has never been subjected to the more exacting strict scrutiny standard. In Gurmankin v. Costanzo, 411 F.Supp. 982, n. 8 (E.D.Pa. 1976), the district court stated:

[T]he plaintiff's claim that the blind constitute 'suspect classification' is unsupportable. Even admitting that the blind are a small, politically weak minority that has been subjected to varying forms of prejudice and discrimination, the limitations placed on a person's ability by a handicap such as blindness cannot be ignored. Unlike distinctions based on race or religion, classifications based

on blindness often can be justified by the different abilities of the blind and the sighted.

Hence, if the handicapped class is not a suspect class, a state's conduct need only bear a reasonable relationship to some proper object. Royster Guano Co. v. Virginia, 253 U.S. 412,415(1925).

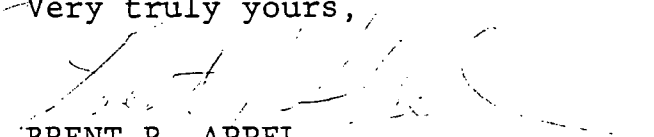
In our present context, there is no basis from which to conclude that Price Lab School unlawfully discriminates against ability-handicapped children. The policy of Malcolm Price School was expressed as follows in past contracts with the Waterloo School District:

5. GUIDELINES FOR PUPIL IDENTIFICATION
AND DESIGNATION INCLUDES:

a. Special education programs throughout the Area VI Education Agency are operated under the jurisdiction of the officers of that agency. The Laboratory School accepts into its special education programs those students assigned through the process and procedures of Area VI. The Laboratory School operates a classroom for intermediate age educable mentally retarded children, a classroom for severe and profoundly handicapped children, and multi-categorical resource programs for both elementary and secondary school pupils.

Therefore, assuming the contract fairly represents the school's policy, handicapped children are not excluded from admission to Price School. Chapter 273, The Code 1979, specifies that assignment of handicapped children should take place through the processes and procedures of area education agencies. This chapter appears designed to place handicapped students in facilities most suitable to their special educational needs. Since the policies appear rationally based, we do not believe that Chapter 273 of the Code, on its face or as applied by Price School, raises any substantial constitutional problems.

Very truly yours,


BRENT R. APPEL
First Assistant Attorney General

BA:s

The research assistance of Mr. Craig Brenneise, a staff member of the Department of Justice, is gratefully acknowledged.

COUNTIES AND COUNTY OFFICERS: County Recorders. Sections 110.11, 110.12, 1979 Code of Iowa -- A county recorder may, but is not required to, demand a cash deposit or a bond from depositaries he or she designates to sell hunting and fishing licenses. (Ovrom to Priebe, State Senator, 9/5/79) #79-9-3(L)

September 5, 1979

Senator Berl E. Priebe
State House
Des Moines, Iowa 50319

Dear Senator Priebe:

This is in response to your letter dated July 9, 1979, in which you requested an opinion concerning Section 110.11, 1979 Code of Iowa. That section states:

Depositaries - bond. The county recorder may designate various depositaries for the sale of [hunting, fishing and trapping] licenses other than the office of the county recorder. The director may designate depositaries other than those designated by the recorders of the various counties but in so doing the interest of the state shall be fully protected either by a sufficient cash deposit or a satisfactory bond

You asked whether a cash deposit was required from depositaries designated by the county recorder.

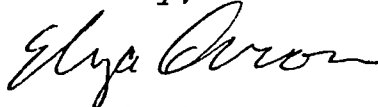
The second sentence of Section 110.11 requires only those depositaries designated by the director of the conservation commission to post a cash deposit or a bond. It does not require the depositaries designated by a county recorder to do so.

The county recorder is responsible for all fees from the sale of hunting and fishing licenses issued through his or her office and sold by others. Section 110.12, 1979 Code of Iowa. The county recorder may therefore wish to require any depositary he or she designates to make a cash deposit or post a bond.

Senator Berl E. Priebe
Page Two

The appointing of depositaries by the county recorder is discretionary, and nothing in the Code prohibits the county recorder from requiring a deposit or a bond. Therefore the county recorder may, at his or her discretion, require a cash deposit or bond from such depositaries.

Sincerely,



ELIZA OVRÓM
Assistant Attorney General

EO/bje-

CITIES AND TOWNS: Impoundment period for stray dogs. Iowa Const. Art. III, §§ 38A and 39A. §§ 188.1(4), 188.26, 188.27, 188.35, 188.36, 351.3, 351.7, 351.8, 351.26, 351.27, 351.33, 351.34, 351.35, 351.37, The Code 1979. Iowa law provides no impoundment period for dogs with a license and rabies vaccination tag, therefore local officials should consult any municipal or county ordinances controlling this situation since local governments may enact ordinances of this nature pursuant to the Iowa Const., Art. III, §§ 38A and 39A. The statutory period within § 351.37 applies only to dogs without a valid rabies vaccination tag. Dogs without a license may be taken up pursuant to the statutory procedures of Ch. 188 or killed pursuant to § 351.26 (Benton to Robinson, State Senator, 9/5/79) #79-9-2(L)

September 5, 1979

Mr. Cloyd E. Robinson
State Senator
404 Cherry Hill Road, S.W.
Cedar Rapids, Iowa 52404

Dear Senator Robinson:

We have your letter of July 9 requesting an opinion from this office concerning the appropriate holding period of a stray dog under Iowa law. Your request has been prompted by a letter from the Secretary of the Iowa Federation of Humane Societies expressing the concern of city pounds and shelters throughout the state as the proper period in which they may impound dogs.

Although Iowa law does not define the term "stray", § 188.1(4), The Code 1979 provides:

"'Estray' shall mean any animal unlawfully running at large the ownership of which cannot, with reasonable inquiry in the neighborhood, be ascertained, or any animal which has been abandoned by its owner".

This statutory definition reflects the common law notion that an estray is an animal whose owner is unknown. Black's Law Dictionary, (4th Ed. 1968) pps. 651-652. For the purposes of responding to your question, a stray dog may be defined as a dog whose owner is unknown or which has been abandoned by its owner.

As your request notes Ch. 351 The Code 1979, generally governs the licensing of dogs. Under the procedure delineated in this chapter, a person seeking to license a dog must apply to the county auditor for the license on or before the first day of January of each year. § 351.3, The Code 1979. Upon

receipt of the application, the county auditor either mails or delivers the license in the form of a metal tag stamped with the year in which issued, the name of the issuing county, and the serial number as recorded in the auditor's record book, § 351.7, The Code 1979. The tag is required to be kept on the dog by a "substantial collar". § 351.8, The Code 1979. In addition to this licensing requirement, Ch. 351 prescribes that each dog owner obtain a rabies vaccination for the animal to be evidenced by a certificate of vaccination. §§ 351.33 and 34, The Code 1979. The veterinarian thus issues a tag with the certificate of vaccination which also must be attached to the collar of the dog. § 351.35, The Code 1979. Only § 351.37, The Code 1979 makes reference to the impoundment of dogs. This section provides:

"Any dog found running at large and not wearing a valid rabies vaccination tag and for which no rabies vaccination certificate can be produced shall be apprehended and impounded.

"When such dog has been apprehended and impounded, the official shall give written notice in not less than two days to the owner, if known. If the owner does not redeem the dog within seven days of the date of the notice, the dog may be humanely destroyed or otherwise disposed of in accordance with the law. An owner may redeem a dog by having it immediately vaccinated and by paying the cost of impoundment.

"If the owner of a dog apprehended or impounded cannot be located within seven days, the animal may be humanely destroyed or otherwise disposed of in accordance with law".

The impoundment period established in this chapter by its own terms applies whether or not the owner of the dog is known, and thus is applicable to certain stray dogs. However, this statutory procedure is expressly limited to dogs, "...found running at large and not wearing a valid rabies vaccination tag and for which no rabies vaccination certificate can be produced... ." The seven-day impoundment period would be applicable only when the stray dog lacks the requisite rabies vaccination tag and rabies vaccination certificate. This provision does not encompass situations in which a stray dog may possess a rabies vaccination tag but no license, or when both the rabies vaccination tag and license are present.

Concerning the former scenario at least two options appear

available in the absence of an express statutory impoundment period. The first option concerns unlicensed dogs, in regard to which § 351.26 provides:

"It shall be lawful for any person, and the duty of all peace officers within their respective jurisdictions unless such jurisdiction shall have otherwise provided for the seizure and impoundment of dogs, to kill any dog for which a license is required, when license tag attached as herein provided."

It must be noted of course, that this option is available only in the absence of any local ordinance which may control the impoundment of stray dogs. Further, a licensed dog may be killed:

"...when such dog is caught in the act of worrying, chasing, maiming, or killing any domestic animal or fowl, or when such dog is attacking or attempting to bite a person." § 351.27, The Code 1979.

The second option, again assuming the absence of any local ordinance controlling stray dog impoundment, may be found in the statutory procedures of Ch. 188, The Code 1979 providing for the taking up of estrays. As noted earlier a stray dog would fall within the definition of an "estray" as defined in § 188.1(4). Section 188.26, The Code 1979 states:

"Any resident of a county may take up an estray when the same is on his premises. He may also take up an estray which is upon the premises of any other person when such other person had knowledge that such estray was on his premises and fails for five days to take up such estray".

Section 188.27, The Code 1979 provides the procedure through which an estray is taken up:

"A person taking up an estray shall within five days thereafter, post up, for ten days, a written notice in three of the most public places in the township, which notice shall be signed by him and shall embrace:

1. A full description of said animal.
2. The time and place of taking up such estray."

Section 188.34, The Code 1979 states:

"If the estray be not claimed by the owner

Cloyd E. Robinson
State Senator
Page 4

within six months from the time it is taken up, the property therein shall vest in the taker-up, if he has complied with the provisions of this chapter".

Other related provisions in Ch. 188 pertain to the owners recovery of the estray, and his rights after title in the estray vests in the person taking it up. Sections 188.35 and 36, The Code 1979. Once title in the estray has vested, it may be sold or retained. Either of these options outlined above appear available for the stray dog without a license.

A dog with a license appears outside the definition of an estray since the license tag carries a serial number reflected in the county auditors book through which the owner may be determined. As a result, Iowa law provides no statutory impoundment period for dogs with both a license and rabies vaccination tag. Absent a state statute which would be controlling in this circumstance, we would advise that the operators of city pounds and shelters consult any city or county ordinance which would be applicable. Under the Iowa Constitution, Art. 3 §§ 28A and 39A, respectively local municipalities and counties are empowered to enact ordinances regulating the impoundment period for dogs with a license and rabies vaccination tag.

Sincerely,

Timothy D. Benton
TIMOTHY D. BENTON
Assistant Attorney General
Farm Division

TDB/nay

MUNICIPALITIES: Conflicts of Interests. § 39.3(1), 362.5, 362.6, 376.4, and Chapter 20, The Code 1979; § 386A.22, The Code 1975. A business agent for a municipal union is not precluded from running for city council. If elected, this union business agent should not take part in any questions before the council relating to labor/management relations in general and any matters relating to his union in particular; however, contracts between these parties would not necessarily be void under § 362.5, The Code 1979. (Mueller to Jesse, State Representative, 10/31/79) #79-10-23.(L)

October 31, 1979

Mr. Norman Jesse
State Representative
1021 Fleming Building
Des Moines, Iowa 50309

Dear Representative Jesse:

You recently requested an opinion of the Attorney General concerning the following question: whether a city employee, who is a business agent for Municipal Laborers Union Local 353, has a conflict of interest which would prevent him from running for the city council?

There is nothing in the Code which speaks to your specific situation. Section 376.4, The Code 1979, merely states, in pertinent part:

An eligible elector of a city may become a candidate for an elective city office by filing with the city clerk a valid petition requesting that his or her name be placed on the ballot for that office.

The only requirement for running for city council seems to be that the individual be an "eligible elector". An "eligible elector" is defined in § 39.3(1) as "a person who possesses all of the qualifications necessary to entitle him to be

registered to vote . . ." Therefore, there is nothing in the Code which would prohibit this individual from running for the city council as long as he or she is an eligible elector.

The question then arises as to whether a conflict of interest would exist if this Municipal Union business agent becomes a member of the city council. Section 362.5, The Code 1979, which until 1975 was found in § 368A.22, provides in pertinent part:

A city officer or employee shall not have an interest, direct or indirect, in any contract or job of work or material or profits thereof or services to be furnished or performed for his city. A contract entered into violation of this section is void. The provisions of this section do not apply to:

. . . .

7. A contract in which a city officer or employee has an interest if the contract was made before the time he was elected or appointed, but the contract may not be renewed.

"Contract" is defined as "any claim, account, or demand against or agreement with a city, express or implied." § 362.5.

It is our opinion that § 362.5, The Code 1979, probably does not apply to the situation presented here. The purpose of this section is to protect the public from public officers who would profit personally from their place of advantage in government. Leffingwell v. City of Lake City, 257 Iowa 1022, 135 N.W.2d 536 (1965). Also in Bay v. Davidson, 133 Iowa 688, 111 N.W. 25 (1905), the court stated, while discussing the above statute:

The prohibition has relation to 'contracts or jobs for work.' It is plain that the expression 'contract or job' is to be construed in the conjunctive. What was intended was to forbid in connection with municipal work the employment by the council of one of its members.

Obviously § 362.5, The Code 1979, does not apply to the type of employment contract involved here. Any dealings between the city and this union would no doubt be in connection with a collective bargaining agreement. Such an agreement under Chapter 20 would be an employment contract between the public employer and public employees. This is not a case where the council member is contracting with the council to employ himself or to provide services to the city. Any possible bargaining agreement to this business agent would be tenuous or nonexistent. Moreover, we note that under Chapter 20, the city council does not select the bargaining agent, if any, for its employees. That is done by the employees at an election. Thus, the policy thrust of § 362.5, the prevention of improper influence over with whom the city contracts, is inapplicable in this context.

Although there is no evidence before us of such, profit to the council member could be a possible result if his salary as a business agent were tied in some way to the "success" of the collective bargaining agreement. If that could be shown, then there is a better case that § 362.5 would apply to this type of contract and any contract between the union and city would be void. It should be noted that any contract (as defined in § 362.5) between the union and the city which was made before this agent were elected would not be void, because of the exception of § 362.5(7), The Code 1979. However, this contract could not be renewed during his term of office.

Because § 362.5 probably does not apply, we should point out the provisions of § 362.6, The Code 1979, and common law. Section 362.6 provides, in pertinent part:

A measure voted upon is not invalid by reason of conflict of interest in an officer of a city, unless the vote of the officer was decisive to passage of the measure.

Also, in Wilson v. Iowa City, 165 N.W.2d 813, 822 (Iowa 1969) the court stated:

We doubt if any rule of law has more longevity than that which condemns conflict between the public and private interests of governmental officials and employees nor any

which has been more consistently and rigidly applied.

The high standards which the public requires of its servants were set by common law and adopted later by statute. It is almost universally held that such statutes are merely declaratory of the common law. (Cases cited).

These rules, whether common law or statutory, are based on moral principles and public policy. They demand complete loyalty to the public and seek to avoid subjecting a public servant to the difficult, and often insoluble, task of deciding between public duty and private advantage.

It is not necessary that this advantage be a financial one. Neither is it required that there be a showing the official sought or gained such a result. It is the potential for conflict of interest which the law desires to avoid. (Emphasis added).

In another leading case dealing with possible conflicts of interest, the court stated: "It is the general tendency of the decisions of the courts of this country to frown upon all attempts and all contracts and all action on the part of the public officers which tend to place them in a position where they will be tempted to act from motives other than a fair and honest discharge of their public duty . . ." James v. City of Hamburg, 174 Iowa 301, 156 N.W. 394 (1916).

Thus, although § 362.5 probably does not apply, § 362.6 may well apply. To avoid the potential sanctions of § 362.6 such a council member should avoid participating in any questions before the council relating to labor/management relations in general and any matters relating to his union in particular.

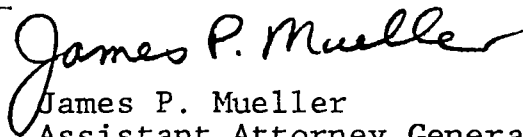
In conclusion, there is nothing in the Code which would preclude a business agent for a municipal union from running for city council. However, if elected, this union business

Mr. Norman Jesse

Page 5

agent should not take part in any questions before the council relating to labor/management relations in general and any matters relating to his union in particular, but contracts between these parties would not necessarily be void under § 362.5, The Code 1979..

Sincerely,

James P. Mueller

James P. Mueller
Assistant Attorney General

JPM:rcp

LIQUOR, BEER AND CIGARETTES: Highways; §§ 123.46, 313.2, 321.1(48), The Code 1979. The words "upon the public streets or highways" do not include areas of a roadside park beyond the highway right of way consisting of areas for vehicular traffic, parking and sidewalks because penal statutes must be strictly construed. Moreover, the word "upon" cannot be construed to mean "near" so that the phrase "upon the public streets or highways" includes a roadside park. Thus, the consumption of beer in areas of a state roadside park beyond the highway right of way is not prohibited under the first phrase of § 123.46. (Mull to Knuth, Jones County Attorney, 10/30/79) #79-10-22(L)

October 30, 1979

Mr. Adrian T. Knuth
Jones County Attorney
212 1st Avenue West
Cascade, IA 52033

Dear Mr. Knuth:

This is in reply to your request for an opinion of the Attorney General regarding the interpretation of a statutory provision regulating the consumption of beer at particular places. Your question is as follows: "Is the consumption of beer at . . . [a] roadside park in violation of the first phrase of Section 123.46 of the Iowa Code, i.e., 'It is unlawful for any person to use or consume alcoholic liquors or beer upon the public streets or highways. . .' [?]"

Your letter gives the following description of a particular roadside park north of the city of Anamosa on U.S. Highway No. 151: "This park is owned by the State of Iowa and maintained by the Iowa State Department of Transportation. It consists of little more than a driveway, toilet facilities and picnic benches. Area youths have begun to use the area for kegers."

It is our opinion that the words "upon the public streets or highways," when strictly construed in a criminal prosecution, do not contemplate areas of a state roadside park beyond the highway right of way consisting of areas for vehicular traffic, parking and sidewalks. Thus, the consumption of beer in such areas is not prohibited under the first phrase of §123.46, The Code 1979.

The statutory provision in question is part of the Iowa Beer and Liquor Control Act, Chapter 123, The Code 1979. It provides in relevant part that:

It is unlawful for any person to use or consume alcoholic liquors or beer upon the public streets or highways, or alcoholic liquors in any public place, except premises covered by a liquor control license, or to possess or consume alcoholic liquors or beer on any public school property or while attending any public or private school related functions, and no person shall be intoxicated nor simulate intoxication in a public place. (Emphasis added.)

Violation of the provision constitutes an offense punishable as a simple misdemeanor, §123.46. The criminal character of the act of consuming beer depends on the locality in which it is committed under §123.46. Proof of a place of consumption as designated in the statute is an essential element of the offense. 1952 Op.Att'yGen. 128.

No statutory definition of street or highway is found in Chapter 123. The statutory definition of street and highway of the motor vehicle laws has been applied to a criminal statute prohibiting carrying guns in a vehicle "on any public highway." See State v. Sims, 173 N.W.2d 127, 128 (Iowa 1969). Section 321.1(48), The Code 1979, provides that: "Street" or "highway" means the entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic. In Kearney v. Ahmann, 264 N.W.2d 768, 770 (Iowa 1978), the court commented on the scope of §321.1(48) by stating that "[a]s thus defined a street includes all parts of the right of way, including the portion used for parkings, sidewalks and pedestrian travel."

A respectable argument can be made that the state roadside parks are part of the highways within the contemplation of the words "upon the public streets or highways" in §123.46, based on the definition of highways in §321.1(48). Obviously, the park area would fall within the public property lines. The contention that the state roadside parks are part of the highways appears also to be supported by the statutory provision authorizing the utilization of roadside parks. Section 313.2, The Code 1979, provides that "[s]aid parks and parking areas shall be a part of the primary road system. . . ." Moreover, a policy argument can be made that in the interests of highway safety, motorists who stop at a roadside park for rest should not be permitted to consume beer. Thus, it can be argued that the word "upon" should be construed to mean "near" so that the phrase "upon the public streets or highways" of §123.46 includes areas near the public streets. See Hilton v. Cramer, 50 S.D. 274, 209 N.W. 543, 544 (1926) (statutory language requiring land for school house site to be situated "upon" a highway construed to mean along or near to the highway).

Criminal statutes, however, must be strictly construed and their scope should not be expanded to include cases beyond the plain meaning of their words though within the policy of the law. State v. Nelson, 178 N.W.2d 434 (Iowa 1970). The ordinary meaning of

the word "street" would not include recreational areas of a roadside park. As the court noted in the street assessment case of Bennett v. Seibert, 10 Ind. App. 369, 35 N.E. 35, 38, (1893), "[b]eing parks, they cannot be said to be, in any proper sense, parts of the street. Streets and parks, while they are both devoted to the uses of the public, are set apart for widely different purposes. A street is a place of passage, a park a place of rest or recreation." In our opinion, the words "upon public streets or highways" should be limited to a strict sense of highway right of way in a criminal prosecution under §123.46. Ordinarily, the highway right of way would consist of the areas used for vehicular traffic, parking and sidewalks.

An example of the scope of the words "upon the public streets or highways" is found in Op. Att'y Gen. #65-4-1. It held that consumption of beer and alcoholic liquors is prohibited upon the roads of a state park under the statutory predecessors of §123.46.¹ The rationale of the opinion was that the state park road system is one of the systems of highways under §306.1, The Code 1962, and thus such roads are public streets or highways within the contemplation of the beer and liquor laws.

The designation of state roadside parks as part of the primary road system under §313.2 is intended as an enabling provision for the acquisition and maintenance of roadside parks by the Department of Transportation. Section 313.2 authorizes the Department of Transportation to "utilize any land acquired incidental to the acquisition of land for highway right of way. . . for roadside parks and parking areas." Since land obtained for roadside parks is considered incidental to that property acquired for highway right of way, §313.2 should not be construed as enlarging the definition of streets and highways to include roadside parks in a criminal prosecution under §123.46.

Support for the view that mere proximity of a particular place to a highway does not in itself make such a place encompassed by the words "upon the public streets of highways" is found in Hutchinson v. State, 8 Ga. App. 684, 70 S.E. 63, 65 (1911). The court in Hutchinson held that standing on a porch of a store approximately 15 to 30 feet from a public road is not standing on the highway within the contemplation of statutory language comparable to the first phrase of §123.46. The court expressly rejected the argument that "on" the highway should be construed as meaning "near" the highway. The court reasoned as follows:

¹Section 123.42, The Code 1962, provides in relevant part that: "It is hereby made unlawful for any person to use or consume any alcoholic liquors upon the public streets or highways," Section 124.37, The Code 1962, provides, inter alia, as follows: "It is hereby made unlawful for any person to use or consume beer upon the public streets or highways,"


[I]t would be hard judicially to prescribe the exact distance on either side of a public road to which the offense should be extended. . . .

The act. . . declares it to "be unlawful for any person or persons to be and appear in an intoxicated condition on any public street or highway." etc. We are of the opinion that this language is unambiguous, and that the words "on the public highway" do not include near the public highway. We are aware that there is a line of decisions in which the word "on" is held to be synonymous with "near" or "contiguous". . . . Every case we have been able to find in which the word "on" is construed to mean near to, adjacent, or contiguous, however, was a civil case: and, of course, a far greater liberality of construction is allowable in such cases than where a criminal statute is to be construed. We have been unable to find any case where a statute making it a crime to do an act at a specified time or at a definite place has been construed to include an act done near the forbidden time or place, unless the locality included by implication was in some way necessarily connected with the locality in which the act was forbidden.

Accord, Cawood v. Commonwealth, 229 Ky. 522, 17 S.W.2d 453 (1929) (court held that being intoxicated 100 yards from a public road was not in a public road within contemplation of statute prohibiting drunkenness).

We find the rationale of Hutchinson persuasive. Parks are areas for recreational use and thus are distinct from streets and highways which are for the purpose of travel. In our opinion, the words "upon the public streets or highways" do not include areas of a roadside park beyond the highway right of way consisting of the areas for vehicular traffic, parking and sidewalks when strictly construed in a criminal prosecution. Moreover, the word "upon" cannot be construed to mean "near" so that the phrase "upon the public streets or highways" includes a roadside park. Accordingly, the consumption of beer in the areas of a state roadside park beyond the highway right of way does not violate the first phrase of §123.46.

Sincerely,



RICHARD E. MULL
Assistant Attorney General

REM:rh

COUNTIES: County Attorney. §§ 20.3(7), 20.4(3), 20.17(2), 332.61, and 336.2(11). Chapters 20 and 336, The Code 1979, do not require a county attorney to negotiate with public employees and otherwise act as agent for the county in Chapter 20 proceedings and, therefore, a part-time county attorney could contract to provide such services and receive extra compensation for those services. (Mueller to Neas, Audubon County Attorney, 10/30/79) #79-10-21CL)

October 30, 1979

Mr. David M. Neas
Audubon County Attorney
411 South Park Place
Audubon, Iowa 50025

Dear Mr. Neas:

This is in response to the following letter from you:

I am writing to request an Opinion as to whether a County Attorney could legally enter into a contract with the County Board of Supervisors to conduct negotiations with Public Employees and otherwise act as agent for the County in proceedings pursuant to the Public Employee Relations Act, Chapter 20 of the Code.

The services contemplated would possibly include some legal representation, but would primarily include assisting County officials with developing personnel policies, bargaining, and assisting in implementing the contract.

My review of prior Attorney General's Opinions indicate that some sorts of duties may be performed by County Attorneys for County agencies for additional compensation and some may not. Therefore, I would appreciate your Opinion in regard to this matter.

First, the question arises whether such a service, negotiating with the public employees as agent for the county, falls within the statutory duties of county attorneys as set forth in the Code. It is our opinion that such is not required under Chapter 336, The Code 1979, which prescribes the duties of county attorneys, nor under Chapter 20, which sets forth public employer and employee rights during collective bargaining. A county attorney cannot be required to perform any duty save such as the law requires of him. Dubuque County v. Fitzpatrick, et al., 144 Iowa 86, 90, 121 N.W. 15, 17 (1909). Nothing within § 336.2, The Code 1979, which sets forth the duties of county attorneys would expressly cover the above-described service, unless such service is "enjoined upon him by law". § 336.2(11).

Section 20.17(2), The Code 1979 states:

The employee organization and the public employer may designate any individual as its representative to engage in collective bargaining negotiations.

This Code section implies that no particular party within the governing body of the public employer is already assigned the duty of representing the employer in collective bargaining negotiations, but that the governing body of the employer may appoint an authorized representative. See 1975 Op. Att'y Gen. 65. It would seem, therefore, that negotiating with the public employees as agent for the county would be a service outside the duties enjoined upon the county attorney by law.

Even though this service may not be one required by law, this does not answer the question whether this county attorney could receive extra compensation for performing such service. Your letter fails to mention if this county attorney is a full-time or part-time county attorney pursuant to § 332.61, The Code 1979. That section provides:

A county may provide that the county attorney shall be a full-time or part-time county officer in the manner provided in this division. A full-time county attorney shall refrain from the private practice of law.

The "private practice of law" is nowhere defined in the Code. However, the clear intent of this recent legislative act is

to place a restriction on the ability of full-time county attorneys to practice law, other than to perform duties required as a county attorney. However, we think the "private practice of law" includes the representation of clients for compensation other than the representation required by the position of county attorney. This would preclude full-time county attorneys from providing any services for extra compensation, for such would be the "private practice of law".

As to part-time county attorneys, the Code does not limit their practice of law. However, the question arises whether the position of negotiator during collective bargaining for the county is incompatible with the position of county attorney. In State v. White, 257 Iowa 660, 133 N.W.2d 903, 905 (1965), the court stated the test of incompatibility to be:

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.'

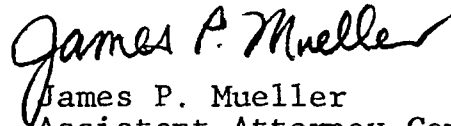
There seems to be no such problem here. As negotiator for the county, the part-time county attorney is merely carrying out an extension of his required statutory duties; that is, the county attorney is merely giving additional service to the county board of supervisors for extra compensation. He/she is not providing a service which is incompatible with the duties of a county attorney, but merely extra service of a similar nature.

A question also remains whether a county attorney in this position as a negotiator for the county will have a conflict of interest. Our opinion as to this is that no conflict of interest will arise. The county attorney is a public employer, like the board of supervisors which he would represent, and would, therefore, have much the same interest.

In conclusion, negotiating with public employees and otherwise acting as agent for the county in Chapter 20 proceedings is not required of the county attorney under Chapters 20 and 336, The Code 1979. However, a full-time

county attorney shall refrain from the private practice of law and, therefore, is precluded from contracting to provide such services and receive extra compensation for such services. Nothing is found in the Code of Iowa or the court decisions which would preclude a part-time county attorney from performing services, which are beyond his public duties, for extra compensation. Nor do we find any inherent incompatibility or conflict of interest in this situation. In concluding this, however, we do not wish to be understood as suggesting that the arrangement is necessarily desirable from a policy perspective. A part-time county attorney will occasionally be called upon to represent the Board of Supervisors in arbitration and other legal proceedings arising out of a collective bargaining agreement. The "heat" sometimes generated by such proceedings may qualify the effectiveness of a part-time county attorney in subsequent negotiations.

Sincerely,



James P. Mueller
Assistant Attorney General

JPM:rcp

COUNTIES: Sections 306.21, 358A.3, 358A.4, 358A.5, 358A.6, 358A.12, 409.4, 409.5, 409.6, 409.7. When a submitted plat request meets all state, county and municipal subdivision regulations, the county board of supervisors has a duty to approve the plat. (Hagen to Criswell, Warren County Attorney, 10/30/79) #79-10-20(L)

October 30, 1979

Mr. John W. Criswell
Warren County Attorney
208 West Ashland
Indianola, Iowa 50125

Dear Mr. Criswell:

This is written in response to your request for an Attorney General's opinion as to whether or not a county board of supervisors has the discretionary power to disapprove a rural subdivision plat when the plat meets all zoning and subdivision regulations as required by county and state law.

The procedure followed by the Warren County Board of Supervisors is as follows: The board promulgates regulations concerning subdivisions according to a comprehensive plan pursuant to ch. 358A. A plat is submitted to the county engineer for approval pursuant to § 306.21. The board of supervisors' approval is then sought before such plat is recorded. Your question arises at this point -- may the board of supervisors, who have set the controlling standards to be met and enforced by the county engineer, disapprove of a subdivision plan which meets those standards?

Chapter 358A, The Code 1979, sets forth the powers of a county board of supervisors as to county zoning. Section 358A.3, The Code 1979. These powers include regulation, restriction and prohibition of land use throughout the county. The regulations

shall be in accordance with a comprehensive plan to encourage the most appropriate use of land throughout the county. Section 358A.5, The Code 1979. The board has the power to prescribe and charge permit fees upon a showing of compliance with these regulations. The section then states: ". . . [U]pon payment of the required permit fee, the board of supervisors shall, within seven days, issue a permit to the applicant." [Emphasis added]. This section imposes a duty on the board to issue this permit; no discretionary power to approve or disapprove a request has been given to the board.

Section 306.21, The Code 1979, which concerns the approval of road plans in rural subdivisions by counties, and ch. 409, The Code 1979, which mainly concerns the platting of subdivisions in general with specific reference to cities, have applicability to this question.

Both sections indicate possible board discretion in the approval of these plats. Section 306.21 provides: "In the event such road plans are not approved as herein provided such roads shall not become the part of any road system defined in this chapter (i.e., public road)." It is our opinion that "not approved" under this provision is a procedural matter, however, affecting the maintenance of the proposed roads as public or private, and does not mean disapproval of a subdivision plat.¹

Chapter 409, The Code 1979, provides that a city council shall approve a plat when the plat conforms to city regulations concerning streets, blocks, street grading, sidewalks, sewers and alleys.² See §§ 409.4-7, The Code 1979.

While the courts have not been in total accord in determining the discretion of a county board of supervisors, we are persuaded by the determinations held in the majority of jurisdictions that the board's powers to regulate subdivisions do not continue beyond providing regulations. Upon compliance with these regulations, the board acts in a ministerial capacity and is duty

¹Two earlier opinions addressed the question of county engineer vs. board of supervisors approval. A county board of supervisors cannot direct the county engineer to approve a plat, but if the plat bears the approval of the board, it may be recorded with the possible consequence of no public use dedication. See Op. Atty. Gen. #78-5-8, Op. Atty. Gen. #78-6-6.

²The city council's approval may be necessary for a rural subdivision if within two miles from city limits. See Op. Atty. Gen. #79-4-2.

bound to approve a submitted plat.³ In Knudson v. State, 157 N.E.2d 469 (Indiana 1959), (concerning a municipality) the Indiana Supreme Court stated:

. . . [P]ublic policy requires that [a municipality's] authority be exercised in a standardized and clearly defined manner so as to enable both the landowners and the municipality to act with assurance and authority regarding the development of such areas. It is for this reason that although public policy requires municipal control of such development, nevertheless the authority of a town to deny a landowner the right to develop his property by refusing to approve the plat of such development is by statute made to rest upon specific standards of a statute or implementing ordinance. Therafter the approval or disapproval of the plat on the basis of controlling standards is a ministerial act. [Emphasis added].

Thus, the county board of supervisors may exercise discretion in zoning by the adoption of uniform regulations and rules, promulgated and published in accordance with appropriate statutes, see §§ 358A.3, 358A.4, 358A.5, 358A.6, 358A.12. The action of the board in this case, however, was mandated by its ministerial duty to perform.

In summary, we are of the opinion that when subdivision regulations of a county and the state have been met concerning a plat request, the county board of supervisors has a ministerial duty to approve the plat.

Very truly yours,


HOWARD O. HAGEN
Assistant Attorney General

HOH:sh

³ This office issued an opinion in 1964 advising that a board of supervisors does have authority to reject a proposed plat if the streets platted do not comply with reasonable requirements. Op. Atty. Gen. 6.6, October 29, 1964. This was a construction of the Iowa statute in effect at that time: Section 306.15, The Code 1962.

CRIMINAL LAW WEAPON'S PERMIT: Sections 724.4, 724.5, 724.6, The Code 1979. Staff members, including correctional officers, of the division of adult corrections must obtain a permit to carry weapons. The \$5.00 fee required for such permits may be paid from the division's appropriated funds. (Cleland to Farrier, Director, Division of Adult Corrections, 10/25/79) #79-10-17(L)

October 25, 1979

Mr. Hal Farrier, Director
Division of Adult Corrections
Iowa Department of Social Services
Lucas State Office Building
Des Moines, IA 50319

Dear Mr. Farrier:

Your predecessor, Mr. McCauley, has requested an opinion of the Attorney General concerning Iowa's new weapon laws. Specifically he asked the following questions:

1. Are state correctional officers or staff members required to obtain a weapons permit to perform their job duties?
2. Is the \$5.00 fee applicable to these state employees to be paid by state appropriated funds?

