COURTS: Witness mileage fees. Iowa Code § 622.69 (1987). Under Iowa Code § 622.69 witnesses are reimbursed for mileage actually traveled in compliance with a subpoena. The courts retain discretionary power to limit witness mileage reimbursement where the witness's "actual travel" is unreasonable or unnecessarily increases the cost of the litigation. (Osenbaugh to Short, Lee County Attorney, 1-30-89) #89-1-7(L)

January 30, 1989

Mr. Michael P. Short
Lee County Attorney
609 Blondeau Street
Keokuk, Iowa 52632

Dear Mr. Short:

We wish to acknowledge receipt of your letter of December 16, 1988, in which you ask for an interpretation of Iowa Code section 622.69 (1987). The question presented is whether under section 622.69 a witness may be reimbursed only for mileage from the point of service or for all mileage actually traveled in compliance with the subpoena. The facts are as follows:

> The Fort Madison City Attorney's Office caused a certain witness to be served for a hearing concerning a city misdemeanor charge. That witness was actually served at her place of residence in the City of Fort Madison approximately one mile from the Courthouse. The hearing was scheduled for the late morning. The witness went to her normal place of employment in Burlington on the day set for hearing and returned to Fort Madison in order to attend the hearing. Following the hearing the witness intended to return to her place of employment in the City of Burlington to complete her normal work day. The witness presented her subpoena and asked for mileage to and from Burlington.

Iowa Code section 622.69 provides:

> Witnesses shall receive ten dollars for each full day's attendance, and five dollars for each attendance less than a full day, and mileage expenses at the rate specified in section 79.9 for each mile actually traveled.

Historically the Code has granted reimbursement for mileage "actually traveled." See Iowa Code § 11326 (1939), (1935), (1931), (1927), and (1924); § 4660 (1897); § 3814 (1873); § 4153 (Revision 1860); and § 2544 (1851).

Prior decisions do not support the view that mileage reimbursement should be based upon the place of service of subpoena. The right to "have fees taxed for the attendance and mileage of witnesses does not necessarily depend upon service of subpoena." In re Estate of Hulme, 185 Iowa 1219, 1221, 171 N.W. 599, 600 (1919). Fees and mileage expenses for witnesses who appear and testify voluntarily can be granted subject to the discretion of the court, even if the witness traveled from another state. For witnesses properly subpoenaed, the court has discretion to grant fees and mileage expenses for the distance actually traveled by the witness. Perry v. Howe, 125 Iowa 415, 101 N.W. 150 (1904); Casley v. Mitchell, 121 Iowa 96, 96 N.W. 725 (1903). Witness mileage reimbursement is normally limited to travel within the boundaries of the state, although this too is subject to the discretion of the court. In re Estate of Hulme, 185 Iowa 1222, 171 N.W. 599 (1919). Thus, since a subpoena of a witness is not necessary to receive mileage reimbursement, place of service should not be used as a basis to determine mileage.

In addition, we do not believe witness mileage reimbursement should be based upon place of residence. In comparison to Iowa Code section 622.69, the federal witness fee statute specifically bases witness per diem and mileage reimbursement on the "distance necessarily traveled to and from such witness's residence." 28 U.S.C. § 1821. If the Iowa Legislature desired to determine mileage from a residence, it could have specifically stated that qualification as the federal government has done in 28 U.S.C. § 1821. Instead it used the phrase "actually traveled."

Accordingly, it is our opinion that, under Iowa Code section 622.69 witnesses are reimbursed for mileage actually traveled in compliance with the subpoena. We note that the courts retain discretionary power to limit witness mileage reimbursement where the witness's "actual travel" is unreasonable or unnecessarily increases the cost of the litigation.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

COMMUNITY CORRECTIONS: Purchase of Property. Iowa Code §§ 246.102, 246.317, 905.4(5), 905.5, 905.8. Judicial District Board of Corrections has the authority to purchase property with approval of the Department of Corrections. (Lindebak to Corbett, State Representative, 1-30-89) #89-1-6(L)

January 30, 1989

The Honorable Ron Corbett
State Representative
State Capitol
L O C A L

Dear Representative Corbett:

You have requested an opinion of the Attorney General concerning the authority of the Judicial District Department of Corrections Board. Specifically you ask whether the local district boards have the authority to use funds to purchase land without first informing or receiving the permission of the State Board of Corrections.

The local boards are established in Chapter 905. Among other duties the District Board shall:

> [a]rrange for, by contract or on such alternative basis as may be mutually acceptable, and equip suitable quarters at one or more sites in the district as may be necessary for the district department's community-based correctional program, provided that the board shall to the greatest extent feasible utilize existing facilities and shall keep capital expenditures for acquisition, renovation and repair of facilities to a minimum.

Iowa Code § 905.4(5) (1987).

Your question involves a determination of whether the statutory authority of the judicial district corrections board extends to purchase of land. We believe that this section by implication authorizes the purchase of land by the district departments. This section gives the judicial district correction board the authority to arrange for and equip suitable quarters by

contract or on an alternative basis. Thus the board has specific authority to obtain a facility to house its program.