To answer the first question as it relates to "correctional officers," we refer to section 724.4(4), The Code 1979, which provides, in part, as follows:

A person who goes armed with a dangerous weapon concealed on or about his or her person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor, provided that this section shall not apply to any of the following:

* * *

4. Any correction officer, when his or her duties require, serving under the authority of the division of adult corrections. (Emphasis added).

Section 724.4(4) specifically exempts from the criminal provision which prohibits carrying concealed dangerous weapons any correctional officer serving under the authority of adult corrections provided that the duties of the officer require the officer to carry weapons. However, keeping in mind the fact that the obvious purpose of Code § 724.4 is to protect the health, safety, and welfare of the people of Iowa, the exemptions provided for in Code § 724.4(4) should be narrowly construed. Therefore, in our opinion, the language, "when his or her duties require, serving under the authority of the division of adult corrections" in Code § 724.4(4) would not permit a correctional officer to carry a weapon to and from work in a manner generally prohibited by Code § 724.4. In other words, the exemption provided for in Code § 724.4(4) is strictly limited to those instances when (1) the correctional officer's duties require the officer to go armed, and (2) the correctional officer actually is engaged in the discharge of those duties.

Section 724.5, The Code 1979, provides that it is "the duty of any person armed with a revolver, pistol, or pocket billy concealed upon his or her person to have in his or her immediate possession the permit provided for in section 724.4, subsection 8" Section 724.5 further provides that it is a simple misdemeanor for a person to fail to produce such a permit upon request of a peace officer. In our opinion, the exemptions provided for in Code § 724.4 do not apply to Code § 724.5. Moreover, since section 724.6, The Code 1979, provides, in pertinent part, that "[a] person may be issued a permit to carry weapons when the person's employment as a . . . correctional officer . . . reasonably justifies that person going armed," it appears that the General Assembly intended that correctional officers obtain professional permits to carry weapons. Obviously, in order to obtain such a permit, a correctional officer would have to satisfy the requirements of sections 724.6 to 724.10, The Code 1979.

It is, therefore, our opinion, based on Code §§ 724.4 through 724.6, that a correctional officer is exempt from the criminal provisions of Code § 724.4 provided that the officer is acting under authority of the division of adult corrections and his or her duties require the use of weapons. However, a correctional officer is not exempt from the provisions of Code § 724.5. Thus, a correctional officer must obtain and carry a professional permit to carry a concealed revolver, pistol, or pocket billy. In addition, Code § 724.6 imposes a general duty to obtain a permit.

With regard to staff members who are not properly classified

as "correctional officers," the statutory exemption referred to in section 724.4(4), The Code 1979, does not apply. Accordingly, in order to avoid the criminal liability imposed by section 724.4, The Code 1979, such staff member is required to obtain and have in his or her possession a nonprofessional weapons permit prescribed by section 724.7, The Code 1979, in order to lawfully carry a dangerous weapon.

With regard to the second question Mr. McCauley posed for our consideration, when it is determined by the division of adult corrections that certain staff members, including "correctional officers," should be armed in the course of performance of their official duties, the \$5.00 fee required pursuant to section 724.11, The Code 1979, may be paid from the division's appropriated funds. These expenditures would constitute part of the "operating expenses" of the division. See generally sections 8.22, 8.31 and 8.38, The Code 1979.

Sincerely,


RICHARD L. CLELAND
Assistant Attorney General

RLC/cla

COUNTIES AND COUNTY OFFICERS: County Hospitals. Ch. 347A; §§ 347A.1, 347A.6, The Code 1979. The board of trustees of a county public hospital organized and operating under ch. 347A, The Code 1979, is not prohibited from employing independent legal counsel. (Hyde to Larson, Winneshiek County Attorney, 10/25/79) #79-10-16(L)

October 25, 1979

Dennis G. Larson
Winneshiek County Attorney
112 W. Main Street
Decorah, Iowa 52101

Dear Mr. Larson:

We have received your request for an opinion from this office concerning whether a county public hospital organized and operating under ch. 347A, The Code 1979, may retain its own legal counsel. We are unable to find any prohibition in the Code which would restrict the board of hospital trustees from such a practice.

The board of hospital trustees is entrusted with the administration and management of a county public hospital acquired, constructed, equipped, enlarged or improved under ch. 347A, The Code 1979. Specifically:

The board of hospital trustees may employ, fix the compensation and remove at pleasure professional, technical and other employees, skilled or unskilled, as it may deem necessary for the operation and maintenance of the hospital . . . The board of trustees shall make all rules and regulations governing its meetings and the operation of the county hospital . . .

Section 347A.1, The Code 1979.

A decision to employ legal counsel would be discretionary and within the purview of the hospital board of trustee's general administrative powers. Further, § 347A.6 specifically empowers the board to employ counsel for necessary legal proceedings in connection with the collection of accounts.

Dennis G. Larson
Winneshiek County Attorney

Page 2

In conclusion, there appears to be nothing in ch. 347A which would restrict the board of trustees of a county hospital organized pursuant to ch. 347A from employing independent legal counsel.

Very truly yours,

Alice J. Hyde

ALICE J. HYDE
Assistant Attorney General

AJH:sh

ENVIRONMENTAL PROTECTION - State Implementation Plan Permit Requirements - Federal Clean Air Act. Sections 455B.12(10), 455B.13(3), The Code 1979; 42 U.S.C. § 7401, et seq.; 400 I.A.C. § 3.1(455B). Current Iowa Statutes and rules do not require a permit from the Department of Environmental Quality prior to construction of portions of a stationary source of air pollution other than equipment which causes pollution and related pollution control equipment. At present the Department does not have the statutory authority to modify its rules to require such a permit. (Ovrom to Crane, Iowa Department of Environmental Quality, 10/24/79) #79-10-15 (L)

October 24, 1979

Larry E. Crane
Executive Director
Iowa Department of Environmental Quality
Wallace State Office Building
L O C A L

Dear Mr. Crane:

You requested our opinion concerning the statutory authority of the Iowa Air Quality Commission to establish rules requiring that a permit be obtained prior to construction of any portion of a stationary source of air pollution.

The federal Clean Air Act as amended, 42 U.S.C. 7401, et seq., requires that each state develop a state implementation plan (SIP) setting forth the manner in which the state will achieve compliance with national ambient air quality standards. 42 U.S.C. 7401(a)(1). The Act requires that SIPs include a permit program which provides for preconstruction review of large sources of air pollutants. 42 U.S.C. §§ 7401(a)(2)(D), 7410(a)(2)(I), 7401(a)(4); § 7475 (permit requirement for major emitting facilities in attainment, or clean air, areas); §§ 7502(b)(6) and 7503 (permit requirement for major stationary sources in nonattainment areas). Under the Act, construction may not be commenced on any "major emitting, facility" or "major stationary source" without first obtaining a permit. 42 U.S.C. §§ 7475 and 7502(b)(6). Major emitting facilities and major stationary sources are stationary sources which emit over specified amounts of pollutants. 42 U.S.C. §§ 7479, 7602(j). A "stationary source" is defined in the Act as "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. § 7411(a)(3). Basically, then, under the Act a permit must be obtained before beginning construction of any building, structure, facility or installation which emits specified amounts of air pollutants.

The Environmental Protection Agency (EPA) requires that each SIP show that the State has the legal authority to prevent construction or operation of a facility, building, structure, installation or combination thereof which will prevent attainment or maintenance of ambient air quality standards. 40 C.F.R. 51.11(a)(4). The state must specifically identify the provisions of state law which grant this authority. 40 C.F.R. 51.11(c). See also proposed rules in 44 Fed. Reg. 51924 (Sept. 5, 1979) (to be codified in 40 C.F.R. § 51.24 and Appendix S, §II.)

You have asked two questions in relation to the Clean Air Act provisions and regulations discussed above:

1. Do the current Iowa statutes and rules require that a permit be obtained before the initiation of construction of any portion of a stationary source of air pollution?

2. If not, does the Air Quality Commission have adequate statutory authority to modify its rules to require that a permit be obtained before initiation of construction of any portion of the source, or must the department's statutory authority be modified?

In response to your first question, Iowa law and Department of Environmental Quality rules require a permit prior to initiation of construction, installation, or alteration of equipment which causes or contributes to air pollution and related pollution control equipment. Sections 455B.12(10), 455B.13(3), The Code 1979; 400 I.A.C. §§ 3.1(455B), 1.2(17)(455B), 1.2(21)(455B). (Actually the definition of "equipment" varies slightly among the different rules and Code sections, but such differences are irrelevant to this opinion. Hereinafter all equipment which causes or contributes to air pollution and related pollution control equipment will be referred to as "equipment".) Except for conditional permits for electrical power plants (See §§ 455B.12(10), 455B.13(3), Chapter 476A, The Code 1979) no permit is required before initiation of construction of portions of a stationary source of pollution other than the equipment.

Iowa statutes and rules therefore allow construction of other portions of a building, facility, structure or installation to commence before a permit for the equipment is obtained. This is at variance with the Act's requirement that a permit be obtained prior to construction of any building, facility, installation or structure, and the requirement in the regulations that the state have authority to prevent construction of the same.

Larry E. Crane
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Thus your first question is answered in the negative: except for conditional permits for electrical generating facilities, Iowa statutes and rules do not require that a permit be obtained prior to initiation of construction of portions of a source of air pollution other than equipment.

Your second question is whether the Iowa Air Quality Commission has adequate statutory authority to change its rules to require a preconstruction permit for all portions of a stationary source rather than just for the equipment. For the reasons set forth below, it is our opinion that the commission does not have such authority under current Iowa statutes.

An administrative body has only such powers as are specifically conferred by the statute creating it, or can be necessarily implied therefrom. Quaker Oats Co. v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862, 867 (Iowa 1978); Brandenhorst v. Iowa State Highway Commission, 202 N.W.2d 38, 41 (Iowa 1972). The relevant provisions of Iowa law are contained in chapter 455B, §§ 10-29, The Code 1979. Section 455B.12 lists the duties and powers of the Air Quality Commission and section 455B.13 lists the duties and powers of the executive director of the Department of Environmental Quality. Each of these Code sections contains only one provision regarding permits. Sections 455B.12(10), 455B.13(3), The Code 1979. Under these provisions, the commission and the director have the authority to require permits before the construction, installation or alteration of equipment. (Also included are permit provisions for construction of electrical power generating facilities). Sections 455B.12(10), 455B.13(3), The Code 1979. See also chapter 476A, The Code 1979 (certification procedure for electrical power plants). Thus the statutory delegation of power does not grant the commission power to require a permit before initiation of construction of portions of a source of air pollution other than equipment, except in the case of an electrical power plant. Under the rule that an agency has only that power delegated to it, it therefore appears that the commission does not have the authority to require permits prior to initiation of construction of portions of the source other than equipment (except in the case of electrical power plants). This conclusion is supported by an examination of several other provisions of chapter 455B.

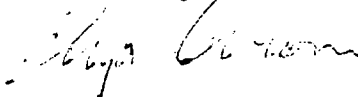
Chapter 455B classifies a broad category of businesses, plants, buildings and residences which emit pollutants as "air contaminant sources." Section 455B.10(2), The Code 1979. The commission is authorized to set maximum amounts of contaminants which these sources may emit. Section 455B.12(4). However, when the statute establishes the permit authority of the commission it mentions only equipment which causes or contributes to air pollution and related

Larry E. Crane
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pollution control equipment (in cases other than electrical generating facilities). §455B.12(10), The Code 1979. This indicates that the legislature was aware of the distinction between "air contaminant source" (which includes a broad category of pollution sources, including equipment, §455B.10(2)) and equipment which causes air pollution and related pollution control equipment. The legislature nevertheless chose to give the commission authority to require a permit only before construction, installation or alteration of equipment, and not before initiation of construction of other portions of an "air contaminant source".

Therefore it is our opinion that the statute delegating the powers of the Iowa Air Quality Commission, chapter 455B, The Code 1979, does not grant sufficient authority to meet the permit requirements of the federal Clean Air Act as amended.

Sincerely,



ELIZA OVRÓM
Assistant Attorney General

EO/bje

COUNTIES AND COUNTY OFFICERS: County Memorial Hospitals. Chapters 37, 347, 347A; Sections 37.5, 37.6, 37.7, 37.8, 37.9, 37.18, 37.28-37.30, 347.13(1), 347.13(11), 347.24, 347A.1, 347A.8, The Code 1979. Title to real property used or proposed to be used for a memorial hospital pursuant to ch. 37, The Code 1979, should be in the name of the county or city which has authorized the hospital's erection and equipment, and not in the name of the hospital commission.
(Hyde to Howell, State Representative, 10/22/79) #79-10-13 (L)

October 22, 1979

Honorable Rollin Howell
State Representative
702 Bradford
Marble Rock, Iowa 50653

Dear Representative Howell:

We have received your request for an opinion from this office concerning whether title to real estate upon which a ch. 37, The Code 1979, memorial hospital rests should be vested in the appropriate county or city where the hospital is located, or in the appropriate hospital commission appointed to manage the hospital. Your request has arisen as a result of certain contemplated transactions involving property currently purportedly owned by the Floyd County Memorial Hospital Commission.

The question of who should hold title to real estate used for public hospital purposes has been analyzed in earlier opinions from this office. We concluded that title to land for a county public hospital established pursuant to ch. 347, The Code 1979, should be in the name of the board of trustees of the county hospital and not in the name of the county where it is located. 1968 Op. Atty. Gen. 414. The board of trustees of a ch. 347 county public hospital is given broad powers, including the power to "[p]urchase, condemn, or lease a site for the hospital, § 347.13(1), The Code 1979, and to "sell or exchange any property", § 347.13(11), The Code 1979. See Phinney v. Montgomery, 218 Iowa 1240, 257 N.W.208 (1934). The power to purchase and sell ordinarily carries with it the authority to take and convey title.

In contrast, a subsequent opinion concluded that title to real estate for hospitals organized under ch. 347A, The Code 1979, should be in the name of the county rather than the board of hospital trustees. 1968 Op. Atty. Gen. 882. The board of trustees of a ch. 347A hospital has much more limited and principally administrative powers than the board of a ch. 347 county public hospital. While § 347.24, The Code 1979, provides: "Hospitals organized under chapter 37 or chapter 347A may be operated as provided for in this chapter [347] in any way not clearly inconsistent with the specific provisions of their chapters," under ch. 347A, The Code 1979, it is the county which is authorized to "acquire, construct, equip, operate and maintain a county hospital and, for the purpose of acquiring, constructing, equipping, enlarging or improving any such county hospital and acquiring the necessary lands, rights-of-way and other property necessary therefor, may issue revenue bonds . . .". Section 347A.1, The Code 1979. See also § 347A.8, The Code 1979; 1976 Op. Atty. Gen. 55. The limitations on a ch. 347A board of hospital trustees and specific reference to county acquisition of property contained in ch. 347A are clearly inconsistent with the provisions of ch. 347 authorizing ownership of property by the hospital board of trustees.

Similarly, the commission appointed to run a ch. 37 memorial hospital has more limited administrative duties: ". . . charge and supervision of the erection of said building or monument, and when erected, the management and control thereof." Section 37.9, The Code 1979. There are specific references to county or city ownership of the property used for memorial hospital purposes.¹ Section 37.5, The Code 1979, provides: "When the proposition to erect any such building or monument has been carried by a majority vote of all voters voting thereon, any such county shall have the power to purchase grounds suitable for a site for any such building or monument." See § 37.6, The Code 1979 (county may issue bonds and become indebted); § 37.7, The Code 1979 (county shall levy to liquidate bonds); § 37.8, The Code 1979 (levy for maintenance of memorial "by a county owning same"); §§ 37.28-37.30, The Code 1979 ("political subdivision which owns the hospital").

These references to county ownership are clearly inconsistent with the provisions of ch. 347 authorizing ownership by the hospital board of trustees. Further, ch. 37 does provide the memorial commission with specific authority to receive and convey real estate to carry out the provisions of §§ 37.22 to 37.25 establishing memorials at local posts or chapters of veteran's organizations. Section 37.26, The Code 1979.

¹Section 37.18, The Code 1979, which sets forth the name and purpose of a memorial, and concludes: "The term 'memorial hall' or 'memorial building' as in this chapter provided shall also mean and include such parking grounds, ramps, buildings or facilities as the commission may build, acquire by purchase or lease or gift to be used for purposes not inconsistent with the uses as set out in this section," refers only to property that will be used for parking. Arrangements for and maintenance of parking facilities would fall within the scope of the commission's management duties. Section 37.9, The Code 1979.

Honorable Rollin Howell
State Representative

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In conclusion, it is our opinion that title to property used or proposed to be used for a memorial hospital established pursuant to ch. 37, The Code 1979, should be in the name of the county or city where it is located and which has authorized its erection and equipment, and not in the name of the memorial hospital commission.

Very truly yours,

Alice J. Hyde

ALICE J. HYDE
Assistant Attorney General

AJH:sh

STATE OFFICERS AND DEPARTMENTS: Department of Substance Abuse -- Funding Costs of Substance Abuse Treatment. Chapter 125; sections 229.51, 204.409, 321.281, 321.283, Code of Iowa (1979). The department of substance abuse is responsible for funding costs in facilities which have a contract with the department. The department's funding responsibility is limited to 75 per cent (or 100 per cent for persons with no legal residence in the state) of the costs of care, maintenance and treatment of a substance abuser. A non-contracted facility treating a substance abuser must seek payment from the patient, from any person, firm, corporation or insurance company bound by contract to provide payment on behalf of the substance abuser, or from the state appeal board in the case of criminal commitments. (Dallyn to Riedmann, Department of Substance Abuse, 10/19/79) #79-10-12 (L)

Mr. Gary Riedmann, Director
Iowa Department of Substance Abuse
418 Sixth Avenue, Suite 230
Des Moines, Iowa 50319

October 19, 1979

Dear Mr. Riedmann:

You have requested an Attorney General's Opinion concerning state funding for persons receiving care and treatment in substance abuse facilities throughout the state. Specifically, you pose the following questions:

1. Is the department of substance abuse's responsibility for funding the costs of individual treatment limited to substance abusers admitted to those facilities with which the director has contracted pursuant to section 125.44, Code of Iowa (1979)?
2. What percentage, and what type, of costs incurred pursuant to substance abuse treatment are the department responsible for?
3. If the answer to number one is yes, then who assumes financial responsibility for those substance abusers, indigent or not, who receive care and treatment in facilities which have no contract for funding with the department.

You have submitted these questions for resolution in the context of substance abusers admitted pursuant to sections 125.33 (voluntary treatment), 125.34 (emergency treatment), 125.35 (emergency commitment), 229.51 (involuntary commitment), 204.409 (controlled substances commitment), 321.281 (O.M.V.U.I. commitment) and 321.283 (O.M.V.U.I. referrals) of the 1979 Iowa Code. As an initial matter, it must be noted that chapters 204 and 321 were enacted prior to Iowa's comprehensive substance abuse act, chapter 125, enacted in 1977 by the 67th General Assembly. Hence, there are a number of ambiguities and inconsistencies between the acts which make total reconciliation virtually impossible.

In any instances where a provision of chapter 125 conflicts with a provision of another statute, an attempt has been made herein to construe the two provisions, if possible, so that effect is given to both. See section 4.7, Code of Iowa (1979). However, in those situations where the conflict has proved irreconcilable, then the provisions of chapter 125 prevail, as the statute enacted latest in time. Section 4.8, Code of Iowa (1979). Similarly, the provisions of chapters 125 and 229 dealing specifically with the department's funding duties and liabilities have been accorded precedence over other statutes dealing generally with the subject of funding. Section 4.7, Code of Iowa (1979). See State v. Thompson, 253 N.W.2d 608 (Iowa 1977).

The General Assembly intended chapter 125 to be a comprehensive act implementing the State's policy of assuring that substance abusers be afforded the opportunity to receive quality treatment and rehabilitative services as well as assuring that such services are operated by qualified individuals. Section 125.1, Code of Iowa (1979). Two of the primary purposes of the department and the substance abuse commission are to license all public and private facilities which engage in the treatment and rehabilitation of substance abusers (with limited exceptions) and to coordinate these licensed "facilities" in order to effectively make available state-wide substance abuse treatment.

An integral part of these duties is provided in section 125.12 which requires the commission and director to establish a comprehensive program for the treatment of substance abusers. This program is divided on a regional basis and consists in part of a limited number of facilities maintained by the director on a contractual funding basis pursuant to section 125.44. The director has the power to plan, establish and maintain individual treatment programs, i.e., treatment facilities, as necessary or desirable in accordance with the comprehensive

substance abuse program. Section 125.9, Code of Iowa (1979). Moreover, he may make contracts necessary or incidental to this power, including contracts with treatment facilities to pay them for services rendered to substance abusers. Section 125.12, Code of Iowa (1979). The director shall not be required to distribute or guarantee any funds: to any individual program providing unnecessary, duplicative or overlapping services within the same geographic area, or to any individual program which has adequate resources at its disposal. Section 125.54, Code of Iowa (1979).

Chapter 125 contains no mandatory requirement that the director distribute any funds to any facility solely on the grounds that it is licensed or that it is in fact providing treatment to a substance abuser. Section 125.12 provides that the director shall implement and supervise the comprehensive program throughout the state. Section 125.44 provides that the director, if he determines in the exercise of his discretion that such a course of action would further the implementation and effectiveness of the comprehensive program, may enter into written agreements (or contracts) with one or more licensed treatment facilities to pay for 75 per cent of the cost of care, maintenance and treatment of a substance abuser. See section 125.12(7) Code of Iowa (1979). The commission on substance abuse, which acts as the sole agency to allocate departmental funds and to approve program funding, shall review and evaluate at least once each year all such agreements and determine whether or not they shall be continued. Sections 125.7, 125.44, Code of Iowa (1979).

With respect to your first question, the implication of these provisions is as follows: The director is vested with broad discretion in determining whether or not the department will contractually fund care and treatment in a licensed facility, subject to commission approval. As there are no mandatory individual funding requirements in chapter 125, the decision of the director not to fund a particular facility, or the absence of any written agreement to so fund, means that the department incurs no obligation to pay for any care or treatment of a substance abuser provided by that particular facility. This conclusion is buttressed by the fact that since the commission (acting as the sole agency to allocate departmental funds) may disapprove a proposed or existing contract with a facility, it would be unreasonable to conclude that that facility could otherwise receive departmental funds in circumvention of the commission's prior disapproval (or contrary to the director's contractual decision). Thus, the determination of whether the department of substance abuse is liable for funding these costs turns on whether there exists a contract between the facility and the department, not on the origin of the commitment decision. The opinion expressed in O.A.G. #79-4-24, that the department should pay the treatment costs of a non-resident defendant undergoing substance abuse treatment at Powell III Center in Des Moines as part of the probationary conditions imposed by the sentencing court, is consistent on its facts with this conclusion.

At the time of that defendant's commitment (approximately January 1, 1978), Powell III Center had a contract with the department effective through June 30, 1978, in the amount of 30,000 dollars. As the defendant consented to voluntary treatment pursuant to section 125.33 as a condition of probation, and as he was apparently unclassified with respect to residence at the time, Powell III Center should have submitted the final costs of the defendant's treatment to the department for payment from the facility's 30,000 dollar contract appropriation (see discussion, infra).

Your second question raises the issue of the percentage and type of costs for which the department is responsible when in a contractual relationship with a particular facility. The Iowa Code clearly limits, with one exception, the maximum extent of the department's obligation to 75 per cent of the cost of the care, maintenance and treatment of a substance abuser. Section 125.44, Code of Iowa (1979). The county of residence of the substance abuser is obligated pursuant to section 125.45 to pay the remaining 25 per cent of the cost of care, maintenance and treatment directly to the facility from its county mental health and institutions fund as provided in section 444.12, Code of Iowa (1979).¹

¹With respect to the county's 25% share of these costs, the approval of the board of supervisors is required before payment is made by a county for costs incurred which exceed a total of five hundred dollars for one year (any twelve-month period) for treatment of any one substance abuser in a licensed facility other than a state mental health institute. This requirement of approval is not applicable to the cost of treatment provided to a substance abuser committed pursuant to section 125.35 (emergency commitment). Sections 125.43, 125.45, Code of Iowa (1979). To the extent it relies on section 125.45, Code of Iowa (1979) as being applicable to substance abusers committed to mental health institutes, the opinion expressed in O.A.G. #78-4-77 is modified and limited to chapter 125 "facilities." This is because section 125.43 expressly states that chapter 230 (not section 125.44 or 125.45) shall govern the determination of costs and payment for treatment provided to substance abusers in mental health institutes. Chapter 230 does not incorporate the language of the "five hundred dollars for one year" limitation expressed in section 125.45.

With respect to the five hundred dollar limitation expressed in section 125.45, the board's approval is required whether the costs are incurred during a single admission or as a result of multiple admissions of the same person during any one year. Where the costs incurred are five hundred dollars or less, the county auditor and treasurer must credit payment to the facility involved, notwithstanding any action on the part of the board of supervisors. Section 125.49, Code of Iowa (1979). This is because sections 125.45 and 125.49 constitute an express exception to section's 333.2 and 334.1 of the Code (which provide that the auditor shall not issue any county warrant for payment by the treasurer unless the board of supervisors has approved the same, except as otherwise provided).

The above-mentioned exception applies if the director finds that the residence of a substance abuser at the time of admission to the facility was in another state or county or that the person is unclassified with respect to residence. In this case the department must pay for the remaining 25 per cent of the cost of care, maintenance and treatment that the county of residence would have been liable to pay. Section 125.47, Code of Iowa (1979). It should be kept in mind that the substance abuser, or any person or organization bound by contract to provide support, hospitalization or medical services on his behalf, remains ultimately liable for these costs. Section 125.48, Code of Iowa (1979). Thus, it is only where a contracted facility has not received payment from the substance abuser within 30 days after his discharge that the department becomes obligated to make the above-mentioned payments directly to the facility. Section 125.44, Code of Iowa (1979).

The department of substance abuser's liability for costs comprises only a statutory percentage of those costs of care, maintenance, and treatment of the substance abuser. The language of section 125.44 is clear on this point; there is no provision in chapter 125 for payment by the department of legal fees, court costs or any other non-medical or non-treatment costs. The conclusion that the department's obligation is limited to the costs of care, maintenance and treatment is buttressed by a reading of sections 229.50-229.53 which provide for the involuntary commitment of substance abusers to licensed facilities. After providing for the hearing and other requisite procedures for involuntary commitments, section 229.52(3) states that:

"This division shall not be construed to require the department to pay the cost of any medication or procedure provided the person during that period [of commitment] which is not necessary or appropriate to the specific objectives of detoxification and treatment of substance abuse."

Section 229.52(3) makes explicit that which is implicit in chapter 125, i.e., the department's funding obligation to those contracted facilities extends only to that percentage of costs relating to the actual care, maintenance and treatment of substance abusers. This is true whether the substance abuser is committed under the provisions of chapters 125 or 229 or whether he or she is committed under the controlled substances or O.M.V.U.I. provisions of chapters 204 and 321 respectively.

This conclusion reasonably reflects the legislative intent behind the enactment of chapter 125. The purpose of the department of substance abuse is not to fund and enforce the procedural diversion of persons into substance abuse facilities, but rather is to assure a comprehensive network of quality care and treatment facilities, some of which the department contracts with to assure at least minimum access for substance abusers notwithstanding legal residence or indigency. Thus, one must look elsewhere for sources of funding for such things as legal fees, court costs or other non-treatment expenses.

In the course of commitments or referrals under sections 321.281 and 321.283, or commitments pursuant to section 204.409, general rules of criminal proceedings apply. This is due to the fact that the commitment procedures under all three of these sections are sentencing alternatives and are thus still integral parts of the criminal proceedings. For example, if a defendant is indigent and unable to afford counsel at the hearing prior to commitment pursuant to section 321.281, then the trial court shall appoint counsel (or continue the appointment of trial counsel) pursuant to Iowa R. Crim. P. 26. Counsel shall be compensated by the county pursuant to section 815.7, Code of Iowa (1979). See 1966 O.A.G. 394 (county liable for legal costs incident to O.M.V.U.I. commitment). Similarly, in an involuntary commitment proceeding pursuant to section 229.51, if the respondent (substance abuser) is unable to obtain counsel or to secure the services of a licensed physician, then the court shall appoint counsel or employ a licensed physician at county expense. Section 229.52, Code of Iowa (1979). It appears that the substance abuser himself, in the absence of any specific rule or statute to the contrary, would remain liable for any non-treatment costs incurred pursuant to an admission under sections 125.33 to 125.36.

The answer to your third question necessarily derives from the resolution of your first question above. There are substance abusers who receive care, maintenance and treatment in facilities which have no contract for funding with the department of substance abuse. As these facilities have no contract pursuant to the approved comprehensive program, they receive no funds from the department. Thus, legal liability for care provided is determined as in general hospital/patient relationships. The substance abuser, insurance company or other person contractually bound to provide support is liable to the facility for costs of care; this is a private contractual relationship between provider and recipient, and the facility must follow normal debt collection procedures in order to obtain payment (in the absence of timely, voluntary payment).

The above analysis is true whether the substance abuser is a voluntary or committed patient in a facility. The director has a duty to provide for adequate and appropriate treatment for substance abusers admitted under sections 125.33 to 125.36, i.e., by contracting with a finite number of appropriate facilities to provide a state-wide, minimal level of subsidized treatment. See sections 125.12, 125.44, Code of Iowa (1979). An administrator of a non-contracted facility accepting a substance abuser for voluntary or emergency treatment assumes that risk of individual payment generally existing in the private sector. This is equally true with respect to involuntary commitments pursuant to section 229.51, Code of Iowa (1979).

At first blush it may appear that a defendant convicted of second offense O.M.V.U.I. may be committed to "any hospital or institution" providing alcoholism or drug abuse treatment, and that he shall be considered a "state patient." See section 321.281, Code of Iowa (1979). However, this statute must be read in pari materia with the later-enacted limiting provisions of chapter 125. To promote the purposes and consistency of the comprehensive treatment program implemented by the department of substance abuse (pursuant to statutory mandate), a defendant can be considered a "state patient" for purposes of payment by the department of substance abuse only when committed to a facility which is contractually a component of the comprehensive program. If the intent of a district court in committing a defendant under section 321.281 is to have the state pay for the treatment, then it should first ascertain the existence of an available contracted facility and then commit the defendant thereto in conformity with the comprehensive plan.

This conclusion is further reflected in the provisions of § 321.283(3), which permit the court to "refer" an O.M.V.U.I. defendant to a facility for treatment after any conviction for operating a motor vehicle while under the influence of alcohol. Such a facility must be one licensed for treatment pursuant to chapter 125 and one "designated by the division on alcoholism" (since merged into department of substance abuse). Section 321.283 (3) Code of Iowa (1979) (which added the quoted language by amendment in 1976). Only a person referred to a facility which is both licensed and designated by the department will be treated as a "state patient" with costs for treatment to be borne by the department of substance abuse.

In this context, the term "designated" logically refers to those facilities with which the director has contracted for purposes of implementing the comprehensive substance abuse program, the purpose of which is to assure the availability of just such treatment for substance abusers regardless of legal resident. See § 125.44, Code of Iowa (1979). Functionally,

the "designation" of an individual facility occurs when the director enters into a contract pursuant to section 125.44 to fund the costs of care and treatment of a defendant committed thereto. The director publishes and distributes annually a list of all facilities in the comprehensive program. Section 125.12(6) Code of Iowa (1979). Thus, the district court is under a clear duty to ascertain the existence of such a contract prior to referring a defendant to a particular facility. Otherwise, the defendant will not be considered a statutory "state patient" for purposes of payment by the department of substance abuse.

A similar analysis applies to a controlled substances defendant committed to a facility pursuant to section 204.409(2) Code of Iowa (1979). While this section speaks of state patients committed to treatment facilities approved by the state department of health, it is clear that this language has been modified by the later-enacted chapter 125. Thus, the district court may order a commitment, but the commitment must be to a facility licensed by the department of substance abuse. If the court determines that the defendant is unable to pay for his treatment, then he must be committed to a facility which has a contract with the department to pay the costs of a "state patient." In the absence of these conditions, the department incurs no liability for costs of care and treatment under section 204.409(2).

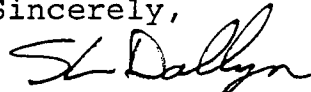
A non-contracting treatment facility has the concomitant duty to advise the district court of its inability to treat a referred or committed defendant at departmental expense. A problem does arise, however, in the situation where a defendant is committed as a generic "state patient" to a non-contracting facility due either to an inconsistent court order or to a mistake resulting from the admitted statutory ambiguities contained in chapters 204 and 321, Code of Iowa (1979). It is obvious that there is legislative intent that the state, rather than the facility or the county, accrue the liability for and fund the care and treatment of a criminal defendant committed pursuant to court order. Yet the General Assembly has made no appropriation of money to fund treatment of such defendants in facilities other than those contracting with the department of substance abuse. The General Assembly has, however, provided for instances where there is state liability but no legislative appropriation in Chapter 25 of the 1979 Code of Iowa. Section 25.1 states as follows:

When a claim is filed or made against the state, on which in the judgment of the comptroller the state would be liable except for the fact of its sovereignty or which has no appropriation available for its payment, the comptroller shall deliver said claim to the state appeal board. The state appeal board shall make a record of the receipt of said claim and forthwith deliver same to the special assistant attorney general for claims who shall, with a view to determining the merits and legality thereof, fully investigate said claim, including the facts upon which it is based and report in duplicate his findings and conclusions of law to the state appeal board.

Until the General Assembly reconciles and clarifies chapters 125, 204 and 321, it may well be that certain non-contracting facilities will incur claims against the state as a result of criminal defendants committed to them pursuant to court order. As a remedy therefor, it is the opinion of this office that non-contracting facilities may properly file legitimate claims with the state appeal board for care provided O.M.V.U.I. and controlled substances defendants committed pursuant to court order. See 1966 O.A.G. 404.

In summary, the department of substance abuse is statutorily responsible for funding costs in facilities which have a contract with the department pursuant to section 125.44, Code of Iowa (1979). The department's funding responsibility is limited to 75 per cent (or 100 per cent for persons with no legal residence in the state) of the costs of care, maintenance and treatment of a substance abuser. A non-contracted facility treating a substance abuser must seek payment from the patient, from any person, firm, corporation or insurance company bound by contract to provide payment on behalf of the substance abuser, or from the state appeal board in the case of criminal commitments.

Sincerely,



SELWYN L. DALLYN
Assistant Attorney General

COUNTIES AND COUNTY OFFICERS: Sections 331.21, 332.3(5), 332.3(27), 343.10 and 343.12, The Code 1979. The county board of supervisors determines the appropriate reimbursement for expenses incurred for meals and lodging provided an elected county official while attending schools of instruction sponsored by the Iowa state association of counties. The amount of reimbursement is determined in accordance with the training reimbursement policy which must be adopted by the county board of supervisors after consultation with the other elected county officials. (Hyde to Bradley, Keokuk County Attorney, 10/18/79)
#79-10-10 (L)

October 18, 1979

Glenn M. Bradley
Keokuk County Attorney
Suite Two
Professional Building
Sigourney, Iowa 52591

Dear Mr. Bradley:

We have received your letter requesting an opinion from this office concerning whether elected county officials or the county board of supervisors determines the appropriate expenditure for meals and lodging provided an elected county official while away from home on official business.

Factually, you present two situations wherein elected county officials incurred meal and lodging costs at standard rates while attending a school of instruction of the Iowa state association of counties, and submitted the actual expenditures to the board of supervisors for reimbursement from the appropriate county fund. The budget for the offices of the elected officials for the fiscal year involved had been approved by resolution of the board, and there were sufficient funds on hand in the budgets of the offices to reimburse the expenditures in full.

On April 16, 1979, however, the county board of supervisors had adopted a resolution stating: ". . . that while on official county business outside of the county, meals be limited to \$10.00 per day and lodging to not more than \$25.00 per day." In accordance with that resolution, the board allowed each claim, but in an amount less than that submitted for reimbursement, which would have required the elected officials to pay the difference from personal funds. The

county auditor paid each claim in full as submitted, citing as authority §§ 343.10 and 343.12, The Code 1979, and an opinion of this office, 1968 Op. Atty. Gen. 614, 615.

You have asked our opinion on the following specific questions:

1. Whether the elected office holder or the county board of supervisors controls the amount spent for meals and lodging by the elected official while performing official business in connection with his or her duties, especially when that elected official is operating within the approved budget allocated to the office.

2. Whether a training reimbursement policy is valid if it is adopted by a board of supervisors without consulting with the other elected officials as directed by § 343.12, The Code 1979.

The opinion the auditor relied upon, 1968 Op. Atty. Gen. 614, stated in pertinent part in the context of interpretation of § 343.10, The Code 1966: "Within the limitation of the budget and the receipts, it is our view that the elected office holder rather than the board of supervisors has control over the procedures within the office to carry out the duties of such office as prescribed by statute." We do not comment here on the vitality of the autonomy on the part of elected county officials within the scope of their office budget. Rather, we believe an amendment to the Code subsequent to 1968 has more direct bearing on the specific factual situation you have presented, and we limit our response to your first question to the factual situation as set forth in your request.

Section 343.12, The Code 1979, entitled "Attendance at seminars and training functions," was amended by the 1978 Regular Session of the 67th G.A., ch. 1118, § 2 to read:

County officer, deputies and employees may attend educational seminars, short courses, schools of instruction or other educational activities related to the performance of their duties, and be reimbursed for mileage and actual expenses incurred where approved by the department head and the board of supervisors as provided in section 331.21. For the purpose of this section mileage expenses received by supervisors shall be in addition to that provided by section 331.22 . . .

The board of supervisors after consulting with the other elected county officers, shall adopt a training reimbursement policy. The policy shall give priority to attendance at training functions conducted at the local level. [Emphasis added].

The language of the first paragraph of the section is couched in permissive and discretionary terms, i.e., "may attend . . . and be reimbursed . . . where approved". The legislature clearly intended the county board of supervisors to approve at its discretion claims for reimbursement for expenses incurred by county officials and employees when attending educational or training functions.¹ Implicit in that power of approval is the power to deny or allow to any extent the claims submitted for reimbursement under the procedure for claim submission pursuant to § 331.21, The Code 1979. The availability of funds in an office budget would have no effect on the decision of the board as to allowance of a claim for reimbursement of training expenses, or as to what extent such a claim may be paid. Section 332.3(5), The Code 1979, empowers the board:

To examine and settle all accounts of the receipts and expenditures of the county, and to examine, settle, and allow all claims against the county, unless otherwise provided by law.

Thus, the board of supervisors makes the determination of the amount to reimburse elected county officials for expenses incurred while attending schools of instruction or other educational activities related to performance of official duties and can authorize reimbursement of all or any portion of the actual expenditures made. The board of supervisors could compel a refund of any amount paid to county officials in excess of the amount specifically approved by them as reimbursement of expenses incurred while attending such seminars or training functions.

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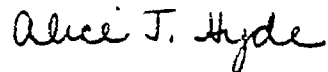
The schools of instruction offered by the Iowa state association would fall within the scope of § 343.12, The Code 1979, as "schools of instructions or other educational activities related to the performance of their duties."

The direction to the board of supervisors to adopt a training reimbursement policy is mandatory.² The use of the term "shall" in the final paragraph of § 343.12, The Code 1979, implies a duty, and excludes any notion of discretion. Section 4.36(a), The Code 1979; Schmidt v. Abbott, 261 Iowa 886,890, 156 N.W.2d 649,651 (1968).

The board of supervisors is thus obligated to consult with the other elected county officers before adopting the training reimbursement policy, and that policy must give priority to local level training functions. While the final authority for the policy clearly rests with the board, the statute contemplates a cooperative exchange of information concerning educational needs resulting in the most feasible training reimbursement policy within budget limitations. There would be serious question about the validity of any training reimbursement policy that was enacted without a good faith attempt by the board of supervisors to obtain input from the other elected county officials, whom the policy would most directly affect.

In conclusion, it is our opinion that the county board of supervisors determines the appropriate reimbursement for expenses incurred for meals and lodging provided an elected county official while attending schools of instruction sponsored by the Iowa state association of counties. The amount of reimbursement is determined in accordance with the training reimbursement policy which must be adopted by the county board of supervisors after consultation with the other elected county officials.

Very truly yours,



ALICE J. HYDE
Assistant Attorney General

AJH:sh

²The April 16, 1979 resolution of the county board of supervisors limiting reimbursement "while on official county business outside of the county" does not appear to be the training reimbursement policy required by the statute.

OPEN MEETINGS: Professional Teaching Practices Commission. Sections 17A.16, 28A.5(1)(f), 17A.3(2), 28A.5(3), 17A.1, 17A.23, 28A.1, 28A.4, 272A, The Code 1979; 640 - 2.10 I.A.C. The Professional Teaching Practices Commission, created and operating under the provisions of Chapter 272A, is subject to the open meetings provisions of ch. 28A, as well as the Administrative Procedure Act in ch. 17A. Final action of the Commission must be taken in open session, pursuant to § 28A.5(3). This final action occurs at the time of the written or recorded final decision in compliance with § 17A.16 and 640 - 2.10 I.A.C. (Hagen to Bennett, Professional Teaching Practices Commission, 10/10/79) #79-10-9(L)

October 10, 1979

Don R. Bennett
Director and Legal Advisor
Professional Teaching Practices Commission
L O C A L

Dear Mr. Bennett:

You have requested an opinion of the Attorney General concerning the relationship between Chapters 17A and 28A, The Code 1979, with respect to the decisions in contested cases under ch. 272A and Professional Teaching Practices Commission Rules promulgated thereunder.

The following questions and concerns are noted:

1. Is there a conflict between the "final action" portion of § 28A.5(3) and the "final decision" portion of § 17A.16, The Code 1979?
2. Are the decision-making procedures outlined in 640 - 2.10 I.A.C. and detailed in your request in compliance with § 17A.16, The Code 1979?

3. Are the decision-making procedures outlined in 640 - 2.10 I.A.C. and detailed in your request in compliance with § 28A.5(3), The Code 1979?

In addition, your letter expressed the following concern:

Does the promptness of notification requirement of § 17A.16, The Code 1979, necessitate immediate final actions on the part of the Commission?

I.

The initial question arises from the Code's usage of different terms for essentially the same result. The requirement in § 17A.16 that "final decision" be in writing and the requirement in § 28A.5(3) that "final actions" be taken in open session are not necessarily conflicting.

Section 17A.16 was enacted in 1974 along with § 17A.23, which provided that the Administrative Procedure Act be imposed in addition to other statutes in existence or hereafter enacted.

Section 28A.5(3) was a 1978 amendment to the Open Meetings Act in effect since 1967.¹ This amendment allowed application of the open meetings provision to previously excepted quasi-judicial agency proceedings. Because of the nature of these quasi-judicial decisions, there is confusion as to when "final action" occurs. The Professional Teaching Practices Commission's perception of a final action seems to be at the time of an oral consensus from the Commission members. At the conclusion of evidence and argument presentation, the Commission deliberates in closed session. During this deliberation, an oral consensus is sought. The Director is instructed to draft a written decision with supporting findings of fact and conclusions of law to be approved by the agency members.

The Code notes a difference between preliminary and final action. The exceptions to open meetings includes discussion of decisions to be rendered in contested cases, § 28A.5(1)(f), while final actions must be taken in open session. § 28A.5(3). The Commission's closed deliberations, as well as the decision drafting, would fall under the open meeting exception. Upon review of the total decision process of the Commission, we are of the opinion

¹ This amendment was needed as a guideline for the closed meetings exceptions broadly construed in the earlier act. See Note, The Iowa Open Meetings Act: A Lesson in Legislative Ineffectiveness, 62 Iowa L. Rev. 1108 (1977).

that a final action on the Commission's part does not result until the written decision has been approved by the agency members and signed and dated by the chairperson.

II.

The second question, therefore, may be answered in the affirmative. The Commission's written final decision and notification procedures comply with § 17A.16.

III.

Open meetings requirements, pursuant to § 28A.5(3), are not necessarily met by compliance with § 17A.16 of the Administrative Procedures Act. Each enactment serves a different purpose. Chapter 17A is intended to provide a minimum procedural code for the operation of state agencies when they affect the rights and duties of the public, but does not abrogate greater procedural duties imposed by any other Chapter. See § 17A.1(2), The Code 1979. Chapter 28A seeks to assure that governmental decisions and the basis and rationale behind them are easily accessible to the people, and any ambiguities are resolved in favor of openness. See § 28A.1, The Code 1979.

Closed sessions are permitted only with adherence to special procedures for a limited number of reasons. § 28A.5(1)(a-j), The Code 1979. Final actions by an agency must be taken in open session. § 28A.5(3). As previously discussed, the Commission's actions when deliberating and drafting their final actions fall within the exceptions to open sessions as a preliminary action. But when a decision is approved by the members and signed and dated by the chairperson, it becomes a final action, and at this point, an open session is required, in addition to the writing and notification requirements in § 17A.16.

In an earlier opinion, Op.Att'yGen. #79-7-12, we addressed the question of whether the quasi-judicial function of the Civil Service Commission appeal hearing was subject to the Open Meeting Act. We concluded that Ch. 28A applied and that closed meetings may be conducted only if they fall within the limited exceptions. The final actions following these exceptional deliberations must

be taken in open session. By analogy, no session at all would be contrary to the open meeting chapter.²

The final action to be taken at the open session may be the announcement of the Commission's decision with a brief statement of supporting facts and law.³ Without a public session disclosing this final action, Ch. 28A purposes are not fulfilled. The people referred to in § 28A.1 are not only the parties involved and reachable by service procedures under Ch. 17A, but the public in general whose interests would be served by this disclosure.

IV.

Your request suggested that immediacy of decision was inherent in the combination of Ch. 17A and Ch. 28A.

It is conceivable that in certain contested cases, the fact situation and established law on the issues involved could result in an immediate decision at the conclusion of the Commission's evidentiary hearing. If supporting statements are made by the Commission as to the findings of fact and conclusions of law read into the record at an open session, Ch. 17A and Ch. 28A would be satisfied.

As a rule, however, a commission has not organized the needed authority and factual basis at that time to make an assured, formal opinion. Due process guaranties require that agencies act on matters brought to them with reasonable dispatch. Deering Milliken, Inc. v. Johnston, 295 F.2d 856, 860 (4th Cir. 1961). An immediate final decision might be contradictory to the requirement in § 17A.16 of a "reasoned opinion" in more complicated hearings. The promptness requirement in § 17A.16 refers to notification of the parties after

² The Administrative Procedure Act also provides that public access to agency action is essential. Section 17A.3(2) states that "no . . . decision is valid . . . nor shall it be invoked by the agency for any purpose until it has been made available for public inspection . . ."

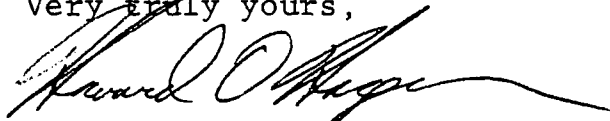
³ It should be noted that the notice and quorum requirements of Ch. 28A and Commission rule set out in 640 I.A.C. § 2.8(1) should be met.

the final action has been taken. Upon notification, the time limits for appeal begin, but until that final action and notification, the reasonableness test is the standard to be met.

The Professional Teaching Practices Commission procedures for hearing, decision drafting and notifications are in keeping with these due process protections. 640 I.A.C. § 1.1 et. seq.

In summary, we are of the opinion that the Professional Teaching Practices Commission is subject to the open meetings provisions of Ch. 28A, as well as the administrative procedural provisions of Ch. 17A. Final action of the Commission must be taken in open session. This final action occurs when written or recorded final decision is approved by the Commission.

Very truly yours,

A handwritten signature in black ink, appearing to read "Howard O. Hagen", with a long horizontal flourish extending to the right.

HOWARD O. HAGEN
Assistant Attorney General

HOH:rcp

AGRICULTURE: Authorization of metric measures for sale of gasoline. Article I, § 8, clause 5 and Article VI, ¶2, U.S. Constitution; 15 U.S.C. §§ 204 and 205; §§ 210.1, 210.5, 210.18, 213.2, 215.18, The Code 1979. The state metrologist is authorized to allow retail gasoline dealers to use pumps which state the volume of a sale in a metric measure. (Willits to Johnson, State Representative, 10/5/79) #79-10-7 (L)

October 5, 1979

The Honorable M. L. Johnson
State Representative
130 Thompson Drive, S.E.
Cedar Rapids, Iowa 52403

Dear Representative Johnson:

You have requested an opinion from this office as to whether the Iowa Department of Agriculture may authorize retail gasoline sales by the use of metric measures. Specifically, you ask if the State Metrologist may authorize metric sales of gasoline if the National Bureau of Standards has not yet gone metric.

Section 210.1, The Code 1979, provides that: "The weights and measures which have been presented by the department to the Federal Bureau of Standards and approved, standardized, and certified by said bureau in accordance with the laws of the Congress of the United States shall be standard weights and measures throughout the state". [Section 189.1(2), The Code 1979, provides that "department" here shall mean the Department of Agriculture].

Section 213.1, The Code 1979, provides for a state metrologist: "The department shall designate one of its assistants to act as state metrologist of weights and measures. All weights and measures sealed by him or her shall be impressed with the word 'Iowa'."

The Iowa Code provides guidance for the State Metrologist as to what standards should be used for measures in this state. Section 210.5, The Code 1979, provides the standard for liquids:

The unit or standard measure of capacity for liquids from which all other measures of liquid shall be derived and ascertained shall be the standard gallon secured in accordance with the provisions of section 210.1. The gallon shall be divided by continual division by the number two so as to make half-gallons, quarts, pints, half-pints, and gills. The barrel shall consist of thirty-one and one-half gallons, and two barrels shall constitute a hogshead.

In addition, § 213.2, The Code 1979, provides for the adoption of national physical standards for weights and measures in Iowa:

Weights and measures, which conform to the standards of the national bureau of standards existing as of January 1, 1979, that are traceable to the United States standards supplied by the federal government or approved as being in compliance with its standards by the national bureau of standards shall be the state primary standard of weights and measures. Such weights and measures shall be verified upon initial receipt of same and as often as deemed necessary by the secretary of agriculture. The secretary may provide for the alteration in the state primary standard of weights and measures in order to maintain traceability with the standard of the National Bureau of Standards. Also such alterations shall be made pursuant to rules promulgated by the secretary in accordance with chapter 17A.

Chapter 215, The Code 1979, requires the Department of Agriculture to inspect all weights and measures in this state. Section 215.18, The Code 1979 provides that:

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 instructions and tests.

The Department of Agriculture, pursuant to Ch. 17A, The Code 1979, has duly adopted rules to implement the above statutes. Applicable to your question is Agriculture Department Rule 30 I.A.C.

§ 55.39(215). The rule provides, in pertinent part:

The specifications, tolerances and regulations for commercial weighing and measuring devices, together with the amendments thereto, as recommended by the National Bureau of Standards and published in the National Bureau of Standards Handbook 44-4th Edition and N.B.S. Handbook 112, and supplements thereto up to January 1 1977, shall be the specifications, tolerances and regulations for commercial weighing and measuring devices in the State of Iowa, except as modified by state statutes or by rules adopted and published by the Iowa Department of Agriculture and not rescinded.

The National Bureau of Standards Handbook 44 is published by the National Bureau of Standards of the U.S. Department of Commerce. The handbook is adopted by the National Conference on Weights and Measures. At the July, 1979, conference in Portland, Oregon, the Conference adopted the following amendment to the handbook: "S.1.1.2.1. Units/On Retail Motor Fuel Devices.-- A retail motor fuel device shall indicate, and record if the device is equipped to record, its deliveries in terms of liters or gallons and decimal subdivisions or fractional equivalents thereof."

Federal law clearly allows the use of metric measurements. 15 U.S.C. § 204 provides:

It shall be lawful throughout the United States of America to employ the weights and measures of the metric system; and no contract or dealing, or pleading in any court, shall be deemed invalid or liable to objection because the weights and measures expressed or referred to therein are weights and measures of the metric system.

15 U.S.C. § 205 sets forth conversion tables to relate to the metric system to the English system. In addition, 15 U.S.C. § 205(b) states that: "It is therefore declared that the policy of the United States shall be to coordinate and plan the increase and use of the metric system in the United States and establish a United States Metric Board to coordinate the voluntary conversion to the metric system."

As can be seen from the rather extensive recitation above of state and federal law and rules, Iowa law is silent as to the specific question of whether metric measures are authorized. It is the opinion of the Attorney General that they are authorized in Iowa. Section 213.2, The Code 1979, as set forth above, requires that Iowa

standards be traceable to the standards of the National Bureau of Standards. The National Bureau of Standards, both by statute and rules cited, authorizes the use of metric measures. In fact, the stated national policy is to convert to metric measures. Federal law specifically authorizes use of the metric system and sets forth conversion tables from metric to English systems. Metric standards have been provided by the National Bureau of Standards to the Iowa Metrologist for use in testing metric measures for accuracy.

Section 210.5, The Code 1979, provides that the standard measure of capacity for liquids from which all other measures or liquids shall be derived shall be the standard gallon. It could be argued that this language allows only gallon measures. We, however, are of the opinion that this language contemplates other units of measure derived from the gallon. As is noted above, federal law sets forth tables to derive metric measures from gallons. To hold otherwise could cast a cloud upon the constitutionality of § 210.5.

Article 1, § 8, clause 5 of the United States Constitution provides that "The Congress shall have Power...To coin Money, regulate the value thereof, and of foreign Coin, and fix the standard of Weights and Measures;" [emphasis supplied]. The Congress, in 15 U.S.C. §§ 204, 205, and 205b, has authorized the use of the metric system and has stated that the national policy is to increase the use of the metric system in the U.S.

To hold that Iowa law prohibits use of the metric system would have the result of rendering that law unconstitutional under the supremacy clause; Article VI, paragraph two, of the United States Constitution. In Higgins v. California Petroleum & Asphalt Co., 109 Cal. 310, 41 P. 1087 (California 1895), the California Supreme Court ruled that the regulation of weights and measures by a state is valid so far as not in conflict with any act of Congress. Sections 210.5 and 213.2 can be read to avoid conflict with the federal laws cited above. Where a statute is fairly subject to different constructions, one of which will render it constitutional and another unconstitutional or of doubtful constitutionality, the construction by which it will be upheld will be followed and adopted. State v. Rasmussen, 213 N.W.2d 661 (Iowa 1973).

For that reason, we interpret Sections 210.5 and 213.2 to allow metric measure sales in Iowa.

This view is buttressed by other case law. Just because a statute which prescribes standard capacities for containers fails to expressly permit manufacture for sale of containers of certain capacity does not prohibit the sale of such a container. U.S. v. Resnick, 299 U.S. 207, 57 S.Ct. 126, 81 L.Ed. 127 (1936). In that case, Resnick was indicted for selling fruits and vegetables in two-quart containers. The government charged that this was illegal since federal law at the time specified that standard containers for selling fruits and vegetables were based upon the bushel and derivatives therefrom. The U.S. Supreme Court sustained the trial court's dismissal of the charges. The Court stated that, "[a]s in absence of governmental regulation the making and selling of con-

Honorable M. L. Johnson
State Representative
Page 5

tainers is untrammelled, failure expressly to permit is not to prohibit". [emphasis supplied] 299 U.S. at 210.

In the case at hand, Iowa law does not expressly permit use of metric measures. That does not prohibit their use.

Section 210.18, The Code 1979 should also be noted. It provides that all commodities bought or sold by weight or measure shall be bought or sold only by the standards established by this chapter, unless the vendor and vendee otherwise agreed. This would seem to indicate that the legislature contemplated sales by measures other than those specifically set forth in the Code, subject to regulation for accuracy by the Department of Agriculture, as set forth in Chs. 210, 213, 214, and 215, The Code 1979.

In conclusion, the State Metrologist is authorized to allow retail gasoline dealers to use pumps which state the volume of a sale in a metric measure.

Sincerely,



EARL M. WILLITS
Assistant Attorney General
Farm Division

EMW/nay

STATE OFFICERS AND DEPARTMENTS: Fine Arts Projects in State Buildings: Ch. 304A, §§ 304A.8 - 304A.14, The Code 1979. Sections 304A.8 - 304A.14 implementing a program of inclusion of fine arts in state building construction projects applies to construction of new buildings and renovation or additions to existing buildings. The amount to be allocated is a function of the total estimated cost of construction, regardless of method of finance. Total estimated cost is the cost of the construction project contained in the architect's plans approved by the legislature, including costs of real estate. (Lindebak to Keller, Fiscal Officer, Iowa Arts Council, 10/3/79) #79-10-4 (L)

October 3, 1979

Dwight Keller
Fiscal Officer
Iowa Arts Council
L O C A L

Dear Mr. Keller:

We have received a request from your Council for an opinion from this office interpreting certain new sections of ch. 304A, The Code 1979. Specifically, your questions concern §§ 304A.8-304A.14, The Code 1979, which were adopted in 1978 by the 67th General Assembly to implement fine arts projects in state buildings.

I. Initially, you ask whether § 304A.8(1) was intended to apply to a new addition to a permanent structure as well as to a totally new free-standing building. Section 304A.9 and 304A.10 require the inclusion of fine arts in the plan and construction of a "state building", which is defined in § 304A.8(1) as:

. . . any permanent structure, wholly or partially enclosed, which is intended to provide offices, laboratories, workshops, courtrooms, hearing and meeting rooms, storage space and other facilities for carrying on the functions of a state agency, including the board of regents; or auditoriums, meeting rooms, classrooms and other educational facilities; eating or sleeping facilities, medical or dental facilities, libraries and museums which are intended for the use or accommodation of the general public; together with all grounds and appurtenant structures and facilities; provided, however, it shall not mean maintenance sheds, separate garages, cellhouses or other secure sleeping facilities for prisoners, or buildings used solely as storage or warehouse facilities. [Emphasis added].

The requirements of §§ 304A.8 et seq. thus apply to permanent structures, wholly or partially enclosed, to be used for the enumerated purposes. "Permanent structure" is not a defined term under § 304A.8; thus, using rules of construction, its every day usage applies. Section 4.1(2), The Code 1979; State v. Hesford, 242 N.W.2d 256,258 (Iowa 1976); Kelly v. Brewer, 239 N.W.2d 109, 113-14 (Iowa 1976). Permanent implies that a structure is not temporary, and will not be moved or fundamentally altered. An existing building, normally thought of as a free-standing, enclosed, self-contained unit, would be a permanent structure, and therefore a "state building", under the relevant Code sections.

Further, §§ 304A.8 et seq., when adopted as ch. 1106, 67th G.A., 1978 Regular Session, was entitled "An Act relating to the inclusion of fine arts projects in state building construction projects. . .". [Emphasis added]. An addition to or renovation of an existing building would be a construction project under the plain meaning of those terms,¹ so long as there was a permanent structure as required by § 304A.8(1). In conclusion, the definition of "state building" in § 304A.8(1) encompasses both new buildings and new structures which are not buildings, i.e., additions or renovations of existing buildings, and the legislature clearly intended to extend the application of §§ 304A.8 et seq. to those projects.

¹ Chapter 262A, which authorizes the issuance of revenue bonds by the board of regents, specifically includes "renovation" in the definition of "project". Section 262A.2(4), The Code 1979.

II. Secondly, you ask whether § 304A.10, which sets forth the percentage allocation for arts is to be interpreted to include funds to be raised by revenue bonds as well as state appropriated funds in determining the estimated total cost against which the statutory ratio of one-half of one percent is to be applied.

The amount allocated to fine arts projects in new construction of state buildings is a function of the total estimated cost of the building. Section 304A.10. The definition of state building includes educational facilities. Section 304A.8(1). Chapter 262A, The Code 1979, gives the state Board of Regents authority to issue revenue bonds when they are needed to supplement legislative appropriation for educational facilities. Buildings partially constructed with revenue bond proceeds remain state buildings, and title is held in the name of the State of Iowa. Section 262A.4, The Code 1979.

In addition, the legislature entitled the Act "An Act relating to the inclusion of fine arts projects in state building construction projects . . .", which indicates that the Act relates to the building project, not to the method of finance.²

In our opinion, "total estimated cost" refers to the cost of the state building, regardless of method of finance. The legislature intended to include both appropriation and bonding in the calculations of estimated cost, and the one-half of one percent to be allocated to fine arts, pursuant to § 304A.10, must be determined from that total.

III. The third question you have posed requires an interpretation of "total estimated cost". First, when is it determined, and secondly, what does it include?

In appropriating funds for capital projects, the legislature has before it the architect's plans and specifications from which the total cost is estimated. The legislature must approve these plans in order to appropriate money for a project. It was the intent of the legislature that the architect's projected cost also serve as the estimated total cost to which the statute refers. In addition, it should be noted that the statute itself includes "all grounds and appurtenant structures and facilities." Section 304A.8(1), The Code 1979. That inclusion indicates a broad construction to include all costs in the construction; the legislature intended to include even the purchase price of real estate, which is purchased by the state for a particular project. "Appurtenant structures and

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Some confusion existed as a result of the use of the term "appropriation" rather than "total estimated cost" in certain sections of the proposed Act, when referring to specific appropriation for building. This, however, was done prior to the enactment of the permanent bill and dealt with projects where the appropriation was the total estimated cost.

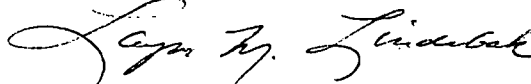
facilities" should be construed to include the cost of plumbing, electrical, ventilation and other systems integrated into the building as well as fixed and moveable equipment as estimated by the architect in his plan.

In conclusion, it is our opinion that §§ 304A.8 et seq. "Fine Arts Projects in State Buildings", applies to both construction of new buildings and renovation or additions to existing buildings which otherwise qualify as "state buildings" under the Code.

Secondly, the amount to be allocated for art to be included in any construction project is a function of the total estimated cost of the construction, regardless of method of finance.

Finally, total estimated cost is the cost of the project contained in the architect's plans approved by the legislature. It includes real estate purchased for a project, fixed and movable equipment, plumbing, electrical, ventilation and other systems integrated into the plans.

Very truly yours,



LAYNE M. LINDEBAK
Assistant Attorney General

LML:sh

COMMERCE COMMISSION: Chapter 476, 1979 Code of Iowa. The Iowa Commerce Commission has the discretion under § 476.2 to provide funding for public participation in proceedings before the Commission, if it determines that funding would effect the purpose of the statute. (McFarland to Jochum, State Representative, 10/3/79) #79-10-3(L)

October 3, 1979

Honorable Thomas J. Jochum
State Representative-11th Dist.
2368 Jackson
Dubuque, IA 52001

Dear Representative Jochum:

You recently requested an opinion of the Attorney General on the question of whether the Iowa Commerce Commission has the authority to finance public participation in rate making and other contested case proceedings before the Commerce Commission.

The Iowa State Commerce Commission has that power and authority which has been vested in it by Chapters 474 and 476 of the 1979 Code of Iowa. Chapter 474 creates the Commerce Commission and Chapter 476 specifies the Commission's powers and duties in regulating public utilities. Neither statute directly gives the Commission authority to finance public participation.

However, § 476.2 vests in the Commerce Commission the broad discretionary power to carry out the purposes of the Act.

The commission shall have broad general powers to effect the purposes of this chapter notwithstanding the fact that certain specific powers are hereinafter set forth. . . . and shall establish all needful, just and reasonable rules, not inconsistent with law, to govern the exercise of its powers and duties

Pursuant to the plenary powers granted under § 476.2, it is within the discretion of the Commerce Commission to provide

funding to finance public participation in its hearings upon a determination by the Commission that funding would effect the purposes of the statute.

The general purpose of Chapter 476 is to grant the Iowa Commerce Commission the power to control and supervise companies which furnish public services. Elk Run Telephone Co. v. General Telephone Co., 160 N.W.2d 371 (Iowa 1968). More specifically, the Commission is mandated by Chapter 476 to assure, through its regulating activities, that Iowa citizens will have adequate public utility services at reasonable rates.

Every public utility is required to furnish reasonably adequate service and facilities. The charge made by any public utility for any heat, light, gas, water or power produced, transmitted, delivered or furnished, or communications services, or for any service rendered or to be rendered in connection therewith shall be reasonable and just. . . .

Iowa Code, § 476.8

In addition to having the general power to enact rules that effect the purposes of the statute, the Commission is specifically authorized by § 476.2 to employ personnel as it finds necessary for the full and efficient discharge of its duties of regulating rates and services.

* * *

The commission shall employ at rates of compensation consistent with current standards in industry such professionally trained engineers, accountants, attorneys, and skilled examiners and inspectors, secretaries, clerks, and other employees as it may find necessary for the full and efficient discharge of its duties and responsibilities as required by this chapter.

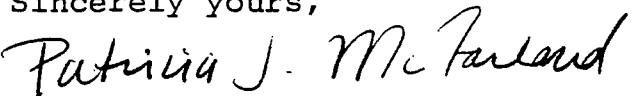
Iowa Code, § 476.2

This authorization to employ personnel does not preclude the Commission from exercising its broad powers to take additional steps towards securing well-balanced information to aid

in its decision-making processes. Because of the inevitably pervasive effect of its orders, the Commission must entertain a broad range of policy considerations and weigh all relevant economic factors before making a decision. In the process of carrying out this balancing function, the Commission might reasonably determine that effective public advocacy in its proceedings is needed to ensure a fair and balanced decision-making process resulting in a just determination of what constitutes adequate service at reasonable rates.

Therefore, if the Commission determines that public participation would aid in the determination of what constitutes adequate service at reasonable rates and that funding to representatives of public interests is needed to ensure their effective participation, it may exercise its broad, general powers to establish procedures to finance public participation.

Sincerely yours,



PATRICIA J. McFARLAND
Assistant Attorney General

cf

STATE OFFICERS AND DEPARTMENTS: Code Editor, § 17A.5(1)(2); § 17A.6(1)(2). The Code Editor is required to keep and index all rules and not simply those that became effective after the passage of the Administrative Procedure Act in 1975. Such an index is required to be published by the Code Editor. The present "cumulative index" does not comport with the letter and spirit of the Administrative Procedure Act. (Appel to Rush, State Senator, 10/3/79) #79-10-2(CL)

October 3, 1979

The Honorable Bob Rush
State Senator
830 Higley Building
Cedar Rapids, Iowa 52401

Dear Senator Rush:

We are in receipt of your request for an opinion relating to the contents and indexing of the Iowa Administrative Code. You ask:

1. Is the Code Editor required to keep an index of all the rules and not just the changes since the I.A.P.A. became effective?
2. Is the Code Editor required to publish the more complete index referred to in the previous question?
3. Does the present index adequately meet the requirements of the Iowa Code?

I.

Section 17A.6(2) of the Iowa Administrative Procedure Act states that the Code Editor "shall cause the 'Iowa Administrative Code' to be compiled, indexed, and published in looseleaf form containing all rules adopted and filed by each agency." You ask whether the compilation and index should include rules adopted prior to the passage of the Iowa Administrative Procedure Act. We think the answer to this question is clearly yes, based both on linguistic analysis of the statute itself and upon its underlying policy.

Section 17A.6 states that the compilation and indexing of the Administrative Code shall contain "all rules adopted and filed by each agency." Rules enacted prior to the I.A.P.A. have been adopted by the agency and must be filed with the Administrative Rules Coordinator pursuant to § 17A.5(1), which states that "Each agency shall file in the office of the administrative rules coordinator three certified copies of each rule adopted by it." Any argument that the compiling-indexing-publishing section applies only to rules adopted after the passage of the IA.AP.A. is defeated by the language in § 17A.5(2), which expressly creates new requirements for "each rule hereafter adopted". Plainly, the legislature knew how to fashion legal requirements which apply prospectively only. Such a qualification was not included in the compilation-indexing-publishing requirement of § 17A.6. We therefore think the language of the I.A.P.A. unquestionably demonstrates that "all rules adopted and filed" by each agency in § 17A.6(2) means all pre-I.A.P.A. rules that have been filed with the Administrative Rules Coordinator pursuant to § 17A.5(1), as well as all post-I.A.P.A. rules.

In addition to linguistic analysis of the statute, the policies which underlie the I.A.P.A. forcefully speak for a comprehensive and well-indexed Administrative Code. A noncomprehensive index would impede legal research and make agency law less accessible to legal practitioners and members of the public. It would be of little utility and would not further the purposes of the Act which include "increasing public access to governmental information." See § 17A.1. We think the broad purposes of the statute reinforce our linguistic interpretation of the relevant I.A.P.A. sections.

II.

Your second question is whether the Code Editor is required to publish an index of the complete compilation of administrative rules. The answer to this question is expressly contained in the I.A.P.A. itself. Section 17A.6(2) states "Subject to the direction of the Administrative Rules Coordinator, the Code Editor shall cause the 'Iowa Administrative Code' to be compiled, indexed, and published in looseleaf form . . .". Because of the use of the word shall, the Code Editor's responsibility to compile, index, and publish the Administrative Code is mandatory, see § 4.1(36)(a).

III.

Your third question is whether the present index to the Iowa Administrative Code meets the compilation-indexing-publishing requirements of § 17A.6(2). The present "cumulative index" to the eleven-volume Iowa Administrative Code consists of twenty-one pages, arranged in part by subject matter and in part by agency name. It features only an occasional cross-reference, and does not contain rules promulgated prior to 1975.

Because of its sparse and noncomprehensive nature, the present index has little utility. The Department of Transportation, for instance, has promulgated about 400 pages of rules, see Iowa Administrative Code, Chapter 820, but the "cumulative index" consists only of slightly more than one-half page of miscellaneous references. This is in large part because pre-1975 rules, which in the case of D.O.T. comprise the bulk of its administrative rules, are not indexed at all. While a more inclusive thirteen-page "analysis" appears at the beginning of the D.O.T.'s Administrative Code chapter, the "analysis" does not present alphabetical subject matter listings but only a brief description of rules in numerical order. In short, even a trained lawyer has difficulty finding relevant rules, let alone a member of the public.

Because of its lack of comprehensiveness, we cannot help but conclude that the present "cumulative index" does not comport with the letter or spirit of § 17A.6(2) of the I.A.P.A. Moreover, the "cumulative index" is not simply technically flawed, but is substantially and materially deficient.

The I.A.P.A. does not expressly state the time period for completion of an indexed comprehensive Administrative Code. But we think it beyond peradventure that four years is more than a reasonable amount of time to complete the task. The Code Editor's failure to comply with the mandatory requirements of the Code is particularly indefensible in light of § 14.22, The Code 1979, which provides a standing unlimited appropriation to carry out the Code Editor's duties. The I.A.P.A. expressly provides that the preparation of the Administrative Code is to be funded according to the terms of § 14.11, see § 17A.6(5). Thus, it cannot plausibly be maintained that the legislature has not given the Code Editor sufficient wherewithal to comply with his statutory duties.

Given the massive growth of administrative law in state government, we think noncompliance with the indexing requirement of § 17A.6 is a very serious problem. Without a meaningful index, agency law is not easily accessible to practitioners or to members of the public. We understand that some efforts have been made to compile an index, but that the as yet unpublished index may be out-of-date or incomplete. We urge the Code Editor to take immediate steps to attain meaningful compliance -- namely, to produce a comprehensive index which includes all agency rules similar to the index that has been produced for the Iowa Code.

The Honorable Bob Rush
State Senator

Page 4

Very truly yours,

BRENT R. APPEL
First Assistant Attorney General

BA:s

ELECTIONS: Campaign Finance Disclosure Commission. Ch. 56, § 56.11, The Code 1979. The Campaign Finance Disclosure Commission may participate in and agree to informal settlement or disposition any time before a complaint is filed with it, and once a complaint has been filed, when such informal settlement results in the dismissal of the complaint by the parties. (Hyde to Eisenhower, Executive Director, Campaign Finance Disclosure Commission, 11/26/79) #79-11-21(L)

November 26, 1979

Ms. Cynthia P. Eisenhower
Executive Director
Campaign Finance Disclosure Commission
L O C A L

Dear Ms. Eisenhower:

We have received your request for an opinion from this office concerning an interpretation of certain provisions of ch. 56, The Code 1979 (the "Campaign Disclosure-Income Tax Checkoff Act"), relating to informal settlements by the Campaign Finance Disclosure Commission (hereinafter the "Commission").

Your questions concern an interpretation of § 56.11, The Code 1979, setting forth the procedures to be followed in investigating and disposing of complaints of alleged violations of provisions of ch. 56. You have related a factual situation wherein a majority of the commissioners participated as hearing officers for a hearing on a complaint concerning alleged violations of ch. 56 by a candidate's committee. The commissioners concurred in their determination that a violation had occurred, but discussed and were unable to agree on possible methods of disposing of the matter, i.e., dismissing the complaint, initiating an informal settlement, or referring the matter for prosecution. Your request continues:

It is my understanding that once the commission decides there has been a violation, they shall refer the matter for prosecution according to section 56.11(3). The commission does not, it appears, have the responsibility to determine the disposition of a case after deciding there has been a violation.

When is it appropriate for the commission to initiate an informal settlement? Must it be initiated after a complaint is filed; before or after a hearing; and/or before the commission determines a violation has occurred? Our administrative rules read as though informal settlements are only appropriate in cases involving delinquent filings where extension may be requested.

Chapter 56, The Code 1979, provides sweeping and thorough control over the public disclosure of campaign receipts and expenditures. It establishes extensive reporting and record-keeping requirements for candidates and political committees, and empowers the commission which it creates to administer and enforce its provisions.

Section 56.11, The Code 1979, sets out the procedure to investigate and dispose of complaints which may be filed by "any eligible elector", or the commission itself, alleging violations of the disclosure requirements of ch. 56. Persons or committees against whom a complaint is filed are afforded notice and a hearing process, after which "the commission shall determine whether or not there are reasonable grounds to believe that a violation . . . did occur." In the event that the Commission determines that there is a reasonable belief that a willful violation of a provision of ch. 56 did occur, see 1976 Op. Atty. Gen. 869, it "shall report the suspected violation" to the proper prosecutorial authorities, "with a recommendation of appropriate action to be taken."

The language used throughout § 56.11 is couched in mandatory terms, i.e., "shall". The use of the term "shall" implies a mandatory obligation and excludes any notion of discretion. Section 4.36(a), The Code 1979; Schmidt v. Abbott, 261 Iowa 886,890; 156 N.W.2d 649,651 (1968). Thus, the Commission is directed to notify the person, candidate or committee against whom the complaint is made, set a hearing date if it concludes that a reasonable basis exists for the filing of the complaint, investigate the complaint, conduct the hearing, determine whether or not

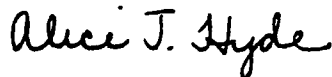
there are reasonable grounds to believe that a violation occurred, and refer any violation for further action by other authorities. Section 56.11, The Code 1979, appears to contain no authority for the Commission to dismiss a valid complaint or informally settle with the parties, other than its power to recommend such settlement as the "appropriate action to be taken" by the United States Attorney, Attorney General or County Attorney.

We do not interpret § 56.11(3), The Code 1979, however, to require an irrevocable complaint process that, once initiated, must be carried through to its final conclusion. The Commission may, at its discretion, "initiate action on its own motion by filing a complaint accompanied by . . . an affidavit". Section 56.11(1), The Code 1979. It would be well within the Commission's power to engage in informal discussion with persons, candidates or committees who are suspected of violating provisions of ch. 56 prior to its own initiation of a complaint.

Further, the Commission performs a quasi-judicial agency function in the adjudication of complaints filed by "any eligible elector" pursuant to § 56.11(1), The Code 1979. Unless the Commission concludes that there is no reasonable basis for a complaint which has been filed, it is obligated to conduct a hearing and make a determination as to the validity of the complaint, much as a trial court is obligated to proceed with a petition filed with it once it has determined that the cause is properly before the court. Parties to a petition filed in district court may withdraw the petition and informally settle prior to the court's final adjudication on the merits. Similarly, we believe that parties to a complaint filed with the Commission are able to withdraw that complaint prior to the Commission's determination that a violation of the provisions of ch. 56 did occur. The Commission would not be precluded from participating in and approving discussion, negotiation and settlement engaged in by the parties to a complaint which results in dismissal of the complaint. The Commission could not, however, on its own motion, dismiss or settle a complaint.

On the basis of our analysis of § 56.11, The Code 1979, we conclude that the Commission may participate in and agree to informal settlement or disposition any time before a complaint is filed with it, and once a complaint has been filed, when such informal settlement results in the dismissal of the complaint by the parties.

Very truly yours,



ALICE J. HYDE
Assistant Attorney General

SCHOOLS: Transfer to Schoolhouse Fund: A school district board of directors may not transfer funds from the general fund to the schoolhouse fund for the purpose of constructing a hot lunch facility without approval of the electors even though there is a sufficient surplus in the general fund to defray the cost of such construction. Iowa Const., Art. IX, § 2nd(1); ch. 24, 296, 2978; §§ 24.14, 275.32, 278.1(5)(7); 279.33, 279.34, 283A.9, 291.12-15, 297.5, The Code 1979. (Hagen to Brown, State Senator, 11/26/79)
~~#11/20/79 # 79-11-20(L)~~

November 26, 1979

The Honorable Joe Brown
State Senator
P. O. Box 1978
Montezuma, Iowa 50171

Dear Senator Brown:

We have received your request for an opinion from this office concerning whether a community school district board of directors may transfer surplus money in the general fund to the schoolhouse fund to pay for a new addition to the facilities.

Your question arises because the board of directors of Montezuma Community School District, which currently has no bonded indebtedness and has accumulated sufficient surplus in its general fund to defray the costs of construction of a proposed hot lunch facility, would like to employ these surplus funds to construct the facility, instead of obtaining voter approval through a bond issue or the special levy process.

Under Article IX, § 2nd(1), Constitution of Iowa, the General Assembly controls and manages the educational system, including "[t]he educational and school funds and lands." Pursuant to that power, the legislature has created a public school fiscal system, providing for the creation and maintenance of two separate funds, the schoolhouse fund and the general fund. See § 291.13, The Code 1979 which states:

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.

Those Code sections pertaining to public school financing provide for meticulous separation of the two funds. See ch. 296, The Code 1979, ("Indebtedness of School Corporations"), ch. 298, (School Taxes and Bonds); §§ 278.1(7), (schoolhouse tax); 291.13, 291.15 (annual report); 297.5 (K-12 purchase and improvement of sites). Specifically, § 283A.9 authorizes school districts to provide hot lunch facilities, "and [to] pay for same from unencumbered funds on hand in the schoolhouse fund derived from taxes voted under authority of §§ 278.1, subsection 7, or 275.32, subject to the terms of this section, or may pay for same from the proceeds of the sale of school property sold under § 297.22, or from surplus remaining in the schoolhouse fund after retirement of a bond issue, or from a tax voted for said purposes." Thus, the Code sections pertaining specifically to construction of hot lunch facilities are consistent with the overall fiscal system which requires separation of the two funds. There are no provisions for the transfer of surplus from the general fund to the schoolhouse fund; the expenditures made for schoolhouse purposes must be drawn from that fund. Sections 291.12, 291.13, The Code 1979.

The vital and long-standing policy consideration behind this separation of funds was expressed in Dyer v. City of Des Moines, 280 Iowa 1246, 1254, 300 N.W. 562, 566 (1941): "The budget law gives to the taxpayers the right to know in advance the amount of money that a city [or other governmental unit covered by the budget law] is going to ask to be levied as taxes, the purpose for which the funds are to be expended." Money directed to the schoolhouse fund must be used only for the purposes for which voted. Section 275.32, The Code 1979. Chapter 24, The Code 1979, which regulates the school district budgetary process, prohibits the use of tax funds for any purpose other than that "estimated and appropriated therefor."

Section 24.14, The Code 1979. Thus, the right of a school district to impose tax levies for the schoolhouse fund and the subsequent expenditure of those funds is strictly regulated.

Further, the rigid statutory system enacted by the legislature separating the schoolhouse and general funds also clearly places the electors in control of decisions concerning the creation and use of a schoolhouse fund and tax levy for schoolhouse purposes. See §§ 275.32, 278.1(7).

The electors at the regular election may direct the transfer of any surplus in the schoolhouse to the general fund. Section 278.1(5), The Code 1979. They would have a corresponding power to transfer surplus from the general fund to the schoolhouse fund. The board of directors is given no such authority to so transfer funds during the annual settlement of school district fiscal affairs.¹ See §§ 279.33-34, The Code 1979.

The reasons for the prohibition against the school board being able to transfer funds was well stated in an opinion issued previously by this office concerning the use of money received by a school district from the "state sinking fund" in 1937. That opinion stated in pertinent part:

The statute provides that school funds shall be used for no other purposes than those for which they were raised. The funds in question were not raised for the purpose of constructing a building, or repairing a building, or building an addition to a building, but were raised for the purpose of defraying the ordinary and usual expenses of the school. To now permit such funds to be used in the construction of a building or addition to a building would be to permit them to be used for a purpose other than that for which they were raised, and would in our opinion be in violation of the statute.

¹ Prior to 1963, a district board did have the power to transfer surplus from the general fund to the schoolhouse fund, but the section authorizing it was repealed, 1963 Session, 60th G.A., ch. 169, § 1. Legislative intent to deny a power is clear where the power, once held, is taken away.

As we have heretofore said, the facts in this matter are extraordinary, but the same condition might arise if school districts levied excessive taxes for their general purposes thereby creating a surplus during the year which at the annual meeting could be transferred to the schoolhouse fund, and in a few years create a balance in the schoolhouse fund sufficient to construct a building, thereby permitting the board of directors to do indirectly what they could not do directly, namely, construct a building and tax the property of the district therefor without submitting such matter to the vote of the electors. [Emphasis supplied].

1938 Op. Atty. Gen. 167,168. We believe that statement is applicable to the question you propound.

After the electors have authorized the transfer of funds from the general fund to the schoolhouse fund or approved a levy for construction of the desired hot lunch facility or the issuance of bonds to finance the project, there is, as a practical matter, a method for proceeding with such a project without further delay. We call your attention to § 24.22, The Code 1979, which permits temporary transfer of active funds.² If the district board obtains approval for a levy pursuant to § 278.1(7) or § 275.32, The Code 1979, the board of directors "shall at its next regular meeting levy such tax and cause the same to be forthwith entered upon the tax list to be collected." See § 298.9, The Code 1979. At that time, the procedures of § 24.7 allowing for supplemental estimates and the transfer provisions of § 24.22 could be utilized. Transfers made pursuant to § 24.22, The Code 1979, must be approved by the State Appeal Board and the school district board "shall provide that money temporarily transferred shall be returned to the fund from which it was transferred." § 24. The Code 1979.

² Permanent transfers are allowed in the case of inactive funds "when the necessity for maintaining any fund . . . has ceased to exist, § 24.21, The Code 1979, or funds transferred to the emergency fund. § 24.22, The Code 1979.

The Honorable Joe Brown
State Senator

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In summary, a school district board of directors may not transfer any surplus in the general fund to the school-house fund for the construction of school buildings, including hot lunch facilities, without specific approval of the electors.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Howard O. Hagen", with a long horizontal flourish extending to the right.

HOWARD O. HAGEN
Assistant Attorney General

HOH:sh

STATE OFFICERS AND DEPARTMENTS: Department of Substance Abuse--
Contracts for Substance Abuse Treatment. Sections 125.44, 124.45,
The Code 1979. If the contract between the department and a
facility is "open-ended," the department is responsible for 75
per cent of the total unpaid expenses submitted to the department
by the facility on a cost-reimbursement basis. If the contract
is in the form of a "maximum grant" agreement, the department's
maximum liability is that total figure on the face of the contract,
again on a cost-reimbursement basis. If the supplemental or
additional costs result from "care, maintenance, and treatment,"
then the department would be responsible for their payment, and
these costs would be included in any computation to determine
the point at which the department's total liability had been
exhausted under a "maximum grant" contract. (Dallyn to Carr, State
Senator, 11/26/79) #79-11-19(L)

November 26, 1979

The Honorable Robert M. Carr
State Senator
Statehouse
Des Moines, IA 50319

Dear Senator Carr:

You have requested an attorney general's opinion regarding
the cost-sharing responsibilities of the Iowa Department of
Substance Abuse and the counties of Iowa for funding substance
abuse programs pursuant to §§ 125.44 and 125.45, The Code 1979.
Specifically, you pose the following questions:

1. Whether the department of substance
abuse is responsible for paying 75 per
cent of the total costs incurred by a
particular facility from the care, maintenance
and treatment of all substance abusers treated
in a given year; or
2. Whether the department's responsibility
for payment is limited to 75 per cent of
the estimated contract figure approved
for a given year; and
3. Whether the department is in any way
responsible for payment of supplemental
or additional unexpected costs arising sub-
sequent to the contract agreement?

Your inquiries regarding § 125.44 and related provisions
raise issues similar to those addressed in an earlier opinion
of this office, 1976 O.A.G. 158. For purposes of clarification,
the following opinion replaces and supplants the discussion contained
in that earlier opinion.

An analysis of your three questions must begin with the provisions of § 125.44, The Code 1979, which establish guidelines for executing contracts between the department of substance abuse and selected treatment facilities, and for payment of costs thereunder by the department. Section 125.44 provides in relevant part:

The director may, consistent with the comprehensive substance abuse program, enter into written agreements with a facility as defined in section 125.2 to pay for seventy-five percent of the cost of the care, maintenance and treatment of a substance abuser. Such contracts shall be for a period of no more than one year. * * *

The contract may be in such form and contain provisions as agreed upon by the parties. Such contract shall provide that the facility shall admit and treat substance abusers regardless of where they have residence. If one payment for care, maintenance, and treatment is not made by the patient or those legally liable therefor within thirty days after discharge the payment shall be made by the department directly to the facility. Payments shall be made each month and shall be based upon the facility's average daily per patient charge. * * *

If the appropriation to the department is insufficient to meet the requirements of this section, the department shall request a transfer of funds and section 8.39 shall apply.

This statute confers a limited freedom of contract on the department of substance abuse to enter into a cost-reimbursement funding relationship with a licensed treatment facility, under provisions agreed on by the parties and consistent with the statutory requirements of § 125.44. Within these statutory guidelines, there appear to be two general types of contracts available to the parties.

The parties may enter into an "open-ended" contract whereby the department agrees to fund 75 per cent of the unpaid costs of the care, maintenance and treatment of the total number of sub-

stance abusers treated in one year by a particular facility.¹ The total cost to the department for the year would be unknown at the time the contract is executed; therefore, the department would have to estimate this projected budget item for purposes of submitting its proposed expenditure requirements to the state comptroller for subsequent legislative appropriation. See § 8.23, The Code 1979. If the actual appropriation to the department proves insufficient to satisfy the actual expenditures made pursuant to these open-ended contracts, then the department shall request a transfer of further funds pursuant to the provisions of § 8.39, The Code 1979. See § 125.44, The Code 1979.

The director may, on the other hand, select a form of contract that provides for a maximum ceiling on the total payment made by the department to a particular facility in a given year. This "maximum grant" contract, by its language mutually agreed upon, limits the department's liability for total payment to the sum total reflected on the face of the contract. This sum is to cover the care, maintenance and treatment costs of a facility for a given fiscal year and is used in such a limiting manner in determining the department's prospective legislative appropriation. This form of contract is apparently the type used by the department at the present time.

Whatever type of contract is adopted by the parties, certain aspects of its performance are governed by the provisions of § 125.44, The Code 1979. First, payment is to be made by the department on a cost-reimbursement basis solely for those costs actually incurred by a facility from the treatment of an identifiable substance abuser. A departmental payment is made only after a patient's discharge and only if no payment has been

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1. The decision of whether or not to contract with a particular facility, and of the type of contract more appropriate vis-a-vis the implementation of the comprehensive substance abuse program, is one ultimately made in the discretion of the director of the department (with the concurrence of the substance abuse commission). See O.A.G. #79-10-12, p. 3 (10/19/79). References herein to payment of "75 per cent of the costs" assume that the substance abuser is a resident of an Iowa county. If the substance abuser is a resident of another state or country, or is unclassified as to residence, then the department would be responsible for 100 per cent of the treatment costs (assuming the absence of any payment by the patient within 30 days after discharge). § 125.47, The Code 1979.

made by the patient within 30 days after discharge. Block transfers of single-sum amounts to cover prospective treatment costs of a facility are not permissible payment procedures under § 125.44. Second, the department's liability for costs is statutorily limited to 75 per cent of the costs of care, maintenance and treatment of a substance abuser. Therefore, the contract could not extend the department's liability for costs to payment of legal fees, building expenses or other non-treatment costs. See O.A.G. 79-10-12, p. 5 (10/19/79).

With these limitations in mind, the answer to your first two questions must be sought in the language of the approved contract executed pursuant to § 125.44. If the contract is "open-ended," the department is responsible for 75 per cent of the total unpaid expenses submitted to the department by the facility on a cost-reimbursement basis (to the extent the department's appropriation plus any approved § 8.39 transfers are available). If the contract is in the form of a "maximum grant" agreement (as presumably is the present case), then the department's maximum liability is that total figure on the face of the contract. Of course, actual payment is again on a cost-reimbursement basis, and a facility receives no more than actual unpaid costs incurred, even if this actual total in a given year is less than the total contract figure.

The answer to your third question again requires an examination of the contract. Payment by the department is limited to the costs of the "care, maintenance, and treatment" of a substance abuser. § 125.44, The Code 1979. If the supplemental or additional costs you mention come within the meaning of the above-quoted language, then the department would presumably be responsible for their payment, and these costs would be included in any computation to determine the point at which the department's total liability had been exhausted under a "maximum grant" contract. The initial determination of whether any such supplemental costs are within the meaning of "care, maintenance and treatment" would be determined by the department with reference to agency rules defining the quoted terms and on a case-by-case determination based on each itemized billing received by the department. Within statutory limits, the language of the parties' contract may also define what type of supplemental or additional costs will be considered as part of the department's responsibility.

A further note is in order concerning the county's statutory obligation for payment of the remaining 25 per cent of the costs of care, maintenance and treatment received by one of its residents in a facility under contract with the department. Section

125.45, The Code 1979, provides:

1. Except as provided in section 125.43, each county shall pay for the remaining twenty-five percent of the cost of the care, maintenance, and treatment under this chapter of residents of that county from the county mental health and institutions fund as provided in section 444.12. The commission shall establish guidelines for use by the counties in estimating the amount of expense which the county will incur each year. The facility shall certify to the county of residence once each month twenty-five percent of the unpaid cost of the care, maintenance, and treatment of a substance abuser. Such county shall pay the cost so certified to the facility from its county mental health and institutions fund. However, the approval of the board of supervisors shall be required before payment is made by a county for costs incurred which exceed a total of five hundred dollars for one year for treatment provided to any one substance abuser, except that such approval is not required for the cost of treatment provided to a substance abuser who is committed pursuant to section 125.35. A facility may, upon approval of the board of supervisors, submit to a county a billing for the aggregate amount of all care, maintenance, and treatment of substance abusers who are residents of that county for each month. The board of supervisors may demand an itemization of such billings at any time or may audit the same.

Subject to the limitation that a county shall not pay more than 500 dollars per year for any one substance abuser absent the approval of the board of supervisors, a county is statutorily required to pay the remaining 25 per cent of the unpaid costs of care, maintenance and treatment received by a resident substance abuser in a facility under contract with the department pursuant to § 125.44. The phrase "remaining twenty-five percent of the cost of the care, maintenance and the treatment" means that a county will not fulfill its obligation merely by paying a facility an amount equal to 25 per cent of the amount paid on a cost-reimbursement billing to a facility by the department for the treatment of a particular substance abuser. This payment by the department represents, at most, only 75 per cent of the total costs to a particular facility. Rather, the county must pay, upon a monthly billing

The Honorable Robert M. Carr
State Senator
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by the facility, 25 per cent of the total (treatment) costs of each individual substance abuser who has not made one payment for treatment within 30 days after discharge and for whom 75 per cent of treatment costs has been billed to the department. See § 125.44, The Code 1979. Of course, a patient's costs not eligible for payment by the department under § 125.44 (i.e., where the particular facility's "maximum grant" contract has been exhausted) would similarly be excepted from any payment by the county under § 125.45.

Sincerely,



SELWYN L. DALLYN
Assistant Attorney General

SLD/cla

SCHOOLS: Offsetting tax against non-resident tuition payments; § 282.2, The Code 1979. A non-resident of a school district who pays tuition in that district should deduct school taxes from tuition in the year both are paid, rather than deducting taxes from tuition paid in the year the taxes were assessed. (Norby to Anderson, Dickinson County Attorney, 11/21/79) #79-11-18(L)

November 21, 1979

Mr. Allen A. Anderson
Dickinson County Attorney
710 Lake Street
Spirit Lake, Iowa 51360

Dear Mr. Anderson:

You have requested an Attorney General's opinion interpreting § 282.2, The Code 1979. This section provides as follows:

The parent or guardian whose child or ward attends school in any district of which he is not a resident shall be allowed to deduct the amount of school tax paid by him in said district from the amount of the tuition required to be paid.

Your question involves the application of § 282.2 to the following situation:

A resident of a neighboring school district, which has a four-year high school, enrolled his children in the high school of the Spirit Lake Community School District in the fall of the school term for 1978-1979. In December, 1978, the non-resident parent obtained title to real property located in the Spirit Lake Community School District and later paid the second installment of the 1977-1978 tax upon the real property he acquired.

Section 282.2 of the Code would apparently permit the taxpayer to offset the second installment against the current tuition. But, a 1936 opinion of the Attorney General, at page 422, indicates that the school tax referred to in § 282.2 of the Code must be for the same tax year as the school year for which tuition is owing. If so, there can be no set off for tuition incurred in the 1978-1979 school year against the 1977-1978 tax, and the nonresident taxpayer would have to wait until he paid the 1978-1979 taxes in 1979-1980 before he can have a set off against the tuition incurred in 1978-1979.

Your question revolves around the proper method of linking together particular tax payments with particular tuition payments for the purpose of making a deduction. A problem arises, as you have pointed out, in that property tax payments are commonly identified by reference to the fiscal year of the assessment upon which they are based, rather than the year in which they are paid. The Attorney General's opinion cited above supports the practice of deducting taxes from the tuition paid in the year the taxes were assessed, stating as follows:

. . . you will note that this is an offsetting tax which is to be deducted by offset so that the tuition due in any given period may be offset by the school taxes paid for that same period and as I understand, the school taxes for the year 1935 are due and payable in 1936 and therefore, the tuition for the year 1935 could be deducted from the amount of those taxes.

1936 Op. Atty. Gen. 422.

Two other Attorney General's opinions appear to take the contrary position, that taxes may be deducted from tuition during the year the taxes are actually paid. These opinions state as follows:

. . . on a claim for offset, the taxpayer is not allowed to go back past the present year, that is, taxes paid in any given year are for the purpose of operating the school for that year, and there could only be an offset of tuition that was due for the same year, so that here the offset can only be for the present school year.

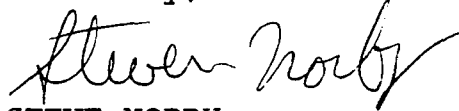
1936 Op. Atty. Gen. 374,375.

We presume that the parent or guardian is personally paying both the tax and the tuition and we believe it is plain that there can only be a donation (sic) for the tax paid during the year for which tuition is demanded.

1934 Op. Atty. Gen. 466.

An assessment must be made in the year preceding the year of collection as a matter of necessity. Reference to currently paid taxes by the date of the assessment logically follows from this practice. However, it does not appear that the Code places any significance on this method of reference as a limitation on the manner in which a deduction can be made pursuant to § 282.2. Additionally, deduction from tuition paid in the year of assessment does not appear to be the most natural interpretation of § 282.2, and does not reflect the realities of school financing. See 1936 Op. Atty. Gen. 374,375. Accordingly, deduction of taxes currently paid from tuition currently paid, rather than from tuition paid during the year of assessment, appears to be the proper interpretation of § 282.2.

Sincerely,



STEVE NORBY
Assistant Attorney General

SN:sh

ELECTIONS: Campaign Finance; Chapter 56, The Code 1979, Public officeholders may expend campaign funds held by a candidate's committee for any lawful purpose provided that full disclosure of contributions and expenditures is made in compliance with the Campaign Finance Disclosure Act. (Hagen to Holden, State Senator, 11/19/79) #79-11-15(L)



Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

ADDRESS REPLY TO:
STATE CAPITOL BUILDING
DES MOINES, IOWA 50319

November 19, 1979

The Honorable Edgar H. Holden
State Senator
2246 East 46th Street
Davenport, Iowa 52807

Dear Senator Holden:

You have requested an opinion of the Attorney General regarding the permissible use of funds obtained by a candidate's committee on behalf of the candidate within the meaning of § 56.2(13), The Code 1979. Specifically, you ask: "If a public officeholder does not dissolve his or her 'candidate's committee' subsequent to election and the committee continues to receive funds, can these funds be used for other than retirement of the prior campaign indebtedness or the expenses of a subsequent campaign of that officeholder?"

On the basis of our analysis of the Campaign Disclosure--Income Tax Checkoff Act (Chapter 56, The Code 1979), we conclude that a candidate's committee may properly disburse its funds for any lawful purpose until that committee has been dissolved pursuant to § 56.6(2), The Code 1979.

Chapter 56, The Code 1979, provides sweeping and thorough control over the public disclosure of campaign receipts and expenditures. It establishes extensive reporting and record-keeping requirements for candidates and political committees. In addition, the Act creates the Campaign Finance Disclosure Committee, giving it extensive power to administer and enforce the Act. However, it is abundantly clear that the Act's sole purpose is the regulation of campaign finance disclosure. No expenditure restrictions, express or implied, exist within the provisions of the Act.

Section 56.28, The Code 1979, requires that "Each candidate for public office shall organize one, and only one, candidate's committee if the candidate anticipates receiving contributions, making expenditures, or incurring indebtedness in excess of one hundred dollars in a calendar year." The Act defines "candidate's committee" as "the committee designated by the candidate to receive contributions, expend funds, or incur indebtedness in excess of one hundred dollars in any calendar year on behalf of the candidate." § 56.2(13), The Code 1979.

Once created, the committee must comply with the extensive disclosure requirements set forth in the Act until it is formally dissolved pursuant to § 56.6(2). Section 56.6(2) states: "If any committee, after having filed a statement of organization or one or more disclosure reports, dissolves or determines that it shall no longer receive contributions or make disbursements, the treasurer of the committee shall notify the Commission or the Commissioner within thirty days following such dissolution by filing a dissolution report on forms prescribed by the Commission. Moneys refunded in accordance with a dissolution statement shall be considered a disbursement or expense but the names of persons receiving refunds need not be released or reported unless the contributors' names were required to be reported when the contribution was received." It is apparent, from this Section, that the Act contemplates a committee with an on-going status. Therefore, a committee may continue to exist, following an election, until it has been dissolved pursuant to § 56.6(2).

In the absence of any restrictions on the receipt and expenditure of funds, a candidate's committee may receive and disburse those funds in any lawful manner for any lawful purpose. Federal law is in accord with this proposition. The Federal Election Campaign Act provides in relevant part: "Amounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures, and any other amounts contributed to an individual for the purpose of supporting his activities as a holder of Federal office, may be used by such candidate or individual, as the case may be, to defray any ordinary and necessary expenses incurred by him in connection with his duties as a holder of Federal office, may be contributed by him to any [charitable] organization, or may be used for any other lawful purpose . . .". 2 U.S.C.A. § 439a(Supp. 1979).

Chapter 56, The Code 1979, contains no restrictions on the ~~expenditure~~ expenditure of campaign committee funds. If the legislature had intended a restriction, it would have so provided.

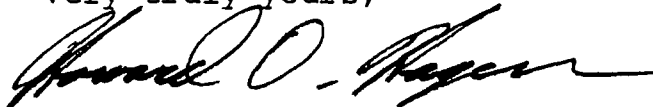
The Honorable Edgar H. Holden
State Senator

Page 3

Therefore, it is our opinion that a candidate's committee may properly disburse its funds for any lawful purpose until that committee has been dissolved pursuant to § 56.6(2), The Code 1979.

A previous opinion of the Attorney General held that campaign contributions made to public officials pursuant to ch. 56 are not violations of the gift and bribery statutes because the more specific provisions of ch. 56 override the criminal statutes. See Op. Atty. Gen. #78-1-7. We see no reason to depart from this holding.

Very truly yours,

A handwritten signature in black ink, appearing to read "Howard O. Hagen", written in a cursive style.

HOWARD O. HAGEN
Assistant Attorney General

HOH:sh

MUNICIPALITIES: Police Radio Broadcasting System -- IOWA CONST. art. 3., § 40; §§ 28E, 364.1, 364.3(4), 384.1, 384.24(3)(j), 693.4, 693.5, 693.6, The Code, 1979. A city may not levy a separate tax to defray the maintenance expenses of a Chapter 693 Police Radio Broadcasting System. So long as a city operates only a receiver set, it may not be required to contribute to the expenses of operating a Chapter 693 system. Member cities and a county operating a Chapter 693 system may reach a Chapter 28E agreement covering the respective contributions to the maintenance expenses of the system and a city may provide funds to cover its contribution as a part of its general tax levy under Section 384.1. (Swanson to Heintz, Chickasaw County Attorney, 11/19/79) #79-11-14(L)

November 19, 1979

Mr. William A. Heintz
Chickasaw County Attorney
Chickasaw County Courthouse
New Hampton, Iowa 50659

Dear Mr. Heintz:

You have requested the opinion of the Attorney General regarding the statutory authority for a tax levy by a city to defray the expenses of a county communications system. The factual situation wherein this question arises can be stated as follows:

Pursuant to Chapter 693, The Code 1979, Chickasaw County has established a Police Radio Broadcasting System. Although the cost of installation was paid from the County General Fund as allowed by § 693.6(1), the County has billed the system's member communities at a rate of \$1.00 per citizen per year in order to defray the expenses of maintaining the system. The City of Nashua has protested the payment of these maintenance fees and questions whether it has the authority to levy a tax to raise the necessary funds.

It is the opinion of this office that a city may provide for the payment of these maintenance expenses as a part of its general authority to levy taxes as provided in §384.1, The Code 1979.

Section 384.1 provides the general authority for a tax levy by a city, as well as placing limits on such a levy:

384.1 Taxes Certified. A city may certify taxes to be levied by the county on all taxable property within the city limits, for all city government purposes. However, the tax levied by a city on tracts of land and improvements thereon used and assessed for agricultural or horticultural purposes, may not exceed three dollars and three-eighths cents per thousand dollars of assessed value in any year. Improvements and personal property located on such tracts of land and not used for agricultural or horticultural purposes and all residential dwellings shall be subject to the same rate of tax levied by the city on all other taxable property within the city. A city's tax levy for the general fund may not exceed eight dollars and ten cents per thousand dollars of taxable value in any tax year, except for the levies authorized in section 384.12. (Emphasis added).

The question then becomes whether the defrayment of expenses incurred in maintaining a county communications system can be considered a "city government purpose" for the purpose of § 384.1. It is obviously beyond question that the equipping and maintenance of law enforcement authorities is a city government purpose. It should be noted that § 384.24(3)(j) defines the equipping of a police department as an "essential corporate purpose" for the purposes of a city's issuance of general obligation bonds.

These maintenance expenses are to be paid out of the funds raised by the general levy under § 384.1. A special tax may not be levied for this purpose. Section 364.1 states that, except as limited by the Constitution or laws of the legislature, a city may "exercise any power and perform any function it deems appropriate

to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort and convenience of its residents." Iowa Constitution Article III, § 40, and § 364.3(4) expressly provide that a city may not levy a tax unless the levy is specifically provided for by a state law. No such authorization exists in the code and therefore any provision of funds to defray the maintenance expenses of a Chapter 693 broadcasting system must be made as a part of the general levy provided for in § 384.1.

As further authority for the proposition that a city may contribute to the maintenance expenses of Chapter 693 broadcasting system, your attention is drawn to 1968 Op.Att'y Gen. 184. In that opinion the predecessor to Chapter 693, § 750.6, The Code 1962, was construed to allow counties, cities and towns the authority to pay the costs of maintaining a supplemental police communications systems.

Although it is clear from the foregoing that a city may provide for the defrayment of the maintenance expenses of a Chapter 693 system, an analysis of the scheme of Chapter 693 leads to the conclusion that there is no language in the Chapter stating that a city must contribute to these expenses. Section 693.4 deals with the choice by the county board of supervisors to install radio receiving sets and provides that the initial costs of the radio receiving sets shall be paid from the general fund of the county. Section 693.6 further provides that the county board of supervisors may install and maintain additional communication systems for the efficient operation of law enforcement agencies and pay the expenses incurred from the general fund of the county. Section 693.5 provides that in cities with a population of two thousand or more, the city council may install at least one radio receiving set as a part of a Chapter 693 system.

The above sections contemplate that a city of the requisite size may install a receiver set and so long as the set is used only for receiving, the city would not be required to contribute to the maintenance of the Chapter 693 system. Under this scheme, the county is responsible for the maintenance of any additional equipment, other than receiving sets in municipalities, that it chooses to install in the system. If, for example, a county chooses to install transmitters in order to be able to transmit messages along the Chapter 693 system, the maintenance expenses of those transmitters would be paid from the general fund of the county. The fact remains from a reading of Chapter 693, however, that so

long as a city that installs a receiver set does not participate in the system beyond the operation of the receiver set, it would not be required to contribute to the maintenance of a Chapter 693 system.

This result may seem to be somewhat anomalous because the benefits of participating in a Chapter 693 system would be severely restricted if a city could only receive police broadcasts and was unable to transmit its own messages. There does not appear to be any language in Chapter 693 pertaining to a city's decision to install any equipment other than a receiver set. It is assumed that most cities participating in a Chapter 693 system will opt to install equipment that would enable them to participate fully in the system.

In order to remedy this potential loophole in the scheme of Chapter 693, the county and the member cities may reach a Chapter 28E agreement. Chapter 28E, The Code 1979, provides in § 28E.3, that any power or authority that may be exercised by a public agency (defined in Section 28E.2 to include a political subdivision of the state) may be exercised jointly with any other public agency that possesses like power or authority. Because Chapter 693 provides the general authority for cities and counties to participate in a police radio broadcasting system, that authority may be exercised through the vehicle of a Chapter 28E agreement. As a part of this agreement, pursuant to § 28E.5(4), provisions should be included to cover a city's contribution to the maintenance expenses of a Chapter 693 system.

Finally, your attention is drawn to 1974 Op.Att'y Gen. 753. That opinion discussed the relationship between Chapter 750 (the predecessor to Chapter 693) and Chapter 28E. The opinion specifically states that "The specifications and requirements of Chapter 28E are easily satisfied and this chapter provides an excellent management foundation for endeavors like county-wide radio networks".

In conclusion, a city may contribute to the maintenance expenses of a Chapter 693 system as a part of its general tax levy under § 384.1. A city may not levy a separate tax for such costs. A city with a population of two thousand or more may install a receiver set, and if that city's participation is limited to receiving, it may not be required to contribute to the maintenance expenses of the system. Should a city opt to participate in the system beyond this limited extent, Chapter 693 contains no provision as to what a city's contribution would be. To remedy this situation, member cities and the county may reach a Chapter 28E agreement that in-

Mr. William A. Heintz

page 5

cludes provisions as to their respective contribution to the maintenance of the system.

Very truly yours,

Jon K. Swanson

Jon K. Swanson
Assistant Attorney General

JKS:jkt

AGRICULTURE: Grain Moisture Testing. Sections 159.5 and Chapter 215A, The Code 1979; H.F. 734, Section 3, 1979 Session 68th G.A. The use of a sample of grain for moisture testing obtained by a method of probing for foreign material not approved pursuant to § 159.5(10) is not prohibited pursuant to H.F. 734 and § 159.5(10). (Willits to Lounsberry, Secretary of Agriculture, 11/14/79) #79-11-13C

November 14, 1979

The Honorable Robert A. Lounsberry
Secretary of Agriculture
Wallace Building
LOCAL

Dear Secretary Lounsberry:

You have requested an opinion of the Attorney General on the question of whether a person may use a sample of grain for moisture testing obtained by an unapproved method of probing for foreign material.

Section 159.5(10), The Code 1979, provides that: "The secretary of agriculture shall be the head of the department of agriculture which shall: ...10. Approve all methods of probing for foreign material content of any type of grain."

Section 3 of H.F. 734, passed by the 1979 Session of the 68th General Assembly and signed by the Governor, amends Ch. 159, The Code 1979, by adding the following new section:

"The secretary shall not approve the use of end intake air probes, which use a vacuum to collect a sample from a load of grain, pursuant to section one hundred fifty-nine point five (159.5), subsection ten (10) of the Code. A person who uses a method of probing for foreign material content of grain which is not approved by the secretary is guilty of a simple misdemeanor."

Chapter 215A, The Code 1979, requires that the Department of Agriculture inspect at least annually every moisture measuring device used in commerce in Iowa, except government devices. Section 215A.3, The Code 1979, empowers the Department of Agriculture to establish rules and regulations to carry out Ch. 215A, The Code 1979. Rules have been adopted and are set forth in the Iowa Administrative Code, 30-55.52(215A) through 30-55.57(215). These

rules do not directly address the use of end intake vacuum grain probes or any other method of collecting a grain sample for moisture testing. Rather, IAC 30-55.53(215A) provides that moisture measuring devices may be rejected for various reasons, including being out of tolerance with the measuring device used by the department by more than one-half of one percent on grain under twenty percent moisture content.

In construing statutes, one looks to the evils the legislature sought to remedy and the purposes it sought to serve. Compiano v. Kuntz, 226 N.W.2d 245 (Iowa 1975). Statutory language is given its usual and ordinary meaning in arriving at legislature intent. State v. McGuire, 200 N.W.2d 832, (Iowa 1972). An act which is penal in nature and imposes a punishment for an offense committed against the state is interpreted strictly. State ex rel Turner v. Koscat Interplanetary, Inc., 191 N.W.2d 624 (Iowa 1971).

The legislation adopted in H.F. 734 is penal in nature because it provides that use of an unapproved method to probe for foreign material is a simple misdemeanor. It must therefore be strictly construed.

The language of H.F. 734 says that pursuant to § 159.5(10), The Code 1979, the Secretary of Agriculture shall not approve the use of end intake air probes, which use a vacuum to collect a sample. This section refers only to foreign material testing. House File 734 makes no reference to Ch. 215A, The Code 1979, concerning moisture measuring devices. The misdemeanor penalty provision of H.F. 734 refers only to foreign material, not also to moisture measuring. Had the legislature desired to prohibit the use of end intake vacuum air probes for collecting a grain sample for moisture testing, it could have done so explicitly, as it did for foreign material testing. Thus, as enacted, the prohibitions are limited to foreign material testing.

Note that the language also is limited to prohibiting one certain type of probe: end intake air probes which use a vacuum to collect a sample. Thus, other types of probes which use gravity or a core sample to collect the sample, but use a vacuum to carry the sample to the tester after it is collected, are not prohibited for either foreign material or moisture testing. This is in keeping with the purpose of the legislation: i.e., to protect farmers from excess penalization or "docking" on the price received for their grain due to the use of a vacuum to collect the sample. Scientific tests conducted at Iowa State University and elsewhere have indicated that the use of a vacuum to collect the sample over-emphasizes the foreign material content. (see C. Herberg, Iowa State University, 1979, "Evaluating Grain Probing Devices and Procedures").

Grain samples collected by various types of probes are typically transported to the tester by vacuum or pneumatic tubes and used for both moisture and foreign material testing. If the probe is of the end intake vacuum variety, this sample may be used only for

moisture testing and not for foreign material testing under the current state of the law. A foreign material sample, if desired, must be collected by some other means. A grain elevator which desires to avoid having to collect two separate samples for moisture and foreign material testing could do so by obtaining a type of probe other than an end intake air probe which uses a vacuum to collect the sample.

In summary, the laws of this state do not prohibit the use of a sample of grain for moisture testing obtained by an unapproved method of probing for foreign material content.

Sincerely,



EARL M. WILLITS
Assistant Attorney General
Farm Division

EMW/nay

TAXATION: Military Service Tax Exemption: Servicemen entitled to the Vietnam Veteran's Bonus: section 35C.1 and 35C.2, The Code 1977 and section 427.3(4), The Code 1979. A person who qualifies for the Vietnam Veteran's Bonus under section 35C.1 would not be entitled to take the military service tax exemption under section 427.3(4) when he or she had not served on active duty as defined in section 35C.2, between August 5, 1964 and June 30, 1973, both dates inclusive, or where said person has never been honorably separated from such active duty. (Price to Shirley, Dallas County Attorney, 11/13/79) #79-11-9(L)

November 13, 1979

Mr. Alan Shirley
Dallas County Attorney
1124 Willis Ave. P.O.Box 487
Perry, IA 50220

Dear Mr. Shirley:

You have requested an opinion of the Attorney General on the question of whether a person who is entitled to receive a bonus under Chapter 35C, The Code 1977, is entitled to a military service tax exemption under section 427.3(4), The Code 1979. Specifically you state:

Section 427.3(4) of the 1979 Code provides for a tax exemption for Viet Nam Veterans who served between August 5, 1964 and ending June 30, 1974, both dates inclusive, and as defined in §35C.2. Chapter 35C was repealed

by the 67th General Assembly, Chapter 1040 §1(1), 31. However, Chapter 35C when it was in effect provided for a Viet Nam Veteran Bonus for anyone who served between July 1, 1958, and ending August 4, 1964.

Is a person qualified to receive a bonus under Chapter 35C (even though now repealed) entitled to the military service tax exemption under Section 427.3 of the Code.

Section 35C.1, The Code 1977 provided in relevant part:

Every person who served not less than one hundred twenty days on active duty, in the armed forces of the United States, at any time between July 1, 1958 and ending on August 4, 1964, both dates inclusive, and who at the time of entering into service was a legal resident of the state of Iowa, and who had maintained such residence for a period of at least six months immediately prior thereto, and was honorably separated or discharged from such service, or is still in active service in an honorable status, or has been retired, or has been furloughed to a reserve, or has been placed on inactive status, shall be entitled to receive from the service compensation fund seventeen dollars and fifty cents, if he earned either a Vietnam service medal or an armed forces expeditionary medal-Vietnam during that period, for each month that such person was in the Vietnam Service area, between July 1, 1958 and August 4, 1964, both dates inclusive, not to exceed a total sum of five hundred dollars.

Section 427.3(4), The Code 1979 provides in relevant part:

Military service-exemptions. The following exemptions from taxation shall be allowed:

4. The property, not to exceed one thousand eight hundred fifty-two dollars in taxable value of any honorably separated, retired, furloughed to a reserve, placed on inactive

status, or discharged soldier, sailor, marine, or nurse of the second World War. . . , or those who served on active duty during the Vietnam Conflict beginning August 5, 1964 and ending June 30, 1973, both dates inclusive, and as defined in section 35C.2. (Emphasis added)

Section 35C.2 The Code 1977 provides the following definition:

Definition of active duty. "Active duty" in the armed forces of the United States means full-time duty in the armed forces of the United States, excluding active duty for training purposes only and excluding any period a person was assigned by the armed forces to a civilian institution for a course of education or training which was substantially the same as established courses offered to civilians, or as cadet, or midshipman, however enrolled, at one of the service academies.

In order for a person to be eligible for the bonus, he or she must have served on active duty between July 1, 1958 and August 4, 1964, both dates inclusive, and have been honorably separated or discharged from such service, or still in active service in an honorable status without ever being terminated therefrom.

In order for a person to be eligible for the military service tax exemption, he or she must have served on active duty between August 5, 1964 and June 30, 1973, both dates inclusive, and have been honorably separated or discharged therefrom. See 1976 Op. Att'y. Gen. 44.

As a consequence, it is our opinion that a person who qualifies for the Vietnam Veteran's Bonus under section 35C.1 would not be entitled to take the military service tax exemption under section 427.3(4) when he or she had not served on active duty, as defined in Section 35C.2, between August 5, 1964 and June 30, 1973, both dates inclusive, or where said person has never been honorably separated from such active duty.

Very truly yours,

L. Joseph Price
Assistant Attorney General

COUNTIES AND COUNTY OFFICERS: County Hospital: Sections 562.4, 347.7 and 347.13(14), The Code 1979. By holding over after the expiration of a written lease to operate the Dubuque County Nursing Home the Dubuque County Board of Supervisors would be considered a tenant at will and such holding over is presumed to be on the same terms as the last written lease. Operating costs are a part of maintenance expenses and may be paid from the fund provided by the tax levy. (Bennett to Curnan, Dubuque County Attorney, (Bennett to Curnan, Dubuque County Attorney, 11/7/79) #79-11-2(L))

November 7, 1979

Mr. Robert J. Curnan
Dubuque County Attorney
461 Fischer Building
Dubuque, Iowa 52001

Dear Mr. Curnan:

We have received your request for an opinion from this office concerning the operation of the Dubuque County Nursing Home. The first question which you present is whether the operation of the facility should be under the direction of the Dubuque County Board of Supervisors or the Dubuque County Hospital Board of Trustees in view of the fact that the last written lease entered into by the two parties expired on June 30, 1978. Since that date the facility has continued to be operated by the Dubuque County Board of Supervisors under the terms of the lease agreement.

Section 562.4, The Code 1979, provides as follows:

Any person in the possession of real estate, with the assent of the owner, is presumed to be a tenant at will until the contrary is shown, and thirty days' notice in writing must be given by either party before he can terminate such a tenancy; but when in any case, a rent is reserved payable at intervals of less than thirty days, the length of notice need not be greater than such interval.

The tenant, the Dubuque County Board of Supervisors, continued to occupy the premises after the expiration of the lease and would be considered as a tenant at will, whose tenancy may be terminated on 30 days' notice. Nickle v. Mann, 211 Iowa 906, 232 N.W. 722 (1930).

In the absence of a new lease arrangement the holding over by a tenant is presumed to be on the same terms as the last written lease unless facts indicate that the terms were modified or changed. Friedman v. Weeks, 190 Iowa 1083, 181 N.W. 390 (1921). Under the facts in this situation it appears that the parties have continued to conduct themselves in accordance with the terms of the written lease. Paragraph eleven of the agreement states that the "operation of the premises as a hospital and/or nursing home shall be under the control and direction of the Tenant, its agents and employees." In answer to your first question, the operation of the facility would continue to be under the direction of the Dubuque County Board of Supervisors.

The second question which you present concerns a tax levy provided for by §347.7, The Code 1979. Specifically, you ask whether the levy of twenty-seven cents per thousand dollars of value may be used for operating expenses other than improvements, maintenance and replacements of the Dubuque County Nursing Home.

On an earlier date this office issued an opinion relating to that section which reads in part, as follows:

The word 'improvement' . . . refers to repairs and alterations which might be necessitated in operating the hospital, and the word 'maintenance' should be interpreted to mean current expense of the institution. Sums received from patients who are able to pay for their care in the county hospital would be placed in the hospital fund and these sums, together with the amount received through the . . . tax levy, should be used for necessary operating expenses.

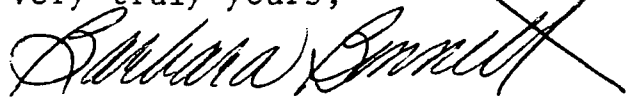
1928 Op.Att'yGen. at 133.

The legislature is presumed to be aware of the interpretation of the terms made by this office and did not take any action to amend §347.7 in light of that interpretation. We would conclude from the legislators failure to act that they intended "maintenance" to include the expenses of operation of the facility. Further evidence that the legislature anticipated a tax levy be used

to pay operating expenses is found in §347.13(14) which provides for the disclosure of the salaries of employees of the facility paid "in whole or in part from a tax levy." Certainly salaries paid employees would be considered operating expenses.

In answer to your second question, since operating expenses are considered to be included in maintenance costs, the tax which the county is required to levy may be used to pay such expenses.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Barbara Bennett", with a large, sweeping flourish extending to the right.

Barbara Bennett
Assistant Attorney General

MINORS: Uniform Gifts to Minors Act; ch. 565A §§ 565A.1(11), 565A.9(2), 565A.11, ch. 599, § 599.1. The provisions concerning minority age contained in § 599.1 do not affect the provisions concerning minority age contained in § 565A.1(11). Hoyt to Sherzan, State Representative, 12/31/79) #79-12-29(L)

Richard Sherzan
State Representative
1104 Fourth Street, S.W. #20
Altoona, Iowa 50009

December 31, 1979

Dear Mr. Sherzan:

You asked for an Attorney General's Opinion concerning the relationship between the differing definitions of minority age contained in §599.1 and §565A.1(11) of the Iowa Code. Specifically, you have asked whether the provisions of §599.1, which define minority as extending to the age of 18 affect the provisions of ch. 565A in which minority is defined as extending until age 21.

The provisions concerning minority age contained in §599.1 do not affect the provisions concerning minority contained in ch. 565A. The provisions regarding minority age contained in these chapters are inconsistent, but the provisions are not in conflict. Chapter 565A provides a simple method for making a gift to a minor in Iowa. It is not, however, the exclusive method for making gifts to minors. Its use is optional. Section 565A.9(2). Once an individual chooses to make a gift to a minor pursuant to the provisions of ch. 565A, all other state laws contrary to the provisions of that chapter do not

apply to the custodial property of a minor held by a custodian under that chapter.¹ Section 565A.11.

In sum, while the provisions of §§599.1 and 565A.1(11) are inconsistent, this inconsistency does not produce a conflict since the use of ch. 565A is optional. However, once a donor chooses to use ch. 565A as the method for making a gift to a minor, the minority provisions of ch. 565A control.

An examination of the history and intent of ch. 565A will help clarify its relationship to other statutes.

Chapter 565A is the Iowa Uniform Gifts to Minors Act. It was enacted by the Iowa Legislature in 1959. 1959 Session, 58th G.A., ch. 342, §9. Its underlying purpose is to facilitate the transfer of securities and monies to minors without going through cumbersome legal processes and expense. The statute is specifically aimed at helping the individual who wants to make a gift of a specific thing to a minor (especially securities). The Act establishes an easy method to avoid the legal requirements associated with a guardianship or a trust while accomplishing the same effect.

At the time the Uniform Gift to Minors Act was enacted, the prevailing legal age was 21. Thus, the definition of majority contained in §565A.1(11) was consistent with other state laws defining majority. This was true until 1973.

¹ Custodial Property is defined in §565A.1(5) as follows:

"The custodial property" includes:

- a. All securities and money under the supervision of the same custodian for the same minor as a consequence of a gift or gifts made to the minor in a manner prescribed in this chapter;
- b. The income from the custodial property; and
- c. The proceeds, immediate and remote, from the sale, exchange, conversion, investment, reinvestment or other disposition of such securities, money and income.

In 1973, the Iowa Legislature changed the majority age in Iowa to 18 years of age. 1973 Session, 65th G.A., ch. 140. A number of statutes were amended to reflect the change, but ch. 565A was not among them.² Thus, the inconsistency between the definition of minority contained in ch. 565A and the definitions of minority contained elsewhere in the Code has remained ever since.

In 1977, a bill seeking to change the majority age in §565A.1(11) from 21 to 18 was introduced in the Iowa Senate. S.F. 18 67th G.A.

The sponsor's main goal was to eliminate the prevailing inconsistency with regard to statutory provisions defining the majority age as 18 and to eliminate any potential confusion surrounding the purchase and transfer of securities by individuals aged 18 to 21.

The opponent's of the bill contended that changing the age from 21 to 18 would decrease a donor's flexibility in making a gift to a minor. In addition, opponents cited potential tax consequences related to §2503 of the Internal Revenue Code.

The question of whether or not the majority age in §565A.1(11) should be changed from 21 to 18 is, of course, a matter for legislative determination. You have inquired as to the legal aspects of the differing definitions of minority. It is not necessary to determine the merits of the above-mentioned argument to answer your inquiry.

Individuals can make gifts to minors in a number of ways under Iowa law. Among them is ch. 565A of the Iowa Code. It provides a convenient vehicle for making gifts of securities to minors. It is often used to accomplish this objective.

² The age of majority was changed by the 65th G.A., ch. 140 with regard to the following statutes: Section 68B.9, §90.1, §92.23, §146.13, §147.3, §232.36, §232.67, §240.2, §242.67, §240.2, §242.6, §242.8, §242.13, §245.4, §245.6, § 247.27, §249A.6, §261.7, §321.179, §321.180, §325.29, §327A.7, §378.5, §379.6, §487.7, §462.11, §512.9, §524.301, §599.1, §610.2, §695.18.

Mr. Sherzan
Page 4

Chapter 565A, however, is not the exclusive method of making gifts to minors in Iowa. Section 565A.9(2) provides:

This chapter shall not be construed as providing an exclusive method for making gifts to minors. [C62, 71, 73, 75, 77, §565A.9]

If a donor should choose to make a gift pursuant to the provisions of ch. 565A, however, the language and dictates of the statute will control. Section 565A.11 provides:

Laws not applicable. Section 668.3 and all other laws of this state contrary to the provisions of this chapter, shall not apply to the custodial property of a minor held by the custodian under this chapter. [C62, 66, 71, 73, 77, §565A.11]

Thus, if a donor has chosen to use the Uniform Gift to Minors Act, the fact that §599.1 provides a different definition of minority has no legal effect.

In summary, while the provisions of §§599.1 and 565A.1(11) are inconsistent, this inconsistency does not produce a conflict since ch. 565A is not the exclusive method of making a gift to a minor under Iowa law. Once a donor chooses to use ch. 565A as the method of making a gift to a minor, differing statutory provisions with regard to the age of majority are not applicable.

Sincerely,

Francis C. Hoyt, Jr.

Francis C. Hoyt, Jr.
Assistant Attorney General

FCH/rbs

CONSTITUTIONAL LAW: Witness Fees -- § 622.71, The Code 1979. Section 622.71, which does not allow witness fees for peace officers and public officials testifying in court in the county of their residence, but does allow witness fees for those same officers who testify in court in a county not of their residence is constitutional and does not violate equal protection. (Blumberg to Richards, Story County Attorney, 12/31/79) #79-12-27(L)

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

December 31, 1979

Dear Ms. Richards:

We have your opinion request regarding § 622.71, The Code 1979. You ask whether the residency distinction in that section is constitutional, with regard to equal protection.

Section 622.71 provides:

No peace officer who receives a regular salary, or any other public official shall, in any case, receive fees as a witness for testifying in regard to any matter coming to his knowledge in the discharge of his official duties in such case in a court in the county of his residence, except police officers who are called as witnesses when not on duty. (Emphasis added]

The emphasized portion is of issue here. The section provides, in substance, that a peace officer or public official who testifies about a matter associated with that officer's official duties in a court in the county of his or her residence shall not receive witness fees. There are exceptions to that which are not of consequence here. Your question relates to those peace officers who reside in a county other than the court where the testimony takes place, as opposed to those who reside in the same county as the court. Presumably, those who reside in another county are entitled to witness fees.

Classifications based on residency are evaluated by two tests. If the residency requirement is one that affects interstate migration, it involves a fundamental right. Therefore, the test is one of strict scrutiny and the classification will be upheld only if necessary to promote a compelling state interest. Shapiro v. Thompson,

394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969). If no fundamental right is involved, the test is one of rational basis. Shapiro, supra. Since the statute in question does not involve interstate migration, or anything closely related to it, strict scrutiny is not applicable. The test here, therefore, is one of rational basis.

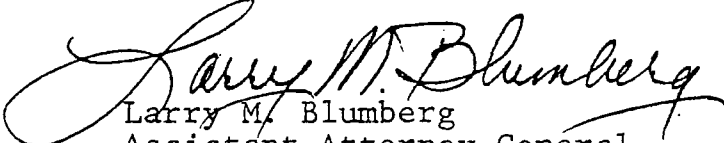
Statutes are presumed to be constitutional. Gleasen v. City of Davenport, 275 N.W.2d 431 (1979); Miller v. Iowa Real Estate Commission, 274 N.W. 2d 288 (1979). Every reasonable basis must be negated. Iowa City v. Nolan, 239 N.W.2d 102 (1976). If § 622.71 is to be declared unconstitutional, it would be so as applied.

Peace officers and public officials are often, and regularly, required to give testimony regarding matters arising out of the discharge of their duties. As such, it can be said that their wages cover such things. Testifying in the court in the county of their residence is not such a burden on them as to necessitate any additional payment to them. This, however, is not necessarily true when testifying in another county. Many times, the costs of traveling to a distant county put a greater economic burden on the officer. Such is a rational basis for the residency provision. The Legislature obviously recognized this when it enacted § 622.71. The fact that the residency reference is not set forth with mathematical nicety or scientific exactness does not offend the Constitution. Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970).

You also asked whether the phrase "in the county of his residence" means, as a matter of statutory construction, "in the county of his employment." The phrase referring to residency is clear and unambiguous. It is not a function of this office to, in effect, change the language of a statute. While it might result in a more equitable solution if the statute referred to the county of employment rather than residency, such a change must be made by the Legislature.

Accordingly, we are of the opinion that the residency language of § 622.71 is not violative of equal protection.

Very truly yours,


Larry M. Blumberg
Assistant Attorney General

LMB:jkt

STATE OFFICERS AND DEPARTMENTS: Expenditure of funds by State Conservation Commission to acquire land to expand state park at Lake Macbride--1979 Session, 68th G.A., Ch. 14, § 7. Plain meaning of language used in capital projects appropriation bill enacted by 68th G.A. is to prohibit the expenditure of funds by the State Conservation Commission to acquire land to increase the extent or size of the state park at Lake Macbride, whether the land to be acquired lies within or without the outer limits of the park. (Peterson to Brabham, Director, State Conservation Commission, 12/31/79) #79-12-26 (L)

December 31, 1979

Mr. William C. Brabham, Director
Iowa State Conservation Commission
Wallace State Office Building
L O C A L

Dear Mr. Brabham:

By letter dated November 14, 1979, you have requested the opinion of the Attorney General as to whether the State Conservation Commission may acquire two designated tracts of land in Johnson County in view of the restriction on use of funds for land acquisition imposed by the legislature in the 1979 capital projects appropriation bill (1979 Session, 68th G.A., Ch. 14, § 7), which, in pertinent part, states that "The funds appropriated by . . . this Act, or any other funds available to the state conservation commission shall not be used to acquire land to expand the state park at Lake Macbride. . . ."

Enclosed with your letter was a Master Property Plat of Lake Macbride State Park (Revised March 31, 1977) on which are depicted the park boundary and the limits of the lands licensed to the State of Iowa from the U.S. Army Corps of Engineers. The Superintendent of Parks for the State Conservation Commission advises that the boundaries thus depicted represent the limits of Lake Macbride State Park established by the Conservation Commission by reference to said Plat.

We note that the two tracts proposed for purchase are not within the park boundaries established by the Commission though both adjoin park land and are within the outer limits

Mr. William C. Brabham, Director
Page 2

of the land licensed to the State by the Corps of Engineers and managed by the State Conservation Commission in conjunction with operation of state-owned lands comprising Lake Macbride State Park.

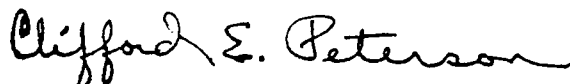
Expand means "to increase the extent, size, number, volume or scope of". Webster's Third New International Dictionary, Unabridged 1967. Expand is similarly defined in Webster's Seventh New Collegiate Dictionary (1963 ed.) which further states that expand "may apply whether the increase comes from within or without, or in any manner such as growth, unfolding, addition of parts".

It can scarcely be argued that the proposed addition of the two tracts would not increase the extent or size of the existing park by their combined area of about five acres. The expenditure of funds for this purpose was expressly prohibited by the legislature.

A statute clear and unambiguous on its face need not and cannot be interpreted by a court and only those statutes which are of doubtful meaning are subject to the process of statutory construction. State v. Hocker, 201 N.W.2d 74 (Iowa 1972); State v. Valeu, 257 Iowa 869, 134 N.W.2d 911 (1965); Herman v. Muhs, 257 Iowa 41, 126 N.W.2d 400 (1964); Dingman v. Council Bluffs, 249 Iowa 1121, 90 N.W.2d 742 (1958).

We conclude, therefore, that the plain meaning of the language used in the capital projects appropriation bill enacted by the 68th G.A. is to prohibit the expenditure of funds by the State Conservation Commission to acquire land to increase the extent or size of the state park at Lake Macbride, whether the land to be acquired lies within or without the outer limits of the park.

Sincerely,



CLIFFORD E. PETERSON
Assistant Attorney General
Environmental Protection Division

CEP:rcp

BEER AND LIQUOR; GAMBLING: Licensing qualifications --
§ 123.3(11)(b), §§ 99B.1(2), 99B.3, 99B.7, 99B.12, 725.9,
725.15. Payment of the federal gambling tax on coin
operated gambling devices by the operator of an establishment
licensed as a organization qualified to conduct gambling
activities is not, standing alone, sufficient to prevent
that operator from qualifying as a person of good moral
character so as to obtain a liquor control license. (McGrane to
Gallagher, Director, Iowa Beer and Liquor Control Department,
12/31/79) #79-12-24(L)

December 31, 1979

Mr. Rolland A. Gallagher
Beer and Liquor Control Department
Valley Bank Building
L O C A L

Dear Mr. Gallagher:

You have requested an opinion on the following question:

"Are licensees or permittees who
possess a federal gaming tax stamp in
violation of section 123.3(11)(b), Iowa
Code?"

In the letter accompanying the question, you relate
that you have received the following information:

[T]here are two distinct stamps: one
is called a federal gaming tax stamp
which is a tax on machines and which
costs \$250.00 a year; the other is
called a federal gambling tax stamp
which is an occupational booking tax
and which costs \$500.00 a year.

This information is basically correct although, as will be
obvious later in this opinion, the distinctions make little
difference.

The Iowa Code requires that a person must be of good
moral character to qualify for a liquor control license or
a beer permit. Sections 123.30(1), 123.127(2), 123.128(2),
123.129(2), Code of Iowa (1979). Section 123.3(11) provides:

"Person of good moral character"
means any person who meets all of the
following requirements:

* * *

b. He does not possess a federal
gambling stamp."

The Code does not further define a federal gambling stamp;
thus arises a dilemma.

As you mentioned in your letter, there are two types
of federal "gambling stamps." The first is provided for
in I.R.C. § 4411. It states:

"There shall be imposed a special
tax of \$500 per year to be paid by each
person who is liable for tax under section
4401 or who is engaged in receiving wagers
for or on behalf of any person so liable."

Persons liable under I.R.C. § 4401 as mentioned in the above
section are those who are engaged in the "business of accepting
wagers," i.e., bookmakers, and those who conduct any wagering
pool or lottery. I.R.C. § 4401.

The second "gambling stamp" is for operators of coin-
operated machines.

"There shall be imposed a special tax
to be paid by every person who maintains
for use or permits the use of, on any
place or premises occupied by him, a
coin-operated gaming device (as defined
in section 4462) at the following rates:
(1) \$250 a year; and
(2) \$250 a year for each additional
device so maintained or the use of
which is so permitted. If one such
device is replaced by another, such
other device shall not be considered
an additional device."

I.R.C. § 4461. Section 4462(a) defines a coin-operated gaming device as any machine which is:

"(1) a so-called 'slot machine which operates by means of the insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens, or (2) a machine which is similar to machines described in paragraph (1) and is operated without the insertion of a coin, token or similar object."
I.R.C.

The "stamp" referred to in the Iowa statute is from the occupation tax called for in I.R.C. § 4901 which provides:

(a) Condition precedent to carrying on certain business. —No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461(a)(1) (coin-operated gaming devices) until he has paid the special tax therefor.

The Code then provided:

(c) How paid
(a) Stamp—All special taxes imposed by law shall be paid by stamps denoting the tax.

However, subsection (c) above has been repealed. Pub. L. 94, Title XIX § 1904(a)(19), Oct. 4, 1976, 90 Stat. 1814. This leaves the tax but not the stamp.

This office believes the repeal of the stamp provision does not affect this opinion or the application of § 123.3(11)(b). Section 6806 of the Internal Revenue Code formerly provided that "stamps denoting the payment of the special tax imposed by section 4461 shall be posted in or on each device" (Emphasis added). This indicates that the tax is the important

purpose of the statute, the stamp is merely evidence "denoting" payment of the tax.¹ Thus, the repeal of the provision for stamps does not in any way reflect on the nature of the machines or the intent to regulate those machines. Likewise we believe the intent of the Iowa legislature was to regulate liquor traffic by keeping it away from persons involved in gambling. To accomplish this purpose, in part, the legislature intended to use, as determinative on the question of one type of involvement in gambling, the payment of the federal gambling tax. They then used the "gambling stamp" language to indicate that the tax stamp was prima facie evidence of the payment of the federal gambling tax. It is the opinion of this office that the payment of the tax brings into play the "gambling stamp" portion of the Beer and Liquor Control Act whether or not a stamp is actually issued.

It is also the opinion of this office that the legislature intended the term "federal gambling stamp," as used in § 123.3(11) (b) to apply to both types of stamps, or rather, to the payment of both types of taxes which previously called for the issuance of the stamps.

Both § 4411 and § 4461 impose the tax on the person. Section 4461 states the tax is "to be paid by every person who operates" a coin-operated gaming device. Also, the section provides that if machines are changed in the place of business, a new tax need not be paid. This indicates that the tax is on the operator not the machine even though the amount of the tax is measured by the number of machines. I.R.C. § 4461(a) (2). It is made clearer in I.R.C., § 4901(a) that the tax is on the person. It states that no person shall be engaged in a business covered by § 4411 or § 4461 "until he has paid the special tax therefor." In an interpretation of § 4461 one federal court stated:

"In the first place, I am of the opinion that the tax imposed is not a tax against the machine but a tax against the operator, or the person who operates it or permits it to be operated in his place of business."

U.S. v. One Bally Dude Ranch Coin-operated Pin Ball Machine,
144 F.Supp. 930, 931 (D.C.M.D. Tenn. 1953).

¹Title 26 U.S.C. § 6806 as amended October 22, 1968, Pub. L. 90-618, Title II, § 204, 82 Stat. 1235, exempts both the § 4411 and § 4461 taxpayers from the requirements that the gambling stamp be publicly displayed. Previously both types of stamps were required to be openly displayed in a place of business, or, in the case of a § 4411 stamp, carried on the person of the holder if the taxpayer had no place of business.

This office therefore believes that the term "federal gambling stamp" in § 123.3(11)(b), Code of Iowa, 1979, refers to both the Occupational Tax on wagering in I.R.C. § 4411 and the Occupational Tax on Coin-Operated devices in I.R.C. §4461.

Other complications arise, however, in the application of the Iowa law. In Shoot v. Illinois Liquor Control Commission, 30 Ill.2d 570, 198 N.E.2d 497 (S.Ct. Ill. 1964), the Illinois Supreme Court held invalid the suspension order imposed by the Liquor Control Commission for the purchase by a licensee of a § 4461 gambling stamp. The court held that the purchase of the stamp alone could not be deemed sufficient to justify a suspension. The Court based its ruling on several things: that the "stamp" was required for machines otherwise legal in Illinois; that the "stamp" was required whether the machine was used for gambling or not if it was constructed so that it could be used for gambling and; because the legislature sought by the provision to prevent gambling in licensed establishments and the possession of a gaming-device stamp did not permit the inference that its holder would engage in gambling. Obviously, Illinois decisions are not binding in Iowa, but the case is persuasive if it is analogous to the Iowa situation. This office believes it is.

Iowa law allows gambling in licensed establishments if certain criteria are met. See e.g., 99B.7, Code of Iowa, 1979; State ex rel Chwirka v. Audino, 260 N.W.2d 279 (Iowa 1977). If this legal gambling includes the use of coin-operated machines which would require a federal gambling stamp, then the State of Iowa would be in the anomalous position of denying a liquor license using as grounds activity that the Court says the Code expressly allows to be carried on in a licensed establishment. It must therefore be determined if any of the machines which require a tax would be legal in Iowa.

Section 99B.7, Code of Iowa, 1979, allows games of chance to be played when the operator is listed as a qualified organization. Section 99B.1(2) defines games of chance and specifically excludes from those games slot machines. So what are slot machines?

A review of cases reveals that most courts have read "slot machines" to cover nearly all coin-operated machines in which an element of chance entered into the play. See e.g., State v. Ellis, 200 Iowa 1228, 206 N.W. 105 (1925); U.S. v. Korpan, 354 U.S. 271, 77 S.Ct. 1099, 1 L.Ed.2d 1337 (1957). However,

the answer is no longer so easy in Iowa. Section 725.9, Code of Iowa, 1979, prohibits the possession of gambling devices and includes in a list of per se gambling devices both slot machines and pinball machines. Thus, it appears that the Iowa legislature did not intend that the term slot machine cover the entire field of coin-operated gaming machines. They apparently intended to cover only the traditional "one-armed bandit." This office believes that had they not so intended they would not have listed pinball machines separately. A retention of only the general term "slot machine" would have required the application of prior case law precedents and consequently the interpretation that any coin-operated gambling device was covered under the term "slot machines." Arguably, the legislature, by listing pinball machine separately, sought merely to clarify the existing law and resolve any doubt as to their character as gambling devices. See e.g. Barnett v. Durant Community School Dist., 249 N.W.2d 626 (Iowa 1977). The separate listing does not, however, clarify their character as slot machines but tends to differentiate them from slot machines. We are then faced with two separate types of coin-operated gambling devices labeled as per se gambling devices and with the problem of categorizing coin-operated gambling devices which are not pinball machines but which, under case law, would be "slot machines." This office believes that the delineation of types of machines, i.e. slot machines and pinball machines, indicates that the legislature intended to make only pin-ball machines and "one-armed bandits" per se gambling devices and that other types of coin operated machines fall into the general prohibition against devices "used or adapted or designed to be used as gambling devices." § 725.9. The separate categorization of a type of "slot machine" tends to remove the generic character of the term slot machine in the statute. This would militate against the interpretation that the term intended to cover all coin operated gambling devices except pinball machines. We believe this is supported by State v. Wiley, 232 Iowa 443, 449, 3 N.W.2d 620, 625, in which the Court said:

Moreover the use of the general language avoids any substantial contention that the statute, by listing a specific style of device, such as pinball machines, has thereby excluded all other devices of the same character which may differ in style or name.

The current Iowa statute, as noted above, does specifically list slot machines and pinball machines. We therefore believe the statute relegates other coin-operated machines to the general definition of "every device used or adapted or designed to be used for gambling," and not to the slot machine category. § 725.9.

This definition becomes more important when we look back to Chapter 99B, where under the authority of that chapter and § 725.15, gambling devices may be used if they are used in games of chance. State ex rel. Chwirka v. Audino, 260 N.W.2d 279 (Iowa 1979). Slot machines, as the term is used in 99B.1(2) and excluded from the definition of a game of chance, must be read consistently with any definition given it under § 725.9. This is true since it is only by virtue of the special exception in § 725.15 that the gambling devices listed in § 725.9 could be used at all under chapter 99B. The statutes thus are in pari materia and must be read together when the subjects overlap. The specific listing of slot machines and pinball machines in § 725.9 precludes the use of a general definition for a slot machine under 99B.1(2). The conclusion therefore is that a qualified establishment may legally use coin-operated gaming devices so long as that device is not a "one-armed bandit" type of slot machine.

Many of these coin-operated machines which would qualify under § 99B.1(2) and 99B.7 would clearly fall within the definition of I.R.C. 4462, and the operator would be required to pay the federal occupational tax. This would put the operator afoul of § 123.3(11)(b) and would apparently disqualify that operator as a beer or liquor license holder.

Previously the law prohibited all gambling in licensed establishments. The legislature has however now determined that under certain conditions gambling can be allowed, as can the use of gambling devices used in conducting games of chance. The legislature has determined that devices which are per se gambling devices may be used by qualified organizations conducting games of chance. This grant of permission specifically excludes only slot machines. Thus a roulette wheel, for example, could be used for gambling in an establishment licensed by the beer and liquor control department if that establishment was also licensed as a qualified organization. If, however, the gambling tax provision of § 123.11(b)(3) is enforced, a pinball machine could not be so used. We believe this incongruity was not intended by the legislature. We believe they intended only to exclude slot machines and not other coin-operated machines

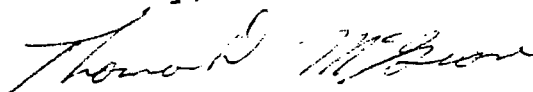
which could be used by a qualified organization. This is not inconsistent with the requirement in § 123.1, Code of Iowa (1979), which requires a liberal construction to accomplish the purpose of the act. A statute should not be given a more liberal construction than was obviously intended. Madsen v. Town of Oakland, 219 Iowa 216, 257 N.W.2d 549 (1935).

The State therefor should be precluded from applying § 123.3(11)(b) to persons who pay the federal gambling tax under I.R.C. §4461 and who are validly licensed to operate the machines as a qualified organization under § 99B.7. If the person is not licensed to operate as a qualified organization and pays the tax, then § 123.3(11)(b) may be applied to deny a license. Simple logic shows this is equitable. If the person pays the taxes required by I.R.C. § 4461 and is not operating as a qualified organization then he is in violation of § 725.9 for possessing illegal gambling devices. The tax required by § 4461 is imposed for operation of the machines and therefor payment of the tax is determinative evidence of possession of illegal gambling devices. It therefor does no violence to justice to deny such a taxpayer a liquor license.

While the situation seems unlikely to arise, the same rationale would apply to a person operating as a qualified organization who is required by the nature of the games of chance he operates to pay the tax under I.R.C. § 4411.

It is therefore our opinion that the payment of a federal occupational gambling tax under I.R.C. §§ 4411 and 4461 cannot automatically disqualify a person to hold a beer or liquor license in the State of Iowa. Inquiry must first be made into whether the tax was required only because of the operation of games of chance by the person as a qualified organization under § 99B.7. If it is only the legal operation of games under § 99B.7 which gives rise to the federal tax liability then a person is not disqualified to hold an Iowa liquor license or beer permit. If a person has paid the federal gambling tax and does not operate any games under § 99B.7, which require that the tax be paid, then the disqualification is effective and the person cannot hold an Iowa liquor license or beer permit.

Sincerely,



THOMAS D. McGRANE
Assistant Attorney General

SCHOOLS: Tuition, school supplies. Sections 282.6, 301.1, The Code 1979. Iowa public schools must be provided free of tuition to all actual residents between the ages of five and twenty-five. All facilities, supplies, and other items which are necessary or essential to instruction must be provided free of charge in a tuition-free school. A school district may purchase other supplies and distribute them to students, but they must be provided for free, rented for a reasonable fee, or sold at cost. (Norby to Murray, State Senator, 12/28/79) #79-12-22CL)

December 28, 1979

The Honorable John S. Murray
State Senator
2526 Chamberlain Avenue
Ames, Iowa 50010

Dear Senator Murray:

You have requested an Attorney General's opinion regarding the practice of the Ames Community School District in charging a "consumables" fee. This fee is charged to offset the cost of certain supplies of an expendable nature which are purchased by the school district, and then made available to the pupils. Examples of the supplies purchased with this fee are paper, paint, tape, paper clips, expendable worksheets, and chemicals and other science supplies. Examples of items not purchased with the consumable fee are textbooks, audiovisual equipment, and shop equipment. According to available information, the consumable fee does not totally reimburse the district for the amount actually expended on "consumables," with the balance coming from the general fund. No attempt is made to charge individual students for the supplies they actually consume. The fee is uniform for all students in any particular grade level, though graduated as follows: elementary, \$21.28 per pupil; junior high, \$25.15; and senior high, \$29.17.

Specifically, your question requires consideration of the consumable fee in light of two statutory provisions, one of which provides for tuition-free education in Iowa public schools, while

the other authorizes sales of school supplies by school districts to pupils. Section 282.6, The Code 1979, provides as follows:

Every school shall be free of tuition to all actual residents between the ages of five and twenty-five . . .

Section 301.1, The Code 1979, provides:

The Board of Directors of each and every school district is hereby authorized and empowered to adopt textbooks for the teaching of all branches that are now or may hereafter be authorized to be taught in the public schools of the state, and to contract for and buy said books and any and all other necessary school supplies at said contract prices, and to sell the same to the pupils of their respective districts at cost, loan such textbooks to such pupils free, or rent them to such pupils at such reasonable fees as the board shall fix, and said money so received shall be returned to the general fund. (Emphasis supplied.)

The resolution of the question presented herein involves a consideration of what types of student fees are prohibited by the provision for tuition-free schools, and what types of fees may be charged pursuant to § 301.1 or other authorization. Neither the Iowa Supreme Court nor the Attorney General have interpreted and applied the statutory terms "tuition" and "school supplies" in considering the propriety of a student fee. The two concepts must be considered in relation to each other, as an overbroad definition of one will diminish the proper scope of the other. Because of this, a meaningful distinction must be drawn between the two concepts.

Initially, it should be noted that the manner in which a fee is administered appears to not be a determinative factor in considering whether it constitutes "tuition." The fact that an otherwise allowable fee is apportioned among all students, resulting in a uniform fee per student, does not appear to require that it be characterized as tuition. See Beck v. Bd. of Ed. of Harlem Cons. School Dist., 63 Ill.2d 10, 344 N.E.2d 440 (1976). Available information indicates that the Ames schools consider the fee in part as a "budget balancer." While this motive is certainly suspect in that it relates to the balancing of the general fund as a whole rather than to purchase of specific consumables, it appears that the actual use of the fee, rather than the form of its administration, should control its characterization.

Although the Iowa Supreme Court has not considered a challenge based on § 282.6, the courts of several other states have considered challenges to school fees under statutory or constitutional provisions requiring "free schools" or schools "free of tuition." These cases do indicate that a requirement of free "tuition" is not an absolute bar of fees. In contrast with a provision for "free schools," challenged student fees are more likely to be sustained under a provision providing for free tuition. See Cardiff v. Bismark Public School Dist., 263 N.W.2d 105, 112, 113 (N.D. 1978). Compare Bond v. Public Sch. of Ann Arbor, 178 N.W.2d 484 (Mich. 1970), with Marshall v. School Dist. Re #3 Morgan Co., 553 P.2d 784 (Colo. 1976). In cases where the term "tuition" has been interpreted, it has generally been defined as the cost of providing instruction and physical facilities. See Marshall, supra, at 785, and Beck v. Bd. of Educ. of Harlem Con. Sch. Dist., 63 Ill.2d 10, 344 N.E.2d 440 (1976). Cf. Board of Education v. Sinclair, 65 Wis.2d 179, 222 N.W.2d 143 (1974). The cost of items used individually by students are less likely to be considered within the scope of tuition than those used in common by all students. See Sinclair, supra, 222 N.W.2d at 148, and Hamer v. Bd. of Ed. of Sch. Dist. No. 109, 265 N.E.2d 616, 619 (Ill. 1970). Fees for textbook rental, or sale of textbooks by a school district to students, are generally not prohibited by a provision for tuition-free education. Marshall, supra, and Chandler v. South Bend Comm. Sch. Corp., 312 N.E.2d 915 (Ind. Ct. App. 1974).

Outside of the scope of tuition, a school could appropriately charge a fee for "school supplies" provided to students. As with "tuition," this term is not easily defined. As noted above, items used by students individually, as opposed to those used in common by all students, are likely to be considered to fall outside of the scope of tuition and within the scope of school supplies, which would permit their cost to be offset by a student fee. See Sinclair, supra, 222 N.W.2d at 148, and Hamer, supra, 265 N.E.2d at 619. Initially, such items as "pencils, pens, notebooks and paper customarily furnished by pupils for their own use" could reasonably be considered as school supplies. See Sinclair, supra, at 148. Similarly, the cost of buildings and staff and faculty salaries might easily be placed within the scope of tuition. Beyond these items, it becomes increasingly difficult to place an item within the scope of tuition or school supplies.

As discussed above, tuition appears to generally include the cost of facilities and instruction. In attempting to apply this general standard in ascertaining if a particular charge is a cost of instruction, it seems reasonable to consider the relation of the item to the administration of actual instruction. The provision of instruction could more specifically be defined to encompass the cost of items used in the presentation of information, in contrast with those used by students in their individual receipt and study of the material presented. A particular item should be considered in light

of whether it is necessary or essential to the instruction of a course. Cf. Paulson v. Minidoka Co. School Dist., 93 Idaho 469, 463 P.2d 935 (1970). Bond v. Public School of Ann Arbor, 178 N.W.2d 484 (Mich. 1970). (In these cases, the courts formulated a similar standard to be applied in ascertaining what items must be provided for free pursuant to constitutional provisions requiring "free" schools.) Items deemed not necessary or essential to the instruction of a course, or to not be a common facility, would fall within the scope of school supplies, and could properly be acquired through student fees.

In applying this standard to the Ames consumable fee, it appears that the fee is improper in that the cost of some items should fall within the scope of tuition, and consequently, must be provided without charge pursuant to § 282.6. For example, chemicals and other science supplies appear to be essential to the instruction of a science class. Similarly, art supplies are essential to the instruction of art classes. Items such as this contrast with items such as the paper, pencils or pens used by a student in note-taking and individual study, which are clearly important to the education process, but not essential to the teacher's presentation of a course. Additionally, paper, pencils or pens used by instructors should be included within the scope of tuition, as they are essential to the presentation of a course. Expendable worksheets also appear to be a part of the instructor's presentation, in contrast to items used individually by students, and therefore should not be purchased with student fees, but provided for free in a tuition-free school.

The Ames consumable fee is not used for the purchase of media or "instructional" equipment. This procedure appears proper in that these items should be considered facilities, and therefore their cost should fall within the scope of tuition. The consumable fee is also not used to purchase textbooks, although Iowa law provides for sale of textbooks by school districts to students. Section 301.1, The Code 1979.

The line drawn between tuition and school supplies is clearly not easily drawn. However, as many costs are incurred in the operation of a school beyond those easily characterized as tuition, this attempt to define tuition must be made or § 282.6 will not effectively serve to provide tuition-free education. It should be remembered that including an item within the scope of tuition does not deprive the student or school system of this item, but merely requires that the item be purchased with money from the general fund.

Regarding those items which can properly be considered school supplies, the manner in which the consumable fee is assessed must be considered in light of § 301.1. It appears that § 301.1 is the only authorization that exists for a school district to charge a

The Honorable John S. Murray
Page Five

fee such as the consumable fee. Other statutes authorize fees for certain goods or services, but only § 301.1 appears to encompass those items currently purchased with the consumable fee.

Section 301.1, quoted above, appears to provide only three alternative methods for the provision of school supplies by a school district. They may be provided at cost, for free, or rented at a reasonable fee. As the consumable fee is a uniform fee which does not account for individual consumption of supplies, and is admittedly not equal to the cost of the supplies, it appears to be an improper method of assessing a school supply fee. The Iowa Supreme Court has never considered a school supply fee under § 301.1, but the Attorney General has on two occasions considered language similar to that of § 301.1. 1907 Op.Atty.Gen. 26, 1916 Op.Atty.Gen. 121. Both of these opinions considered charges to pupils for textbooks at greater than contract prices, and interpreted language similar to § 301.1 to require sale at actual contract price. The purpose of the statute was considered to be the securing of uniformity and minimization of cost to students. 1907 Op.Atty.Gen. 26. The fact that § 301.1 requires that supplies be sold at actual cost, or rented based on fees calculated to be reasonable, seems to indicate that this provision was not designed to accommodate as extensive a program of supply procurement as has been undertaken in Ames. To properly administer the present program at Ames, an extensive system of accounting would be necessary. However, this would appear to be necessary, as § 301.1 allows only three alternative methods for provision of school supplies to students. As the Ames consumable fee is not administered according to any of these methods, it is in violation of § 301.1.

In conclusion, the Ames School District consumable fee appears to be unlawful in two major respects. First, some of the items purchased through the fee must be characterized as essential and necessary to the process of instruction, and therefore, a charge for them is a tuition charge in violation of § 282.6. Regarding those items which can properly be sold to students as school supplies, the Ames schools are charging students in an improper manner. A uniform fee for sale of supplies is contrary to § 301.1 in that it does not account for individual consumption, and is not a sale at the contract price.

Sincerely,



STEVEN G. NORBY
Assistant Attorney General

SGN:kkb

ADOPTIONS: Independent Placements. §§ 238.1, 238.2, 238.5, 600.2(2), 600.8, 600A.2(17), 600A.4(2)(a), 600A.4(3), The Code 1979. A person may make an independent placement for an adoption without being licensed as a child-placing agency. The legislature intended that both "child-placing agencies" and "independent placements" could be used in the adoption process. (Robinson to Reagen, Commissioner, Department of Social Services, 12/28/79) #79-12-21(L)

Mr. Michael V. Reagen, Ph.D.
Commissioner
Iowa Department of Social Services
Fifth Floor, Hoover Building

December 28, 1979

L O C A L

Dear Mr. Reagen:

The request for an official attorney general's opinion was stated as follows:

Recently we have encountered a problem which we feel needs to be resolved by an official Attorney General's opinion. The problem arose due to concerns expressed by various people that one of the certified adoption investigators is, in effect, acting as a child placing agency. A certified adoption investigator is a person certified by the Department to conduct investigations required by Chapter 600, The Code 1979.

This investigator offers counseling services to unmarried pregnant women who wish to place their children for adoption, accepts custody of the child and in some cases apparently is appointed guardian. As I understand it, this individual does not "represent himself as a child placing agency", although he is involved in the same activities as a licensed agency which places children for adoption. ...

We were informed the reason independent placements are legal in Iowa is because they are defined in Chapter 600A, The Code.

My questions are as follows:

1. Is the definition of independent placements in Chapter 600A sufficient basis to allow unlicensed persons to place children without first securing a license as required by Chapter 238?
2. If independent placements are legal, then how do we resolve the conflict with Chapter 238? When does a "person" involved in these activities become a child placing agency and therefore subject to the licensing requirements?
3. Are attorneys who are licensed to practice law in Iowa exempt from the requirements of securing a license as a child placing agency if they in fact "actually engage, for gain or otherwise, in such placement"? ...

Your assistance with this matter will be greatly appreciated.

Your request calls for an interpretation of apparently conflicting portions of Iowa law. In Doe v. Ray, 251 N.W.2d 496, 500-501 (Iowa 1977), we find:

In interpreting these statutes we are guided by familiar principles of statutory construction. Of course, the polestar is legislative intent. Iowa Dept. of Rev. v. Iowa Merit Employ. Com'n., Iowa, 243 N.W.2d 610, 614; Cassady v. Wheeler, Iowa, 224 N.W.2d 649, 651. Our goal is to ascertain that intent and, if possible, give it effect. State v. Prybil, Iowa, 211 N.W.2d 308, 311; Isaacson v. Iowa State Tax Commission, Iowa, 183 N.W.2d 693, 695. Thus, intent is shown by construing the statute as a whole. In searching for legislative intent we consider the objects sought to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. Peters v.

Iowa Emp. Security Com'n., Iowa, 235 N.W.2d 306, 310; Iowa Nat. Indus. Loan Co. v. Iowa State, Etc., Iowa, 224 N.W.2d 437, 440.

However, we must avoid legislating in our own right and placing upon statutory language a strained, impractical or absurd construction. Cedar Mem. Park Cem. Ass'n v. Personnel Assoc., Inc., Iowa, 178 N.W.2d 343, 347.

Finally, we note that in construing a statute we must be mindful of the state of the law when it was enacted and seek to harmonize it, if possible, with other statutes relating to the same subject. Egan v. Naylor, 208 N.W.2d 915, 918 and citations.

In addition to the above rules of statutory construction, it is significant to note that the Iowa Supreme Court has held on many occasions that the legislature may be its own lexicographer. State v. Thomas, 275 N.W.2d 422 (Iowa 1979), Cedar Rapids Community School District v. Parr, 227 N.W.2d 486 (Iowa 1975). This means that the legislature may employ its own definitions to terms it uses when writing a statute. In this instance, the term "independent placement" is defined in § 600A.2(17) as a:

...placement for purposes of adoption of a minor in the home of a proposed adoptive parent and who is not acting on behalf of the Department or the child-placing agency.

The legislature also defined "child-placing agency" in § 238.2, The Code, as:

Any agency, public, semipublic, or private, which represents itself as placing children permanently or temporarily in private family homes or as receiving children for such placement, or which actually engages, for gain or otherwise, in such placement, shall be deemed to operate a child-placing agency.

We feel that the lexicographer could have done a more complete job with these definitions as it pertains to your problem. It is complicated by § 238.5, The Code 1979, which provides:

238.5 License required. No person shall conduct a child-placing agency or solicit or receive funds for its support without an unrevoked license issued by the state director within the twelve months preceding to conduct such agency.

Ordinarily, the usual meaning is to be given statutory language, but manifest intent to the legislature will prevail over the literal import of the words they employ. Lynch v. Bogenrief, 237 N.W.2d 793 (Iowa 1976).¹

In response to your first question, it is the opinion of this office as we seek to harmonize these statutes, that it was the manifest intent of the legislature as shown in the definition of "independent placement" in § 600A.2(17) to allow a person to place children without first securing a license as required by § 238.5. Section 600A.2(17) specifically allows for an "independent placement" of a minor for purposes of adoption in the home of the proposed adoptive parent by a person who is neither acting on behalf of the Department of Social Services nor a child-placing agency.

In further support of our conclusion that independent placements may be made is § 600A.4(2)(a), The Code, which specifically provides that the release of custody for purposes of an adoption shall be accepted only by an agency or a person making an "independent placement". To require that a person making an independent placement be licensed, would in effect change that person's status to that of an agency, thus, making the distinction as outlined in § 600A.4(2)(a) nonexistent. This would lead to an absurd construction of the statute.

Section 600A.4(3) states:

3. Notwithstanding the provisions of subsection 2, an agency or a person making an independent placement may assume custody of a minor child upon the signature of the one living parent who has possession of the minor child if the agency or a person making an independent placement immediately petitions the juvenile court designated in section 600A.5.... (emphasis added)

This subsection reinforces the point we made with respect to § 600A.4 (2)(a). It may be true that the "assumption of custody"

¹Chapman v. Houston Welfare Rights Org., ___ U.S. ___, 99 S.Ct. 1905, 60 L.Ed.2d 508, 528 (1979) has the same concept stated somewhat differently: "... we should remember the familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."

of a minor child and the "release of custody" for purpose of adoption are functions normally associated with a child placing agency. Both of these functions, however, are also specifically available to a person making an "independent placement" in the above subsections.

In answer to your second question, we point out that § 238.1 provides:

238.1 Definitions. The word "person" or "agency" where used in this chapter shall include individuals, institutions, partnerships, voluntary associations, and corporations, other than institutions under the management or control of any division of the department of social services or any director thereof.

It is clear from the above section that the terms "person" and "agency" may in fact be composed of the same elements, but they are not synonymous. There is a distinction between a person who conducts a child-placing agency for which a license is required under § 238.5 and a person making an "independent placement" under § 600A.2(17).

As we have indicated above, it is apparent that the legislature provided a dual method of adoptions in Iowa. This is illustrated in the final report of the Adoption Laws Study Committee, December 1974 [the cover cites 1975] to the 66th General Assembly which recommends: ...

7. The attached bill provides that the judiciary should be as active as is practicable in reviewing each step in the termination proceedings with the goal of protecting the rights of all persons involved in the proceedings. ...

10. A pre-placement investigation of prospective adoptive parents should be conducted in almost all prospective adoption situations, except parents planning to adopt an adult should not be investigated. A pre-placement investigation should be conducted with regard to whether the prospective parents and child will be suited to each other and should compile a complete medical and developmental history on the child to be adopted. A placement should not be permitted until the investigator approves of such placement, although the prospective parents should be allowed to appeal a disapproval to

the district court. ...

13. A child-placing agency should conduct a pre-placement investigation of a placement it has arranged. The Department of Social Services should conduct all other pre-placement investigations. The district court shall appoint a qualified person to conduct any post-placement investigation. ...

17. Independent placements by doctors, lawyers, and clergy of this state should be allowed so long as the criteria for investigation and supervising these placements, as established by the attached bill, are maintained. ...

We recognize that all of these recommendations were not adopted by the legislature. Independent placements, for example, were not limited to the doctors, lawyers and the clergy. Anyone may qualify. The report is, nevertheless, helpful in ascertaining the intent of the drafters of the bill.

What is the distinction, then, between the powers given to a child-placing agency and those given to a person making an independent placement? The main distinction is that an agency may have someone on its staff conduct the adoption investigation² required in § 600.8, The Code, whereas a person making an independent placement must rely on an adoptive investigator (defined in § 600.2(2), The Code) to make the proper reports to the court. Rule 770--139.4(2)(a)(i) requires that an applicant for certification as an adoptive investigator work at least 50% of the time in adoptions. An objection, however, was filed to this part of the rule.

The Department of Social Services has the authority to promulgate a rule to prevent an adoptive investigator from investigating his own independent placement. This should take care of abuse in this area of concern.

²Rule 770--139.4(2)(b) IAC provides for the approval of a person currently employed as a social worker in a licensed child-placing agency or the Department of Social Services. Both approval and certification are provided for in § 600.2(2), The Code, which provides the definition of an adoptive investigator.

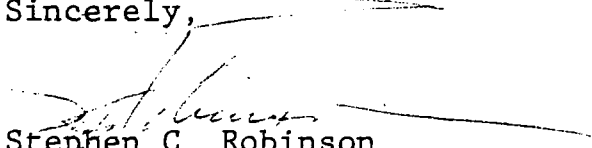
Finally, the conflict between the Department of Social Services' personnel who believe that only licensed and qualified persons ought to be placing children for adoption vis-a-vis independent placements is not new. The legislature has been well aware of this situation for a long time. The statutory provisions in ch. 600A relating to "independent placement" were enacted [§§ 15, 16 ch. 140 Acts 67th G.A. 1977 session] much later than ch. 238, which appeared first in the Code 1927. Section 4.8, The Code 1979, provides:

4.8 Irreconcilable statutes. If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment* by the general assembly prevails. If provisions of the same Act are irreconcilable, the provision listed last in the Act prevails.
[footnote omitted]

While the statutes may be harmonized, and are not strictly speaking irreconcilable, we believe the Iowa courts would apply the same reasoning to this situation. Doe v. Ray, supra, at p. 503. The courts are the final arbiters concerning those questions of the adoption process in the state of Iowa under the present law. In our opinion, persons are not required to be licensed under § 238.5 so long as they are making an "independent placement."

In summary, it is evident to us that the legislature intended that both "child-placing agencies" and "independent placements" could be utilized in the adoption process. If the Department of Social Services believes there is abuse in this process, they should bring this to the attention of the legislature.

Sincerely,


Stephen C. Robinson
Assistant Attorney General

SCR/tjb

STATE OFFICERS AND DEPARTMENTS: Board of Nursing; Licensed Practical Nurses - 42 U.S.C. § 1395 et seq.; 42 CFR 405.1024(e); § 152.1(3), The Code 1979. Licensed practical nurses are not prohibited from taking telephone or other verbal orders from a physician unless a statute or regulation so provides. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 12/27/79)
#79-12-20 (L)

Mrs. Lynne M. Illes
Executive Director
Iowa Board of Nursing
LOCAL

December 27, 1979

Dear Mrs. Illes:

You have requested an opinion regarding licensed practical nurses (LPNs). You ask whether they can accept telephone and other verbal orders from physicians. Upon further conversation with you, it appears that your concern stems from hospital regulations prohibiting LPNs from taking telephone orders from physicians.

Section 152.1(3), The Code 1979, defines the practice of an LPN:

3. The "practice of a licensed practical nurse" means the practice of a natural person who is licensed by the board to do all of the following:

a. Perform services in the provision of supportive or restorative care under the supervision of a registered nurse or a physician.

b. Perform additional acts under emergency or other conditions which require education and training and which are recognized by the medical and nursing professions and are approved by the board, as being proper to be performed by a licensed practical nurse.

There is nothing in that section which prohibits an LPN from taking verbal orders, nor is there any such prohibition in the remainder of the chapter. Neither is there anything in your rules, 590 I.A.C., which speaks to this issue. It can thus be said that LPNs can take verbal orders from physicians unless some other law or rule prohibits it.

Mrs. Lynne M. Illes
Page Two

The Federal Government, through 42 U.S.C. § 1395, et seq., has established health insurance for the aged and disabled. The benefits provided therein include those for inpatient hospital services. 42 U.S.C. § 1395d. The definition of "hospital" is found in 42 U.S.C. § 1395x(e) as an institution primarily engaged in providing services to inpatients, maintaining patient records, having bylaws, having a review plan, and the like. Subsection (9) also defines "hospital" as an institution meeting such other requirements as the Secretary of HEW finds necessary.

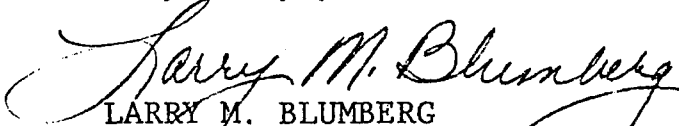
Pursuant to that section, rules have been promulgated regarding the conditions of participation in the health insurance program by hospitals. 42 CFR 405.1011 et seq. Rule 405.1024 concerns those requirements for the nursing department. Rule 405.1024(g)(6) provides:

(6) All medical orders are in writing and signed by the physician. Telephone orders are used sparingly, are given only to the registered professional nurse, and are signed or initialed by the physician as soon as possible.

This rule has been interpreted to mean, and stands for the proposition, that only registered nurses can take telephone orders from a physician in a hospital. In other words, if any hospital is to participate in the health insurance for the aged and disabled program, it must meet the statutory and regulatory requirements, including the one that LPNs cannot take phone orders from a physician. This rule does not appear to apply to those hospitals not participating in the program, nor do they appear to apply to other health facilities not contained in the Federal scheme.

Accordingly, we are of the opinion that there is no general statutory or regulatory enactment prohibiting LPNs from taking telephone orders from a physician unless they are working in an institution covered by federal statutes or regulations prohibiting same. Nor is there any such enactment prohibiting LPNs from taking other verbal orders from a physician. This is not to say, however, that a facility or employer cannot, on its own, impose such restrictions and the like as a condition of employment.

Very truly yours,


LARRY M. BLUMBERG
Assistant Attorney General

LMB/cc

STATE OFFICERS AND DEPARTMENTS: Reversion of Funds - § 8.33, The Code 1979. Grants made by the Commission on Aging, from appropriations by the Legislature, to area agencies are not subject to reversion at the end of the fiscal year pursuant to § 8.33. (Blumberg to Bowles, Executive Director, Commission on the Aging, 12/27/79) #79-12-19(L)

December 27, 1979

Mr. Glenn R. Bowles
Executive Director
Commission on the Aging
LOCAL

Dear Mr. Bowles:

You have requested a clarification of an earlier opinion, Op. Att'y Gen. # 78-12-23. In that opinion it was stated that funds given by your agency to a local area agency should revert back to the State if not expended by the end of the fiscal year by the local agency. The basis of that opinion was § 8.33, The Code 1977.

Section 8.33, in both the 1977 and 1979 Codes provides:

No obligation of any kind whatsoever shall be incurred or created subsequent to the last day of the fiscal term for which an appropriation is made, except when specific provision otherwise is made in the Act making the appropriation. On the last day of the fiscal term it shall be the duty of the head of each department, board, or commission, or officer receiving the appropriation under any Act, to file with the state comptroller a list of all obligations incurred, and for which warrants have not been drawn, up to and including that date. On September 30, or as otherwise provided in an appropriation Act, following the close of each fiscal term all unencumbered or unobligated balances of appropriations made for said fiscal term shall revert to the state treasury and to the credit of the fund from which the appropriation or appropriations were made, except that capital expenditures for the purchase of land or the erection of the buildings or new construction shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made unless the Act making the appropriation for the

Mr. Glenn R. Bowles
Page Two

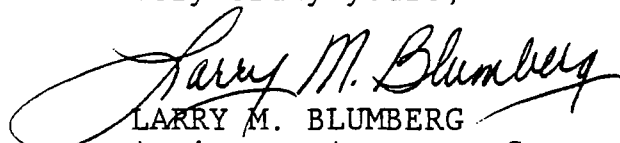
capital expenditure contains a specific provision relating to a time limit for incurring an obligation or reversion of funds. This section shall not be construed to repeal the provisions of sections 19.11 to 19.14.

This section, as does the chapter, speaks in terms of appropriations by the legislature to departments, boards or commissions. The term "department" is defined in § 8.2(1) to mean departments, boards, institutions, bureaus, offices or other agencies of the state government. The section addresses the reversion of unencumbered appropriations to the state treasury at the end of the fiscal year.

The appropriation in question, 1977 Session, 67th G.A., ch.7, § 1(d), was \$100,000 to the Commission on Aging for the development and maintenance of senior centers. Pursuant to § 8.33, if the Commission on Aging had any of that appropriation remaining at the end of the fiscal year, that amount would revert back to the state treasury. That section, however, does not apply to money already spent or encumbered by a state department. If the Commission had given the money to a local area agency for a senior center, the money would be beyond the reach of § 8.33. It matters not how much of the senior center project had been completed. Section 8.33 would only be applicable if the Commission was building the center. In that event, it might be of some relevance whether employment of an architect is a sufficient encumbrance. Such an issue is not relevant where a state agency gives money, under applicable authority, to another group or entity. This office has held in previous opinions to you that employees and volunteers of the area agencies are not employees of the State, nor are the area agencies State Agencies. See, Ops. Att'y Gen. # 78-2-24 and # 79-8-2. Thus, we do not see where § 8.33 would be applicable.

The appropriation was made to the Commission for the development of senior centers. The Commission gave out the money for that purpose. There is nothing in the appropriation limiting it other than for senior centers or requiring that it be spent by the local agency within the fiscal year. Therefore, any money so expended by the Commission is not subject to § 8.33. Accordingly, the prior opinion, # 78-12-23, is hereby withdrawn.

Very truly yours,


LARRY M. BLUMBERG
Assistant Attorney General

LMB/cc

STATE OFFICERS AND DEPARTMENTS: Department of Public Safety -- criminal history data and intelligence data. Chapter 692, The Code 1979. Section 692.8, The Code 1979 creates a blanket proscription against placing "intelligence data" in any kind of computer data storage system. The section in its present form is violated if "intelligence data" is placed into a computer even though its main use and purpose is file automation. Richards and Young to Holetz, Acting Commissioner, Department of Public Safety, 12/27/79) #79-12-18 (L)

December 27, 1979

Acting Commissioner Robert G. Holetz
Iowa Department of Public Safety
Wallace State Office Building
Des Moines, Iowa 50319

Dear Acting Commissioner Holetz:

Your department has requested an opinion of the Attorney General regarding § 692.8, The Code 1979. Specifically you have inquired:

Is it a violation of 692.8 of the 1979 Code of Iowa to place 'intelligence data' contained in the files of the Department of Public Safety, on an automated, in house, storage unit within the department, which technically may be a 'computer' but which has no outside access, and the main use and purpose of which is file automation?

The pertinent portion of § 692.8, The Code 1979 provides:

Intelligence data contained in the files of the department of public safety or a criminal justice agency shall not be placed within a computer data storage system. (emphasis added)

"Intelligence data" is defined in § 692.1(11), The Code 1979 as "information collected where there are reasonable grounds to suspect involvement or participation in criminal activity by any person." Thus this information would include

not only hard facts but also mere speculation, rumor, suspicion, and innuendo. As such it is distinct from the types of information defined as "criminal history data" in §§ 692.1(3) through 692.1(7), The Code 1979. This information is specifically categorized, generally involves data resulting from formal, official action by a criminal justice agency (e.g., arrest), and may be "maintained by the department or bureau in a manual or automated data storage system." Section 692.1(3), The Code 1979.

The distinction is reflected throughout Chapter 692. Of significance to this opinion are Code §§ 692.12 and 692.14 which respectively provide:

692.12 Data processing. Nothing in this chapter shall preclude the use of the equipment and hardware of the data processing service center for the storage and retrieval of criminal history data. Files shall be stored on the computer in such a manner as the files cannot be modified, destroyed, accessed, changed or overlaid in any fashion by noncriminal justice agency terminals or personnel. That portion of any computer, electronic switch or manual terminal having access to criminal history data stored in the state computer must be under the management control of a criminal justice agency.
(emphasis added)

692.14 Systems for the exchange of criminal history data. The department shall regulate the participation by all state and local agencies in any system for the exchange of criminal history data, and shall be responsible for assuring the consistency of such participation with the terms and purposes of this chapter.

Direct access to such systems shall be limited to such criminal justice agencies as are expressly designated for that purpose by the department. The department shall, with respect to telecommunications terminals employed in the dissemination of criminal history data, insure that security is provided over an entire terminal or that portion actually authorized access to criminal history data.
(emphasis added)

These provisions clarify that "criminal history data" may be stored in computer systems provided proper security over storage and use is maintained. But this cannot by implication be extended to include "intelligence data," since under familiar rules of statutory construction the express mention of one thing ("criminal history data") implies the exclusion rather than the inclusion of another ("intelligence data"). Dotson v. City of Ames, 251 Iowa 467, 101 N.W.2d 711 (1960) ("expressio unius est exclusio alterius"). These provisions further evidence a legislative intent to keep intelligence data, the reliability of which is largely untested, out of all computerized storage systems.


The concerns of the legislature prompting enactment of chapter 692 are discussed at length in Note, The Dissemination of Arrest Records and the Iowa TRACIS Bill, 59 Iowa L.Rev. 1162 (1974). See also 1974 Op.Att'y.Gen. 254; Symposium: Computerized Criminal Justice Information Systems, 22 Villanova L.Rev. 1171 (1977). The legislature was obviously alarmed by the potential for abuse caused by the centralization of this data in a computer system such as TRACIS - the possibility of unauthorized "computer tap" access with its concomitant destruction of the affected person's privacy and character. This office has reviewed some of the literature available on the type of computer under consideration, known in the industry as a "stand alone, in-house micro-computer." See, e.g., Search Group Inc., Microcomputers and Criminal Justice - Introducing a New Technology (Dec. 1978). A significant distinguishing feature of the stand-alone microcomputer is the absence of a "modem" which is "a device that modulates (i.e., a process by which the characteristics of one wave or signal are varied in accordance with another wave or signal) and demodulates signals transmitted over communication facilities (e.g., telephonic)." IBM, Data Processing Glossary 73 (5th ed. 1972). Since there is no "modem", "[n]o telephone interaction to a host computer (e.g., TRACIS, NCIC) is required for operating programs at (the 'stand-alone') system level." Search Group Inc., Microcomputers and Criminal Justice - Introducing a New Technology at 23 (Dec. 1978). In other words, a microcomputer would operate entirely independently of the TRACIS system ("stand alone"), with no outside terminals ("in-house"), thereby considerably reducing the possibility of any unauthorized "computer tap" access. Thus, the available literature suggests that this type of "computer data storage system" is not subject to the kinds of abuse which the legislature attempted to remedy by § 692.8.

Acting Commissioner Robert G. Holetz
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However, the plain meaning of § 692.8 is that "intelligence data" simply cannot be placed in any kind of computer data storage system. Although we recognize that the type of computer under consideration has great utility and may not endanger the interests protected by chapter 692, we cannot by this opinion create such an exception in the face of this blanket proscription. Such an exception may be created only by the Iowa Legislature.

Sincerely,


HAROLD A. YOUNG
Assistant Attorney General


RICHARD L. RICHARDS
Assistant Attorney General

HAY/RLR/bje

PUBLIC RECORDS: Confidentiality: Chapter 68A, Code of Iowa 1979; §§ 455B.16, 455B.52; 400 I.A.C. §§ 51, 52, 53 (455B). Written records of complaints received by the Department of Environmental Quality, including names of complainants, are public records subject to public examination and copying. However, if examination of a particular record would not be in the public interest and would cause substantial and irreparable injury to a person or persons, the Department could seek to prevent its disclosure. (Ovrom to Crane, Executive Director, Iowa Department of Environmental Quality, 12/18/79) #79-12-17 (L)

December 18, 1979

Mr. Larry Crane
Executive Director
Iowa Department of Environmental Quality
L O C A L

Dear Mr. Crane:

You have requested our opinion concerning confidentiality of complaints received by the Department of Environmental Quality. You explained that the Department receives numerous complaints from persons who do not wish their names to be made public, especially in cases where an employee complains about actions of his or her employer, or a resident of a small town complains about pollution or another environmental quality violation by a facility in the town. You asked two questions:

1. Is the Department of Environmental Quality required by Iowa law to disclose the identity of complainants?
2. Are the Department's written records of complaints public records subject to disclosure under Iowa's Freedom of Information Act, Chapter 68A, Code of Iowa 1979?

It is our opinion that written records of complaints, including names of complainants, are public records under Chapter 68A, The Code 1979, and are subject to disclosure under that chapter.

However, in certain circumstances the D.E.Q. may be able to prove to a court that written records of complaints or written records containing complainants' names should not be made available for public examination.

Your first question asks if the D.E.Q. is required by Iowa law to disclose the identity of complainants. The Department's duty to disclose information to the public is contained in Chapter 68A, The Code 1979, which requires non-exempt public records be made available for public examination and copying. § 68A.2, The Code 1979. If there is no existing written record of a complainant's name, we know of no law which requires disclosure of the name. Your second question asks if written records of complaints are subject to disclosure under Chapter 68A, The Code 1979. Assuming that complainants' names are kept with the written records of complaints, or in other written records in the possession of the Department, your two questions can be answered together.

Second 68A.1 defines "public records" as "all records and documents of or belonging to this state ... or any branch, department, board, bureau, commission, council, or committee" thereof. Section 68A.1, The Code 1979. This definition is not helpful analytically. We doubt the legislature intended every piece of paper in the possession of a state employee to be available for public inspection unless it falls within a specific exemption. Consider, for example, whether a memorandum from a law clerk to a justice of the Supreme Court, the questions for a professional licensing examination before it is administered, or a rough draft of this opinion should be viewed in the first instance as "public records". The Iowa Supreme Court has not yet grappled with this definition in a precise or determinative manner, but the plurality opinion in their most recent decision involving Chapter 68A strongly suggests the court would hold that written records of complainants' names and written records of complaints received by the Department are public records within the meaning of § 68A.1. See Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 299-300 (Iowa 1979) (upon acceptance of citizens' letters of complaint in governor's office, they became documents "of or belonging to the state" and hence public records).

Section 68A.2 provides that every citizen of Iowa has the right to examine and copy public records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential. D.E.Q. rules

also provide that "all files, records, documents and other materials within the department's possession are available for public inspection." 400 I.A.C. § 51.1(2) (455B). It is obvious that the rules of the Department of Environmental Quality, like the laws of Iowa, provide for broad public access to Department records. Additionally, D.E.Q. rules create some limitations on disclosure, but they are the same as those provided in Chapters 68A and 455B of the Code. (Chapter 455B is the statute governing the D.E.Q.). See 400 I.A.C. § 51.1(3)(455B); 1976 Op.Att'yGen. 759, 763 (analysis of D.E.Q. confidentiality rules). The remaining issue is therefore whether Chapter 68A or some other Code provision limits the public's right to examine records containing names of complainants; or records of complaints in general.

Section 68A.7 lists specific categories of records which are exempt from disclosure under Chapter 68A. None of these exemptions encompasses written records of complaints or written records containing complainants' names. An examination of Chapter 455B reveals three limitations on disclosure of records. One provides for confidentiality of information in the applications for managers of wastewater treatment plants, and is clearly inapplicable to records of complainants' names or records of complaints under consideration here. See § 455B.52(3), The Code 1979. The second and third exemptions provide for confidentiality of information received in D.E.Q. investigations which concerns trade secrets or other privileged business information. See § 455B.16, The Code 1979 (provides for confidentiality of information received in an air pollution investigation which relates to trade secrets, secret industrial processes and other privileged information which affects competitive position in trade or business. See 1976 Op.Att'yGen., supra; and H.F. 719, 68th G.A., 1979 Session, § 7(3) (to be codified in Chapter 455B, The Code) (provides for confidentiality of information received by the D.E.Q. in hazardous waste investigations which contains trade secrets or privileged commercial or financial information.)

Therefore, the exemptions from disclosure contained in § 68A.7 and in Chapter 455B do not apply to written records containing complainants' names nor to written records of complaints received by the Department, except to the extent the records contain trade secrets or other privileged business information. Records of complainants' names would not be exempted from disclosure under these provisions. Furthermore, it is unlikely that the general records of complaints under consideration here would contain trade secrets or privileged business information, so they also would not be exempted from disclosure under these provisions.

However, § 68A.8¹ provides a "safety valve" which might allow the agency in certain circumstances to withhold at least the name of complainants who wish to remain confidential. See Op.Att'yGen. #79-8-25 (regarding disclosure of library circulation records under Chapter 68A). That section allows the Department to seek an injunction from the court to prohibit examination of a public record if such examination 1) would not be in the public interest, and 2) would cause substantial and irreparable injury to any person or persons. The burden of proof would be on the Department. The injunction would apply only to a specific record, and could not be used to keep an entire class of records--such as names of all complainants or all complaints received--confidential. Section 68A.8 further provides that the custodian of the record may "reasonably delay" examination of a record in order to seek an injunction if it is done in good faith.

The availability of an injunction under § 68A.8 will, of course, depend upon the facts of each particular case. We do not believe the D.E.Q. would often be successful in restraining examination of the general written records of complaints. However, with regard to a complainant who wishes to remain confidential, we believe in many cases that a valid argument could be made in favor of keeping his or her name confidential. According to your letter, many complainants will not give their names to the D.E.Q. without an assurance of confidentiality, and without complainants' names the D.E.Q. often cannot fully investigate the complaints. Allowing disclosure of names could therefore inhibit people from making complaints, and could also hinder the D.E.Q. from making full investigation of complaints. This would cause pollution or other environmentally dangerous activities to continue undetected by the D.E.Q., which would definitely be against the public interest. Furthermore, disclosure of a complainant's name in many instances could also cause substantial and irreparable injury to the complainant, for instance in the case of an employee complaining about actions of his or her

¹Section 68A.8 states:

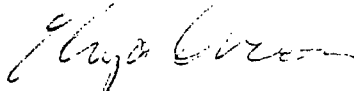
Injunction to restrain examination. In accordance with the rules of civil procedure the district court may grant an injunction restraining the examination (including copying) of a specific public record, if the petition supported by affidavit shows and if the court finds that such examination would clearly not be in the public interest and would substantially and irreparably injure any person or persons. . . .

Section 68A.8, The Code 1979.

employer. If these elements can be shown, the written record of a complainant's name could be kept confidential.

The Department may well feel that its ability to investigate complaints will be hindered because it cannot assure complainants that their names will remain confidential. It may also feel that the procedure for restraining inspection of a public record by obtaining an injunction in court under § 68A.8 is too time-consuming to be practicable. If so, the Department might seek an additional statutory exception in § 68A.7 for names of complainants who wish to remain confidential, or a new provision in Chapter 455B requiring confidentiality of those complainants' names.

Sincerely,



ELIZA OVRÓM
Assistant Attorney General
Environmental Protection Division

EO:rcp

MUNICIPALITIES: Revenue Bonds -- §§ 384.82 and 384.87, The Code, 1979. A city that issues revenue bonds to purchase property may use the proceeds of the sale of that property to pay off the bonds. (Blumberg to Bruner, State Representative, 12/14/79) #79-12-16(L)

December 14, 1979

The Honorable Charles Bruner
State Representative
209 East Sixth #5
Ames, Iowa 50010

Dear Representative Bruner:

You requested an opinion from this office regarding whether property purchased through the sale of revenue bonds may be sold to pay off those bonds. Division V of Chapter 384, The Code 1979, sets forth the requirements for revenue financing, including revenue bonds.

Section 384.82 provides that a city may issue revenue bonds to pay all or part of the costs of projects, and that such revenue bonds are payable solely and only out of the net revenues of that project. Section 384.87 provides similarly, and that such bonds are not a debt of or charge against the city within the meaning of a debt limitation provision.

There is nothing in the Code which speaks to your question. If the proceeds from the sale of the property can be used to pay off the bonds, such proceeds must fall within the general category of "revenue." In Bennett v. City of Mayfield, 323 S.W.2d 573 (Ky. 1959), the city had issued revenue bonds for an industrial project, and then leased the property to a private industry with an option to buy. The Court, when faced with the question of whether the sale of the property was a proper method to pay off the bonds held that the plaintiff's interpretation of a statute limiting payments on the bonds from the net revenues of the project to exclude proceeds from a sale of the property was too restrictive. It held (323 S.W. 2d at 577):

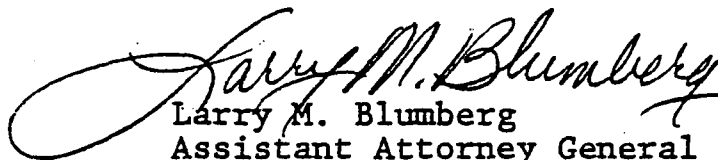
Ordinarily, the word "revenue" is regarded as meaning income, but the meaning is more comprehensive. Webster defines the word to mean also "a source of income" and "that which returns or comes back." The Supreme Court long ago held that "revenue" includes the

proceeds of the sale of public securities and lands. United State v. Norton, 91 U.S. 566, 23 L.Ed. 454. In Protest of Reid, 160 Okl. 3, 15 P.2d 995, it was held that when a municipal utility was sold, the proceeds of the sale constituted "revenue" which must be applied to purposes for which the money was borrowed, and that included the retirement of un-matured bonds which were issued for the purpose of constructing the utility. . . . By a parity of reasoning it is logical and reasonable to say that there is no prohibition against applying proceeds of sale of the property to the satisfaction of outstanding bonds. We hold that as being the proper interpretation of the statute concerning payment of the bonds in this case.

Although the facts are not entirely consistent with those we have before us, the Supreme Court of Iowa, in Green v. City of Mount Pleasant, 256 Iowa 1184, 131 N.W.2d 5 (1964), cites to Bennett, and at least implies that the sale of property to pay off revenue bonds is permissible.

Accordingly, we are of the opinion that where a city issues revenue bonds to purchase property it may use the proceeds from the sale of that property to pay off the bonds.

Very truly yours,


Larry M. Blumberg
Assistant Attorney General

LMB:jkt

CRIMINAL LAW: Accommodation Offense. Sections 204.401(1), 204.401(3), 204.410, 902.8, The Code 1979. The accommodation offense defined in § 204.410 is a separate and distinct criminal offense. It is classified as a serious misdemeanor by reference to § 204.401(3). Since it is a serious misdemeanor, it may not be used as the basis for an habitual offender allegation under § 902.8. (Staskal to Thoman, Assistant Woodbury County Attorney, 12/14/79) #79-12-15 (L)

December 14, 1979

Charles N. Thoman
Assistant Woodbury County Attorney
3rd Floor
Courthouse
Sioux City, Iowa 51101

Dear Mr. Thoman,

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

Is an accommodation delivery of a Schedule I, II, or III controlled substance a felony or serious misdemeanor under Code § 204.410 for purposes of application of the habitual offender provision in Code § 902.8?

The answer is that an "accommodation offense" under § 204.410, The Code (1979) is a serious misdemeanor. Section 204.410 reads:

In a prosecution for unlawful delivery or possession with intent to deliver a controlled substance, if the prosecution proves that the defendant violated the provisions of section 204.401, subsection 1, but fails to prove that the defendant delivered or possessed with intent to deliver the controlled substance for the purpose of making a profit, the defendant shall be guilty of an accommodation offense and shall be sentenced as if convicted

of a violation of section 204.401, subsection 3. An accommodation offense may be proved as an included offense under a charge of delivering or possessing with the intent to deliver a controlled substance in violation of section 204.401, subsection 1. (emphasis added)

This statute thus does not expressly classify the crime of an accommodation offense as either a felony or a misdemeanor, unlike other criminal offenses in the Code. See §§ 902.1 & .9 (felonies) and § 903.1 (misdemeanors). Instead, Code § 204.410 provides that a person convicted of an accommodation offense shall be sentenced as if he had been convicted of violating Code § 204.410(3), that is, of simple possession of a controlled substance. Thus, the accommodation offense is classified, although indirectly, as a serious misdemeanor.

This cumbersome classification process is best explained by viewing the legislative history of Code § 204.410. Section 204.410 was passed in 1971 as part of Iowa's new comprehensive Uniform Controlled Substances Act. As passed, that section read:

Any person who enters a plea of guilty to or is found guilty of a violation of section four hundred one (401), subsections one (1) or two (2), of this Act may move for and the court shall grant a further hearing at which evidence may be presented by the person, and by the prosecution if it so desires, relating to the nature of the act or acts on the basis of which the person has been convicted. If the convicted person establishes by clear and convincing evidence that he delivered or possessed with intent to deliver a controlled substance only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled or counterfeit substance to become addicted to or dependent upon the substance, the court shall sentence the person as if he had been convicted of a violation of section four hundred one (401), subsection three (3) of this Act. 1971 Session, 64th G.A., Ch. 148, § 410.

This provision was unique. Its purpose was to ameliorate the broad reach of § 204.401 wherein every delivery, every transfer of possession, whether for the purpose of profiting or not, constituted the major offense of delivering a controlled substance. This was recognized by the Supreme Court in State v. Vietor, 208 N.W.2d 894 (Iowa 1973) when it cited from the Drug Abuse Committee's final report to the legislature which stated:

"Section 410 is not a part of the Uniform Controlled Substances Act. In philosophy, it is patterned somewhat after section 204.20, subsection 5. The purpose of section 410 is to allow courts to sentence less severely than would otherwise be required persons who are technically guilty of violating subsections 1 or 2 of section 401, if the offense was in fact an accommodation to another person (for example, an individual who has two marijuana cigarettes giving or offering one to another individual) and the convicted person is not a 'drug pusher' in the usual sense of that term. The determination whether or not this is the case is made by the court in a proceeding which is in the nature of a postconviction hearing. If a convicted person wishes to avail himself of the lighter penalties provided under this section, it is his responsibility to request such proceedings and to show that his offense was in the nature of an accommodation and not drug trafficking."

Id. at 899. Thus, § 204.410 was, when enacted, clearly intended to be merely an ameliorative sentencing provision. Furthermore, in Vietor, the court characterized it as such and was, therefore, able to uphold the constitutionality of § 204.410 against the claim that it placed the burden on a defendant, in effect, to show the inapplicability of the more severe penalty (for delivery without an accommodation).

Then, in State v. Monroe, 236 N.W.2d 24 (Iowa 1975) the court was forced to reconsider its Vietor position on § 204.410 in view of the United States Supreme Court's decision in

Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). The court reversed the position it had earlier taken in Vietor and held that § 204.410 was not merely an ameliorative sentencing device, but that it defined two separate criminal offenses; delivery for profit, and delivery as an accommodation. In view of this, it was unconstitutional to place the burden upon the defendant to show he was an accommodator.

Instead of declaring the entire section unconstitutional, however, the court chose to excise the offending language as follows:

"204.410 Reduced sentence for accommodation offenses. Any person who enters a plea of guilty to or is found guilty of a violation of section 204.401, subsections 1 or 2, may move for and the court shall grant a further hearing [at which evidence may be presented by the person, and by the prosecution if it so desires] relating to the nature of the act or acts on the basis of which the person has been convicted. If the convicted person [establishes by clear and convincing evidence that he] delivered or possessed with intent to deliver a controlled substance only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled or counterfeit substance to become addicted to or dependent upon the substance, the court shall sentence the person as if he had been convicted of a violation of section 204.401, subsection 3."

236 N.W.2d at 36-37 (excised language in brackets).

The legislature subsequently amended § 204.410 to its current form, making the accommodation offense a lesser-included offense under a charge of delivery for profit or possession with intent to deliver for profit. 1976 Session, 66 G.A., Ch. 1245, ch. 4, § 231.

It may have been preferable, and led to greater clarity, if the legislature had amended § 204.401 to include the accommodation offense within that section. However, the legislature did not choose that course. It chose, rather, the more expedient course of simply retaining § 204.410 and changing it from a sentencing provision to a separate and distinct criminal offense, thereby insuring conformity with the court's holding in Monroe. That is the reason that the "as if" language remains in § 204.410.

Despite the remaining presence of that language, however, it is abundantly clear that § 204.410, contrary to its original nature as a sentencing provision, is currently a separate and distinct criminal offense. In State v. Metcalf, 260 N.W.2d 857, 860 (Iowa 1977), for example, the Supreme Court stated:

Legally, therefore, three offenses are involved in a charge of possession with intent to deliver: (1) possession with intent to delivery for profit, (2) the accommodation offense, and (3) simple possession. Hence the accommodation offense is a legally included offense in such a charge; it involves an element which simple possession does not -- intent to delivery. (emphasis added)

In State v. Grimme, 274 N.W.2d 331 (Iowa 1979) the defendant pled guilty to delivery of a schedule I controlled substance in violation of § 204.401(1)(a). Defendant claimed, on appeal, that he should have been granted a hearing on the question of accommodation. The Supreme Court responded:

Under the amendment, as in the present Code, an accommodation offense is included in a delivery charge. See § 204.410, The Code. In this case defendant pled guilty to the major charge and thereby gave up any right to be convicted only of the included offense.

He did not have the right which he claims he should have been permitted belatedly to exercise.

Id. at 338.

Mr. Charles N. Thoman
Page 6

In summary there can be no doubt that the accommodation offense defined in § 204.410 is a separate criminal offense. Section 204.410 is no longer merely a sentencing provision attached to § 204.401(1). While it has changed to a criminal offense, some of its original language remains intact. This explains why it is classified as a serious misdemeanor by reference to another statute, a somewhat unique way of classifying an offense.

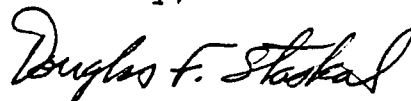
The conclusion that the accommodation offense is a serious misdemeanor is bolstered by the following dicta from Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Robert James Green, N.W.2d _____, (Iowa Sup. Ct. No. 62355 filed Nov. 14, 1979) (en banc):

The respondent was originally charged with the felony of delivery of a schedule II controlled substance, in violation of section 204.401(1), The Code. As the result of a plea bargain he entered a guilty plea to the reduced charge of an accommodation offense, a serious misdemeanor, under section 204.410.

(slip opinion p. 4) (emphasis added).

In conclusion, a conviction for an accommodation offense may not be used to trigger the habitual offender sentencing provision since that offense is not a felony. Section 902.8, The Code (1979).

Sincerely,



DOUGLAS F. STASKAL
Assistant Attorney General

DFS:mlr

CRIMINAL LAW, PROBATION, RESTITUTION ORDERS: Sections 907.12 and 606.7, The Code 1979. Restitution plan entered into pursuant to Code § 907.12 does not constitute a lien and the Clerk of Court does not have authority to issue execution as in civil cases. The Clerk of Court is not required to maintain a separate index for restitution orders. (Cleland to Bordwell, Washington County Attorney, 12/13/79) #79-12-14(L)

December 13, 1979

Mr. Richard S. Bordwell
Washington County Attorney
103 1/2 North Marion Avenue
P.O. Box 308
Washington, IA 52353

Dear Mr. Bordwell:

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

1. Does a restitution order under § 907.12, The Code 1979, constitute a lien?
2. If the answer to the preceding question is yes, should the restitution order be filed in the lien index?
3. If the restitution order is a lien, may the Clerk of Court issue an execution as in civil cases?
4. If a restitution order does not constitute a lien, is the Clerk of Court required to maintain a separate index?
5. If the Clerk of Court is required to maintain a separate index, is it subject to inspection by the general public?

The answer to your first question is no. This result derives from an analysis of § 907.12, The Code 1979. In light of the negative answer to your first question, the answers to questions two and three are also no. It is unnecessary to reach your fifth question since the answer to your fourth question is no. This answer derives from our interpretation of § 606.7, The Code 1979.

The term "lien" denotes a "legal claim or charge on property, either real or personal, as security for the payment of some debt

or obligation; a hold or claim which one person has on the property of another as a security for some debt or charge, although the property is not in the possession of the one to whom the debt or obligation is due." 53 C.J.S. Liens § 1(a)(1948). Moreover, "[a] lien may be created only by contract, . . . , or by some statute or fixed rule of law; it cannot be created by the court merely from a sense of justice." In re Frentress' Estate, 249 Iowa 783, 89 N.W.2d 367, 370 (1958) quoting from 53 C.J.S. Liens § 2 (1948).

Section 907.12(3), The Code 1979, provides, in relevant part, as follows:

If the trial court exercises any of the sentencing options under section 907.3, the court shall require as a condition of probation that the defendant, in co-operation with the probation officer assigned to the defendant, promptly prepare a plan of restitution, including a specific amount of restitution to each victim and a schedule of restitution payments.

Once the restitution plan is completed it must be submitted to the court. Section 907.12(4), The Code 1979. The court must enter an order approving the plan or modifying it, and compliance with the plan is a condition of defendant's probation. Id.

Section 907.12(8), The Code 1979, provides, in relevant part, that defendant's failure to comply with the plan is a violation of the conditions of defendant's probation, and that the trial court is free to modify the plan. However, the court may not "extend the period of time for restitution . . . beyond the maximum probation period" Id. Finally, § 907.12(9), The Code 1979, provides, in relevant part, that this "section and proceedings under this section [907.12] shall not limit or impair the rights of victims to sue and recover damages from the defendant in a civil action."

There is nothing in Code § 907.12 which suggests that the restitution plan should be treated as a civil contract. In fact, a close examination of Code § 907.12 suggests that the restitution plan should not be so treated. Under Code § 907.12(8) the trial court is given unilateral authority to modify the plan. This power is totally inconsistent with the law of contracts. See Heggen v. Clover Leaf Coal & Mining Co., 217 Iowa 820, 253 N.W. 140, 141 (1934). The restitution plan provided for in Code § 907.12 is expressly made a condition of

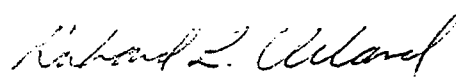
probation. Thus, in our opinion, if defendant fails to comply with the restitution plan, the remedy lies not in contract law, but in the revocation of defendant's probation.

Absent specific language in Code § 907.12 to the contrary, that section should not be read to create a statutory lien against the defendant's real and personal property. Section 907.12(8) specifically connects defendant's probation to his or her compliance with the restitution plan. Thus, the General Assembly has provided the means to enforce the restitution plan, and, under the principle expressio unius est exclusio alterius no other means of enforcement should be read into the statute. See Dotson v. Ames, 251 Iowa 467, 101 N.W.2d 711, 714 (1960).

With regard to your second and third questions, the answers to both questions are no. The trial court's restitution order does not constitute a lien, and therefore, it should not be entered into the "lien" index and the Clerk of Court does not have authority to issue execution as in civil cases.

With regard to your fourth question, the answer is no. Section 606.7, The Code 1979, sets forth the records and books which the Clerk of Court is required to maintain. A separate book for restitution orders is not included in that list. Moreover, when the General Assembly has seen fit to require the Clerk of Court to maintain separate records for certain subjects, it has specifically authorized the clerk to do so. See Section 631.2, The Code 1979. Therefore, the Clerk of Court is not required to keep a separate index for restitution orders. Moreover, since the clerk is not required to keep a separate index, it is not necessary to address your fifth question.

Sincerely,



RICHARD L. CLELAND
Assistant Attorney General

RLC/cla

BEVERAGE CONTAINER DEPOSIT LAW: §§ 455C.1, 455C.2, 455C.3, 455C.4, The Code 1979. Beverage distributors may not refuse to accept and pick up from retail dealers the kind, size and brand of empty containers they sell to dealers because they are not in plastic bags purchased from the distributor. Requiring the dealer to purchase bags from the distributor could in some cases violate the law's requirement that distributors pay dealers one cent per container for handling. (Ovrom to Mullins, State Representative, 12/13/79). #79-12-13(L)

December 13, 1979

Representative Sue Mullins
Iowa House of Representatives
Statehouse
L O C A L

Dear Representative Mullins:

This is in response to your request for an Attorney General's Opinion concerning collection of empty beer cans by distributors from retail dealers as required in Iowa's beverage container deposit law. According to your letter, distributors are requiring dealers to buy plastic bags from the distributors and are refusing to pick up the empty cans unless they are in the bags. You asked the following questions:

1. May a distributor refuse to accept his or her empty containers from a dealer unless those containers are placed in a bag purchased from the distributor?
2. Must a dealer pay for bags furnished by a distributor when there is no credit back of that cost to the dealer by the distributor?

It is our opinion that a distributor is required to accept the kind, size and brand of empty containers he or she sells, and may not refuse to do so because they are not in a bag purchased from the distributor. Furthermore, requiring the dealer to purchase bags from the distributor could, in some cases, violate the law's requirement that distributors pay one cent per container to dealers for handling.

Iowa's beverage container deposit law, Chapter 455C, The Code 1979, defines "dealer" as one who sells beverages to consumers. § 455C.1(4). A "distributor" is one who sells

beverages in containers to a dealer. § 455C.1(5). Dealers must accept empty beverage containers from consumers, and refund a five cent deposit for each container. § 455C.3(1). In turn, a "distributor shall accept and pick up from a dealer served by the distributor . . . any empty beverage container of the kind, size and brand sold by the distributor. . . ." § 455C.3(2), The Code 1979. The distributor is required to reimburse the dealer the five cents per container refund value, plus an additional one cent for each container. § 455C.2(2), The Code 1979.

The principal rule in construing a statute is to ascertain and give effect to the legislative intent, which is determined from the language of the statute. In re Miller's Estate, 159 N.W.2d 441, 443 (Iowa 1968). In response to your first question, the bottle bill is silent as to the manner in which dealers should bag or package empty containers for return to distributors. However, the language from the statute quoted above imposes an unconditional obligation on beverage distributors to accept and pick up from dealers "any empty beverage container of the kind, size and brand sold by the distributor." We believe it would violate the statute for distributors to refuse to accept empty containers unless they are in plastic bags purchased from them.

Your second question is whether dealers must pay for bags furnished by a distributor when the cost is not credited back to the dealers. The deposit law requires a distributor to pay dealers one cent for each empty container returned to the distributor. § 455C.2(2), The Code 1979. Your letter does not contain specific facts concerning the number of cans dealers place in each bag, nor does it state the price dealers must pay for each bag. However, it does appear that there would definitely be a point at which the charge for a bag could defeat the legislative intent that dealers be compensated for handling costs and would consequently violate § 455C.2(2), The Code 1979.

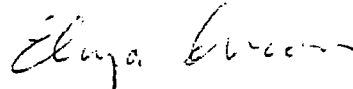
We understand that distributors are requiring use of the bags because a certain number of cans goes into each bag, and this makes counting the cans easier for distributors. Additionally, empty cans are easier to carry in a bag than they would be if kept loose. We want to stress that the practice of selling plastic bags to dealers to use for returning empty beer cans is not in and of itself a violation of the beverage container deposit law. The conflict with the deposit law arises when

Representative Sue Mullins
Page 3

distributors refuse to accept empty containers from dealers unless they are in bags purchased from the distributors, because the law imposes an unconditional requirement that a distributor accept from dealers the kind, size and brand of containers sold by the distributor. Distributors should be allowed to impose reasonable requirements concerning bagging or packaging of the empty cans they pick up. If they want to furnish plastic bags for dealers to use and charge a deposit on each bag, or make bags available for sale, or allow dealers to buy them elsewhere, we think they could do so without violating the beverage container deposit law.

It is desirable that distributors and dealers work out a method for return and collection of empty cans which is mutually agreeable. Most have been able to do so. Of course if a dealer and a distributor cannot agree on how to return empty cans, they may petition the Department of Environmental Quality for a rule on the subject, or they may seek an addition to the statute to clarify the matter.

Sincerely,



ELIZA OVRÓM
Assistant Attorney General
Environmental Protection Division

EO:rcp

COUNTIES AND COUNTY OFFICERS: Clerk of Court, duties re issuance of marriage license. DOMESTIC RELATIONS: Marriage. License. Sections 595.4, 596.1, 596.2, 596.7, The Code 1979. If a marriage license is issued but becomes void due to a failure to solemnize within twenty days, a second license may be issued pursuant to the first application for a license, which is valid for one year after it is filed. However, the clerk must be satisfied of the competency of the parties to marry at the time the second license is actually issued. A health certificate (blood test) obtained within twenty days prior to the date of application is valid for the one-year period the application is valid. The clerk may charge the same fee for the second license as for the first. (Norby to Pawlewski, Commissioner of Public Health, 12/12/79) #79-12-12(L)

December 12, 1979

Norman L. Pawlewski, Commissioner
Department of Public Health
L O C A L

Dear Mr. Pawlewski:

You have requested an Attorney General's opinion concerning a question involving the issuance of marriage licenses. Specifically, the following problem:

Section 595.4, unnumbered paragraph 2, The Code 1979, provides that if a "marriage license has not been issued within one year from the date of the application, the application shall be void and of no effect". However, § 596.7, The Code 1979, provides that marriage licenses issued shall become void unless the marriage be solemnized within twenty days following the issuance thereof. No mention is made in the Code of the validity of the original application and blood test after the license has been issued and has become void.

If a license becomes void because the marriage takes place later than twenty days following the issuance of the license, can another license be issued within the one-year period following the date of application? If the answer is affirmative, should the five-dollar fee for the marriage license be charged again for the second time?

Section 595.4, unnumbered paragraph 2, provides:

After expiration of three days from the date of filing the application by the parties, the clerk shall issue the license if he is satisfied as to the competency of the parties to contract a marriage. If the license has not been issued within one year from the date of the application, the application shall be void and of no effect.

Section 596.7 provides:

Marriage licenses issued under the provisions of this chapter shall become void and of no effect unless the marriage be solemnized within twenty days following the issuance thereof.

Your question specifically involves the effect of a failure to solemnize a marriage, which expressly renders a license void, upon the ability of the clerk to issue a subsequent license pursuant to the initial application. The Code specifies no grounds for an application to become void for any reason other than the passage of one year. A 1970 Attorney General's opinion indicates that a delay in picking up a license beyond the three-day period following the date of application does not prohibit the issuance of a valid license, as long as the clerk is satisfied as to the competency of the parties to marry at the time the license is ultimately issued. 1970 Op. Atty. Gen. 397, 398. This would require that the clerk be satisfied as to the requirements contained in chs. 595 and 596, the health certificate or blood test.

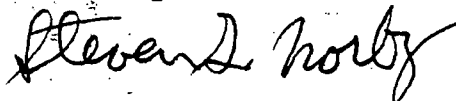
In regard to the blood test, § 596.1 requires that the health examination take place within twenty days prior to the date of application. A 1962 Attorney General's opinion indicates that if the certificate is properly obtained, it will remain valid as long as the application remains valid. See 1962 Op. Atty. Gen. 105, 106. In other words, the blood test is sufficient as long as the initial application is valid, and conversely, the application cannot be rendered void due to a failure to obtain any subsequent blood tests in the one-year period following the application.

It, therefore, appears that a first license can be issued at any time during the one-year period following the application. It should subsequently follow that a second license can be issued, unless the failure to solemnize the first license affects the competency of the parties to marry. Chapter 595 does not provide any bar to marriage on this basis, and there appears to be no basis upon which such a bar should be inferred. The fact that the statutory

scheme appears designed to accommodate parties who fail to make a timely solemnization also supports the practice of issuing a second license pursuant to the first application. The long period of validity for an application, in contrast with the short period for solemnization, would be unnecessary if the failure to solemnize made the application void. Accordingly, a second marriage license may be issued after a first license has become void for failure to solemnize, provided that the second license is issued within one year of the date of the original application, a valid health certificate was obtained within twenty days prior to the application date, and the clerk is otherwise satisfied as to the competency of the parties to marry at the time the second license is actually issued.

The Code authorizes the clerk to collect a \$5 fee for issuance of a marriage license. § 606.15(28), The Code 1979. It is proper for the clerk to collect the same fee for the second license also, as the clerk must perform essentially the same tasks in issuing the second license as in issuing the first.

Sincerely,



STEVEN G. NORBY
Assistant Attorney General

SGN:sh

COURTS: Probate fees for testamentary trusts. Sections 633.10, 633.28, 633.31, 633.70, The Code 1979; rule 372, Iowa R.C.P. Docketing of a trust created by a will is subject to a clerk's fee. The amount of fee for such docketing and filing of annual reports should be determined by local court rules. (Hyde to Johnson, State Auditor, 12/12/79] #79-12 11(L)

December 12, 1979

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

Dear Mr. Johnson:

You have requested an opinion from this office concerning taxation of costs by county clerks of court applicable to testamentary trusts. Your request was prompted by a problem encountered by law firms when filing annual reports for testamentary trusts. Apparently, a lack of uniformity in the taxing of costs and application of filing fee procedures exists among counties in Iowa.

The issue can be resolved by consideration of the following questions:

- 1) Does the separate docketing requirement for a testamentary trust under § 633.28, The Code 1979, give rise to a separate filing fee?
- 2) If so, is the filing fee computed according to the provisions of § 633.31, The Code 1979? For example, are annual reports submitted to the clerk of court subject to the fee prescribed in § 633.31(2)(k), The Code 1979?
- 3) What is the authority for determining and establishing fees on matters presented to the clerk of court when no specific statute exists?

I.

Section 633.28, The Code 1979, provides:

When a trust is created by a will the administration thereof shall be treated as a separate proceeding, with a separate docket number, from the date of the order of appointment or confirmation of the original trustee, unless otherwise ordered by the court. When the clerk docket a trust proceeding under this section, he shall place and keep in such file a true copy of the will creating such trust.

At the time § 633.28 was enacted in 1963, it was accompanied by a Bar Committee Comment indicating the purpose of the section was to distinguish trust proceedings from estate proceedings, since trusts are usually of much longer duration.

One interpretation espoused by some clerks of court is that the filing of a testamentary trust is merely part of the administration of an estate, and no further charge should be assessed. The contrasting view interprets § 633.28 literally and deems this separate filing of a trust as a new and independent matter and, therefore, subject to an additional charge. We find this latter analysis persuasive. Section 633.10, The Code 1979, makes a clear distinction between settlement of an estate, § 633.10(1), and administration of testamentary trusts, § 633.10(4), when they fall under the jurisdiction of the district court sitting in probate. A testamentary trust administration will, in most cases, continue beyond the settlement of the estate, and will be an active proceeding subject to the jurisdiction of the court in probate until its termination; it should be subject to the taxation of costs independently of the administration of the estate which created it.

II.

In imposing fees for this separate docketing procedure, some clerks of court have applied § 633.31, The Code 1979, to the administration of a testamentary trust. That section provides a schedule of fees for particular services in probate matters performed by the clerk, such as filing transcripts, issuing certifications, entering rules or orders, approving bonds, etc. Section 633.13(2)(k) provides for fees based on the value of the personal property and real estate of a decedent " . . . for other services performed in the settlement of the estate . . ." [Emphasis added]. Thus, while clerks may invoke § 633.31(2)(k) when taxing costs for services which may be "probate matters", but not otherwise provided for, such "other services" must be "performed in the settlement of the estate." Having determined that § 633.28 establishes trust administration as a proceeding separate from estate administration,

services provided by court clerks in the administration of a testamentary trust, including the filing of annual reports pursuant to § 633.70, The Code 1979, would not fall under the graduated probate fee provision of § 633.31(2)(k).

III.

There is no statutory provision specifying the fees for docketing of testamentary trusts and filing of annual reports.¹ It is the practice in most districts that charges not otherwise specified by statute be prescribed by local court rules, pursuant to rule 372, Iowa R.C.P.

Your request and the specific problem which prompted it sought an opinion which would require uniform fees to be charged. It is our opinion, however, that the Code provides only for local determination of these matters. The uniformity you seek should be addressed to legislative remedy.

In conclusion, § 633.28, The Code 1979, which requires separate docketing of a testamentary trust, gives rise to separate fees for services performed by clerks of court in the administration of such trusts. Fees for services otherwise not provided for in § 633.31, The Code 1979, such as filing of annual reports, do not fall under the schedule of fees provided in § 633.31(2)(k), and should be determined by local court rules.

Very truly yours,

Alice J. Hyde

ALICE J. HYDE
Assistant Attorney General

AJH:sh

¹Section 606.15, The Code 1979, provides a schedule of fees for clerks of court "except in probate matters."

BEER AND LIQUOR CONTROL DEPARTMENT: §§ 123.49(2)(c), 537.1301(16), 537.1301(17), The Code 1979. A liquor control license or retail beer permit holder may establish a bona fide credit card system and sell liquor or beer on credit pursuant to this system. (Norby to Gallagher, Iowa Beer and Liquor Control Department, 12/7/79) #79-12-9CL)

December 7, 1979

Rolland A. Gallagher, Director
Iowa Beer and Liquor Control Department
L O C A L

Dear Mr. Gallagher:

You have requested an Attorney General's opinion regarding the effect of § 123.49(2)(c), The Code 1979, on the practice of the issuance of credit cards by holders of liquor control licenses or retail beer permits. Your request was prompted by the suspension in June, 1979, of a liquor control license for violation of this provision, and an August, 1979 article in the Iowa Wholesale Beer Distributors Association Bulletin which suggested that license and permit holders may set up their own credit card systems.

Section 123.49(2), The Code 1979, provides as follows:

No person or club holding a liquor control license or retail beer permit under this chapter, nor his agents or employees, shall do any of the following:

(c) Sell alcoholic beverages or beer to any person on credit, except with a bona fide credit card. This provision shall not apply to sales by a club to its members nor to sales by a hotel or motel to bona fide registered guests.

Specifically, you have asked the following questions:

1. What does the term "bona fide credit card" in section 123.49(2)(c), The Code 1979, mean?
2. What devices qualify as a "bona fide credit card"?
3. Does "bona fide credit card" include merely credit cards issued by a commercial company such as Master Charge?
4. Are credit cards made and distributed by liquor control licensees (the procedures recommended by the August, 1979 Iowa Wholesale Beer Distributors Association Bulletin) "bona fide credit cards" as this term is used in § 123.49(2)(c)?

As you are aware, § 123.46(4)(c), The Code 1962, the predecessor to § 123.49(2)(c), was interpreted by the Attorney General in 1963. 1964 Op. Atty. Gen. 267. This opinion interpreted the statute to prohibit liquor license and beer permit holders from issuing their own credit cards. As discussed below, this opinion must be overruled in that § 123.49(2)(c) cannot properly be interpreted to prohibit license or permit holders from issuing their own credit cards.

The question of what constitutes a "bona fide credit card" was unclear at the time of the 1963 opinion in that neither "bona fide credit card" nor "credit card" had been defined by the Iowa Legislature or the Iowa Supreme Court. See 1964 Op. Atty. Gen. 267, 268. The 1963 opinion relied on a general description of a credit card transaction contained in a federal securities law decision to reach the conclusion that the term "credit card" implies a relationship involving a third party guarantor of payment to a merchant who provides goods or services on credit to a credit card holder. Id. See Williams v. United States, 192 F.Supp. 97, 100 (S.D. Calif. 1961). If this definition is accepted, a licensee or permittee could not institute a credit card system of their own as no third party guarantor would be involved. Only the licensee or permittee and the customer would be involved. The definition adopted in the 1963 opinion would limit credit cards to transactions pursuant to credit cards issued by commercial companies which guarantee payment to the vendor, and exclude any vendor from issuing cards directly to customers.

The legislature has still not provided a definition of a "bona fide credit card". However, with passage of the Iowa Consumer Credit Code in 1973, a definition of "credit card" has been provided, although the Iowa courts have not as yet interpreted this definition. "Credit card" is defined in § 537.1301(17), The Code 1979, as follows:

"Credit card" means a card or device issued under an arrangement pursuant to which a card issuer gives a cardholder the privilege of purchasing or leasing property or purchasing services, obtaining loans, or otherwise obtaining credit from the card issuer or other persons.

This definition encompasses a credit card issued directly from the card issuer to the card holder. The presence of a third party guarantor is not a necessary element of a credit card arrangement under current Iowa law. Additionally, it does not appear that the § 537.1301(17) definition was considered as a change in Iowa law at the time of its passage, although it was in conflict with the 1963 opinion. Essentially, the definition of a credit card appears to not have been considered prior to 1973, with the exception of the 1963 opinion, which stated that a third party guarantor is necessary. However, the rationale of the 1963 opinion does not appear to be a sound basis upon which to restrict credit card arrangements, and is inconsistent with many long established credit card arrangements. Consequently, the limitation of credit card arrangements to those arrangements involving a third party guarantor appears to have been erroneous. Licensees and permittees cannot, therefore, be prohibited from issuing their own credit cards on the premise that their cards will not involve a third party guarantor.

Defining the term "bona fide credit card" also requires a consideration of what was intended by the inclusion of "bona fide" in the statutory language. The 1963 opinion appears to consider the use of the term bona fide to be an indication of a legislative intent to prohibit licensees and permittees from issuing their own credit cards. Id. p. 269. The prohibition of sales on "credit", in contrast to sales with a bona fide credit card, contained in § 123.49(2)(c) certainly indicates an intent to restrict some sales. However, only credit sales are prohibited. The distinction between credit sales and credit card sales can be illustrated by reference to ch. 537, The Code 1979. In § 537.1301(16), credit is defined as follows:

"Credit" means the right granted by a person extending credit to a person to defer payment of debt, to incur debt and defer its payment, or to purchase property or services and defer payment therefore.

In § 537.1301(17), a transaction pursuant to a credit card is defined as follows:

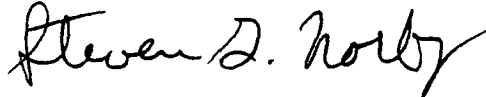
"Credit card" means a card or device issued under an arrangement pursuant to which a card issuer gives a cardholder the privilege of purchasing or leasing property or purchasing services, obtaining loans, or otherwise obtaining credit from the card issuer or other persons. A transaction is "pursuant to a credit card" if credit is obtained according to the terms of the arrangement by transmitting information contained on the card or device orally, in writing, by mechanical or automated methods, or in any other manner. A transaction is not "pursuant to a credit card" if the card or device is used solely to identify the cardholder and credit is not obtained according to the terms of the arrangement.

As these sections indicate, sales pursuant to a credit card can be distinguished from other sales on credit. This distinction appears to provide a logical basis for determining what is a bona fide credit card system. A bona fide credit card sale must comply with the description contained in § 537.1301(17), in that a prior arrangement would be required and information contained on the card actually transmitted in completing the transaction.

As noted above, the 1963 opinion viewed the legislative intent behind § 123.49(2)(c) to require a prohibition of credit cards issued by licensees or permittees. However, it does not appear that the language of this statute can be properly interpreted to contain such a limitation. Therefore, § 123.49(2)(c) does not prohibit liquor license or retail beer permit holders from issuing their own credit cards. It should be noted, however, that a license or permit holder who issues a credit card must comply with the provisions of the Iowa Consumer Credit Code and provisions regarding interest rates. See chapters 535, 537, The Code 1979.

As to your inquiry as to what devices qualify as a bona fide credit card, the definition contained in § 537.1301(17) is illustrative. Any type of card or device should be proper, as long as it is used in the proper manner. The card must be used pursuant to a credit arrangement, not merely as identification.

Sincerely,



STEVEN G. NORBY
Assistant Attorney General

SGN:sh

STATE OFFICERS AND DEPARTMENTS: Regular Registration Plates for Board of Medical Examiner's Investigators--§ 4.1(36); 147.55, 148.6, 258A.3, 258A.4 and 321.19, The Code 1979. Investigators for the Board of Medical Examiners are eligible for regular license plates on state vehicles. The issuance of such plates is discretionary. (Blumberg to Saf, Executive Director, Iowa Board of Medical Examiners, 12/5/79) #79-12-6(L)

Mr. Ron V. Saf
Executive Director
Iowa State Board of Medical Examiners
LOCAL

December 5, 1979

Dear Mr. Saf:

We have your opinion request regarding § 321.19, The Code 1979. You have an investigator who follows up on complaints against physicians and surgeons licensed by your board. In some of these investigations he goes "under cover" to gather evidence, sometimes by making a "buy" of controlled substance from the practitioner. You wish to know whether the investigator, who is not a peace officer, is eligible for "dummy" plates on an unmarked state vehicle as an aid to his investigations. You also ask what the discretion of the Department of Transportation is to allow the use of such plates.

Section 321.19(1) provides, in pertinent part:

All vehicles owned by the transaction of official business by the representatives of foreign powers or by officers, boards, or departments of the government of the United States, and by the state of Iowa, . . . are hereby exempted from the payment of the fees in this chapter prescribed. . . . The department shall furnish, on application, free of charge, distinguishing plates for vehicles thus exempted, which plates except plates on Iowa highway safety patrol vehicles shall bear the word "official," and the department shall keep a separate record. Registration plates issued for Iowa highway safety patrol vehicles, except unmarked patrol vehicles, shall bear two red stars on a yellow background, one before and one following the registration number on the plate which registration number shall be the officer's badge number. . . . Provided

that the director of general services or the director of transportation may order the issuance of regular registration plates, for any exempted vehicle, used by peace officers in the enforcement of the law and persons enforcing chapter 204 and other laws relating to controlled substances.
[Emphasis added]

Of importance here is the above underlined portion of that section. It provides, in substance, that others in addition to peace officers are eligible for the regular (dummy) plates. Those others encompasses persons enforcing Chapter 204, The Code 1979, and other laws relating to controlled substances.

Chapters 148 and 150A, The Code 1979, not only provide for the licensing of physicians and surgeons by your board, but also the discipline of those licensees. Section 148.6 sets forth the grounds for licensee discipline. They include:

- a. Knowingly making misleading, deceptive, untrue or fraudulent representation in the practice of his profession.
- b. Being convicted of a felony in the courts of this state or another state, territory, or country. . . .
- c. Violating a statute or law of this state, another state, or the United States, without regard to its designation as either felony or misdemeanor, which statute or law relates to the practice of medicine.
- e. Knowingly aiding, assisting, procuring, or advising a person to unlawfully practice medicine and surgery, osteopathic medicine and surgery or osteopathy.
- g. Being guilty of a willful or repeated departure from, or the failure to conform to, the minimal standard of acceptable and prevailing practice of medicine and surgery, osteopathic medicine and surgery or osteopathy in which.

proceeding actual injury to a patient need not be established; or the committing by a physician of an act contrary to honesty, justice, or good morals, whether the same is committed in the course of his practice or otherwise, and whether committed within or without this state.

h. Inability to practice medicine and surgery, osteopathic medicine and surgery or osteopathy by reason of illness, drunkenness, excessive use of drugs, narcotics, chemicals, or other type of material or as a result of a mental or physical condition.

Section 147.55 also provides grounds for licensee discipline, including:

2. Professional incompetency.
3. Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of a profession or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.
4. Habitual intoxication or addiction of the use of drugs.
5. Conviction of a felony related to the profession or occupation of the licensee or the conviction of any felony that would affect his or her ability to practice within a profession. A copy of the record of conviction or plea of guilty shall be conclusive evidence.
7. Use of untruthful or improbable statements in advertisements.
8. Willful or repeated violations of the provisions of this Act.

See also, §§ 258A.3(2)(b) and 258A.4(f).

Any of the above enumerated grounds may have something to do with controlled substances. The board has, in the past, invoked license discipline for violations of Chapters 204, 155 and the federal laws and regulations regarding controlled substances. The acts involved included sale of controlled

Mr. Ron V. Saf
Page four

substances on the street, the misuse of prescriptions for controlled substances, faulty and fraudulent record keeping of controlled substances and the like.

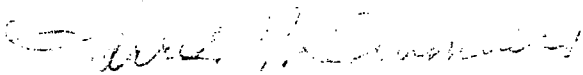
Pursuant to § 258A.3(2)(b), the board can revoke, suspend or otherwise limit certain privileges of physicians and surgeons, including the federal and state controlled substance registrations. Although investigations by the federal and state authorities given the direct responsibility of enforcing the controlled substance and pharmacy laws result in license discipline by the board, investigations by the board often lead to investigations or actions by those federal and state authorities. The board, ultimately then, does enforce laws relating to controlled substances.

We understand that the request is made because the investigator, as a means of obtaining evidence, needs to do some undercover work with reference to purchases of controlled substances from licensees on whom complaints have been made. Although such undercover work is normally done by federal and state drug enforcement authorities, such investigators are not always available or willing to assist. The responsibility of the board and the State is to the public to the end that such investigations should be made. However, it might pose a problem for an individual driving a state car with the state emblems and state license plates to be able to do such undercover work.

No matter how important or necessary the need for the special plates, it is still discretionary with the director of general services and the director of transportation whether such plates will be issued. As indicated in § 321.19, they "may order the issuance of regular registration plates. . . ." As provided in § 4.1(36), "may" confers a power, not a duty or requirement.

Accordingly, we are of the opinion that investigators for the Board of Medical Examiners fit within § 321.19 regarding the issuance of regular license plates. However, such issuance is discretionary with the directors of general services and transportation. Two previous opinions on § 321.19, 1968 Op. Att'y Gen. 547, and 1972 Op. Att'y Gen. 92, were written before significant and applicable changes were made in the section, and therefore are inapplicable.

Vert truly yours,


LARRY M. BLUMBERG
Assistant Attorney General

LMB/cc

FINANCIAL INSTITUTIONS: Title insurance purchases by lending institution. Sections 515.48(10), 524.905(5)(f), 534.2(1), The Code 1979. It is not unlawful for lending institutions to purchase title insurance out of the state of Iowa on property located within the state. This title insurance does not satisfy Iowa law requirements for proof of first or prior lien status of mortgages held by Iowa lending institutions. (Hyde to Pringle, Supervisor, Savings and Loan Associations, State Auditor's office, 12/5/79) #79-12-5 (L)

December 5, 1979

John A. Pringle, Supervisor
Savings and Loan Associations
State Auditor's Office
L O C A L

Dear Mr. Pringle:

You have requested an opinion of this office as to whether in-state lending institutions may purchase title insurance from out-of-state companies. Specifically, you were concerned because of federal loan requirements of title insurance evidencing first lien status of a mortgage.

Your request notes the Iowa Supreme Court's decision in Chicago Title Insurance Co. v. Huff, 256 N.W.2d 17 (Iowa 1977), upholding the constitutionality of § 515.48(10), The Code 1973. In Chicago Title, the court determined that, under a due process analysis, the state could restrict this particular type of insurance because of a definite and reasonable relationship to legitimate state goals. 256 N.W.2d at 27. Chicago Title and the statute it upheld speak only to "business in this state", and do not address restrictions on out-of-state purchases by or for Iowa citizens. The court did, however, affirm the lower court's opinion which stated: "The Iowa statute does not prohibit Iowa citizens from going outside of the State of Iowa to purchase title insurance . . . A statute prohibiting the citizens of the state from procuring such insurance outside the state . . . would be unconstitutional." Id., Appendix at 43.

If a lending institution, a savings and loan association in particular, is deemed a citizen, it may be afforded the right to procure out-of-state title insurance. Section 534.2(1), The Code 1979, defines a savings and loan association as a "corporation".

The requirements of organization and certification that must be met are akin to other profit-motivated, incorporated entities in Iowa. While it is widely held that a corporation is a citizen of the state of its incorporation for jurisdiction purposes, see 18 C.J.S. Corporations, § 8, it does not necessarily follow that a corporation's "citizenship" extends into areas of substantive law. A corporation is not a "citizen" within the meaning of the privileges and immunities clause, but it has been held to be a "person" within the meaning of the equal protection and due process clauses of the Fourteenth Amendment. Fulton Market Cold Storage v. Cullerton, 582 F.2d 1071,1079 (7th Cir. 1977); see Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed. 673 (1938); Allgeyer v. Louisiana, 165 U.S. 578, S.Ct. 427, 41 L.Ed. 832 (1897).

Therefore, since prohibiting this type of insurance would violate due process, and since corporations have standing in asserting due process guarantees, it is our opinion that a savings and loan association, certified in Iowa, may obtain title insurance outside of Iowa on property located in Iowa. We caution, however, that the need to comply with Iowa methods of title abstracting is not abrogated by title insurance, i.e., the use of title insurance to satisfy certain statutory requirements is insufficient.

Iowa banking laws require an attorney's written opinion to prove that a mortgage is a first lien on real property. Section 524.905(5)(f), The Code 1979. In a previous opinion from this office, § 524.905(5)(f) was construed to apply only to loans secured by land located within the state of Iowa. The use of title insurance for proof purposes in adjoining states may be preferred by those states and, therefore, permitted for out-of-state property. 1976 Op. Atty. Gen. 299.

Similarly, a 1954 opinion dealing with savings and loan associations stated that title insurance cannot be accepted by a state auditor's examiner in lieu of an attorney's opinion to prove a first and prior lien. 1954 Op. Atty. Gen. 149. This opinion construed an amendment to the Code which for the first time specifically excluded title insurance as a proper subject for insurance. 1947 Session, 52nd G.A., ch. 258, § 5.

In Chicago Title, the Iowa Supreme Court upheld the constitutionality of the prohibition against title insurance within the state because of the necessity to protect citizens from needless consumer costs and possible invidious industry practices. 256 N.W.2d at 26-27. The procedures offered by Iowa Land Title Standards and required by Iowa laws provide adequate safety in title conveyances of Iowa land. However, these measures may be inadequate for or unfamiliar to another government. If another state or the federal government requires title insurance for lending purposes from a citizen of Iowa, that citizen cannot be precluded from obtaining it.

In conclusion, it is not unlawful for lending institutions to purchase title insurance out of the state of Iowa on property located within Iowa, but such title insurance does not satisfy Iowa law requirements for proof of first or prior lien status of mortgages held by Iowa lending institutions.

Very truly yours,

Alice J. Hyde

ALICE J. HYDE
Assistant Attorney General

AJH:sh

COUNTIES AND COUNTY OFFICERS: Appointment of Deputy Sheriffs --
§§ 4.7, 341.1, 341A.7, 341A.8 and 341A.13, The Code 1979.
Appointment of deputy sheriffs, excluding the top deputies listed
in § 341A.7, does not require the approval of the board of super-
visors. (Blumberg to Davis, Scott County Attorney, 12/5/79)
#79-12-4 (4)

Mr. William E. Davis
Scott County Attorney
416 West 4th Street
Davenport, Iowa 52801

December 5, 1979

Dear Mr. Davis:

We have your opinion request of August 21, 1979, regarding
the appointment of deputy sheriffs. Your question is whether the
Board of Supervisors, pursuant to Chapter 341, The Code 1979,
must give their approval.

Section 341.1 provides:

Each county auditor, treasurer,
recorder, sheriff, county attorney,
clerk of the district court, may,
with the approval of the board of
supervisors, appoint one or more
deputies or assistants, respectfully,
not holding a county office, for
whose acts he shall be responsible.
The number of deputies . . . for
each office shall be determined by
the board of supervisors, and such
number together with the approval
of each appointment shall be by
resolution made of record in the
proceedings of such board.

There have been several opinions by this office interpreting this
section over the years. In 1930 Op. Att'y Gen. 379 it was held
that the section gave the supervisors the authority to authorize
the number of deputies or assistants a county officer could employ,

and also the privilege to approve or disapprove the appointment. We held in 1932 Op. Att'y Gen. 1 that this section meant the supervisors could not disapprove an appointment because of the respective opinions of its members as to the qualifications of an appointee. In an opinion of January 13, 1933, 1934 Op. Att'y Gen. 65, we held that the supervisors had authority to approve the number and to dictate the number which may be appointed. We further held in 1936 Op. Att'y Gen. 149, 150, the supervisors could not defeat the legislative intent by refusing to approve any and all appointments. Although the supervisors should not approve the appointment of a dishonest or poorly qualified person, it should recognize and approve any reasonable and proper appointment.

In a letter opinion of August 16, 1961, we stated that other than fixing the number of employees, the power of the supervisors was restricted to the approval of the appointments. After discussion of what this "approval" consisted, citing to several authorities, we held that the supervisors possessed no original power of employing such deputies and assistants. Thereafter, in 1962 Op. Att'y Gen. 116, we were confronted with the question whether the appointment of bailiffs by the sheriff required approval of the supervisors. After a lengthy discussion of the statutory language and interpretations regarding the employment of bailiffs, we stated that such appointments need not be approved by the supervisors. Finally, in 1972 Op. Att'y Gen. 605, we were faced with a similar question regarding special deputy sheriffs. We there stated that §341.1 applied only to regular deputies, and that it appeared the legislature intended to grant the supervisors a check on the number of deputies so that the county officers could not saddle the counties with unreasonable salary costs.

Smith v. Newell, 254 Iowa 496, 117 N.W.2d 883, (1962), concerns the appointment of bailiffs in relation to §341.1. The Court held that the appointment of the bailiffs by the sheriff pursuant to §337.7 was final and complete. Since there was no mention in that statute of approval by the supervisors, the supervisors' refusal to approve the appointments had no legal effect. In a concurring opinion, Mr. Justice Snell stated that §341.1 appears to apply to original appointments. The supervisors could not act arbitrarily or capriciously, but it could establish standards, and within those standards veto appointments.

Chapter 341.A was included in the Code by 1973 Session, 65th G.A., ch. 227. Section 341A.13 provides:

Whenever a position in the class-
 ics of service is to be filled, the
 sheriff shall notify the commission
 of that fact, and the commission shall
 certify the names and addresses of the
 ten candidates standing highest on the
 eligibility list for the class or grade
 for the position to be filled. The
sheriff shall appoint one of the ten
persons so certified, and the appoint-
 ment shall be deemed permanent. (Emphasis
 added).

This section is special whereas § 341.1. is general. That is,
 § 341.1 applies to all elective officers' appointments while
 § 341A.13 applies only to sheriffs and their deputies. There-
 fore, pursuant to § 4.7, The Code, § 341A.13 controls. This
 is true of both original appointments and promotions. The pur-
 pose of civil service is to provide a uniform system of selection
 and to insure that those who are selected are qualified. Section
 341A.8 specifically provides that all appointments and promotions
 shall be based solely on merit, efficiency and fitness as deter-
 mined by examination. See also 1979 Op Att'y Gen. No. 79-5-7.

The fact that the person in charge of the department for
 purposes of Chapter 341A, the sheriff, makes the appointments
 is consistent with the method of selection found in the civil
 service statutes for the police and fire departments. See,
 § 400.15. However, pursuant to § 341.1, approval of the board
 of supervisors relative to the number is still necessary. In
 addition, § 341A.7 provides that chief or top deputies are not
 covered by civil service. Therefore, the selection of those persons ar
 subject to approval of the board of supervisors.

Accordingly, we are of the opinion that appointments and
 promotions of deputy sheriffs, excluding the top deputies listed in
 § 341A.7, are the responsibility of the sheriff. The board of
 supervisors only has approval of the number of deputies and
 those top deputies excluded from Chapter 341A.

Very truly yours,

Larry M. Blumberg
 Assistant Attorney General

LMB:jkt

COUNTY AND COUNTY OFFICERS: County Attorney; County Public Hospital Board of Trustees. § 336.2(2), (6), and (7), 347.13, 347.14(10), The Code 1979. Chapter 336, The Code 1979, which enumerates the duties the county attorney must render to county officers, covers services to be performed for the county public hospital board of trustees. The board of trustees may employ independent legal counsel in the exercise of their general grant of power to administer and manage the hospital. (Bennett to Glaser, Delaware County Attorney, 12/4/79) #79-12-3(L)

December 4, 1979

Mr. Robert J. Glaser
Delaware County Attorney
Court House
Manchester, Iowa 52057

Dear Mr. Glaser:

This office is in receipt of your request for an opinion concerning the duties of the county attorney in his or her representation of the county hospital board of trustees. Specifically, you ask for a clarification of the county attorneys' duties to a hospital established under chapter 347, The Code 1979, and whether the general grant of power under § 347.14(10), The Code 1979, to the hospital board of trustees empowers them to hire independent legal counsel?

The duties of a county attorney are statutory and as enumerated in § 336.2, The Code 1979, include:

336.2 Duties. It shall be the duty of the county attorney to: . . .

2. Appear for the state and county in all cases and proceedings in the courts of his county to which the state or county is a party, except cases brought on change of venue from another county, and to appear in the appellate courts in all cases in which the county is a party, and also in all cases transferred on change of venue to another county, in which his county or the state is a party. . . .

6. Commence, prosecute, and defend all actions and proceedings in which any county officer, in his official capacity, or the county, is interested, or a party.

7. Give advice or his opinion in writing, without compensation, to the board of supervisors and other county officers and to school and township officers, when requested so to do by such board or officer, upon all matters in which the state, county, school, or township is interested, or relating to the duty of the board or officer in which the state, county, school, or township may have an interest; but he shall not appear before the board of supervisors upon any hearing in which the state or county is not interested.

These are statutory duties which the county attorney is obligated to perform for county officials. See § 4.36(a), The Code 1979. Because the members of the county hospital board of trustees are elected by the voters of the county, they are considered to be county officials. See § 39.21(2), The Code 1979. It follows that the county attorney must bring or defend all actions to which the county hospital is a party, and represent the board of trustees in any lawsuits resulting from actions the trustees take in their official capacity. The county attorney is obliged to advise the board of trustees and give them his or her written opinion when so requested regarding any matter in which the county hospital is interested or which relates to the duties of the trustees.

Your second question concerns the power of the board of trustees of a hospital established under Ch. 347, The Code 1979, to hire independent legal counsel. The county hospital board of trustees is vested with broad authority, with comprehensive mandatory powers and duties. Section 347.13, The Code 1979. In addition, the board of trustees possesses a variety of optional powers and duties as provided in § 347.14, The Code 1979, including the power to:

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

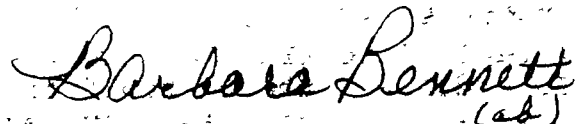
Section 347.14(10), The Code 1979.

The power granted by the language of § 347.14(10) to the board of trustees of a county hospital operating under ch. 347 is similar to that exercised by counties pursuant to the constitutional grant of home rule. Iowa Const. art. III, § 39A. The broad grant of power is restricted only when "specifically denied" by another section of ch. 347. Nothing in that chapter, however, appears to contain any provision which forbids the board of trustees to retain counsel other than the county attorney. Further, § 347.14(10), The Code 1979, explicitly authorizes the board of trustees to hire counsel for necessary legal proceedings in connection with the collection of accounts.

If the employment of independent legal counsel would assist the trustees in carrying out their statutory duties to manage, control, and govern the hospital, then hiring an attorney would be a proper exercise of their powers. The county hospital board of trustees may employ independent legal counsel, so long as the duties assigned or delegated to such outside counsel do not have the effect of entirely usurping the powers and duties conferred and imposed on the county attorney by statute. See 1920 Op. Atty. Gen. 619.

In conclusion, ch. 336, The Code 1979, which enumerates the duties the county attorney must render to county officers, covers the services to be performed for the county public hospital board of trustees. The board of trustees may employ independent legal counsel in the exercise of their general grant of power to administer and manage the hospital.

Very truly yours,

Handwritten signature of Barbara Bennett in cursive script.

Barbara Bennett
Assistant Attorney General

BB:AJH:nay