This section further provides that the board shall "to the greatest extent feasible utilize existing facilities." The negative implication of that phrase is that a new facility can be obtained if there is no suitable existing facility. The Code further provides that the board "shall keep capital expenditures for acquisition, renovation and repair of facilities to a minimum." The word "acquisition" suggests that the board can acquire a new facility by purchase of land or buildings if another suitable alternative is not available.

It is also noteworthy that the authority given to the Director of Corrections to buy and sell real estate under Iowa Code § 246.317 gives that authority only for the use of institutions. Institutions are listed in Iowa Code § 246.102 and do not include judicial district correctional programs.

Thus, the Department of Corrections does not have clear authority to purchase land for judicial districts. Because it seems logical that it was intended that some governmental body could purchase land to implement community based programs, the best argument is for placement of that authority with the local board.

We are also of the opinion, however, that the Department of Corrections must approve the expenditures for the purchase of land. Iowa Code Section 905.5 provides:

> The county designated . . . as the administrative agent for each district department . . . shall submit that district department's budget and supporting information to the Iowa Department of Corrections in accordance with the provisions of chapter 8. The state department shall incorporate the budgets of each of the district departments into its own budget request, to be processed as described by the uniform budget, accounting and administrative procedures established by the department of management.

Iowa Code § 905.8 provides:

> The Iowa department of corrections shall provide for the allocation among judicial districts in the state of state funds appropriated for establishment, operations,

> support, and evaluation of community-based correctional programs and services. However, state funds shall not be allocated under this section to a judicial district unless the Iowa department of corrections has reviewed and approved that district department's community-based correctional program for compliance with the requirements of this chapter and the guidelines adopted under section 905.7.

It is clear that the Iowa Department of Corrections must review the budget of a district department for purchase of land in which to construct community corrections facilities.

Sincerely,

LAYNE M. LINDEBAK
Assistant Attorney General

LML:kap

APPROPRIATIONS: REVERSION OF FUNDS. Iowa Code § 8.33. Funds set aside for purchase of real estate and construction of building do not revert if binding real estate contract is entered into before close of the fiscal year. (Lindebak to Running, Representative, 1-30-89) #89-1-5(L)

January 30, 1989

The Honorable Richard Running
State Representative
Statehouse
Des Moines, IA 50319

Dear Representative Running:

This letter is in response to your letter seeking clarification of Iowa Code § 8.33 in reference to a land purchase undertaken by the Sixth Judicial District.

As you correctly identified, capital expenditures for the purchase of land which were committed and in progress prior to the end of the fiscal year are excluded from the requirement that those funds must revert to the State treasury if not spent by the end of the fiscal year.

The answer to your question turns on the interpretation of the words "committed and in progress." This section has not been interpreted by the Iowa courts.

According to your letter, the director of the Sixth Judicial District Corrections Department gave an offer to purchase to a realtor along with $37,400 for the land. The offer to purchase was contingent upon the change of zoning. The question then is whether or not this contract and payment is sufficient to indicate that the capital expenditures were committed and in progress prior to the end of the fiscal year.

Your question involves a determination whether the presence of a condition precedent in the real estate contract which would be performed after the end of the fiscal year renders the capital expenditures subject to reversion. We are of the opinion that the expenditure was committed and the purchase was in progress prior to the end of fiscal year even though the condition precedent, the zoning change, had not yet been performed. With such a case the contract is binding if the event constituting the condition precedent occurs. See Gildea v. Kapenis, 402 N.W.2d 457 (Iowa App. 1987); Khabbaz v. Swartz, 319 N.W.2d 279 (Iowa 1982). If there was a meeting of minds as to the condition precedent, the contract is binding unless the condition precedent is not performed; then there would no longer be a duty to perform. It appears from your letter that there was a meeting of minds as to the intent to seek a zoning change. Your letter indicates that the parties could not have acted on the zoning change until August, 1988. Because there appears to be a valid condition precedent, the contract to purchase the land would be binding until the failure of that condition precedent.

We must therefore conclude that the capital expenditures for the purchase of land were committed and in progress prior to the end of the fiscal year.

Sincerely,

Layne M. Lindebak
Assistant Attorney General

LML:kap

COUNTIES AND COUNTY OFFICERS; ELECTIONS: Residency of petitioners for establishment of benefited recreational lake district. 1988 Iowa Acts, ch. 1194, §§ 3 and 8; Iowa Code § 39.3(1) (1987). A petition for establishment of a benefited recreational lake district must be signed by owners of property within the proposed district who are eligible electors of the proposed district for the purpose of voting in elections for political office. (Smith to Hanson, State Representative, 1-30-89) #89-1-4(L)

January 30, 1989

The Honorable Darrell R. Hanson
State Representative
State Capitol
L O C A L

Dear Representative Hanson:

You have requested an opinion of the Attorney General concerning 1988 Iowa Acts, ch. 1194, which created a new Iowa Code ch. 357E, providing for the establishment and dissolution of benefited recreational lake districts. The Act requires that a determination whether to establish such a district be made by the county board of supervisors after hearing on a petition requesting establishment of a district.

Section 3 of the Act states in pertinent part that the petition must be:

> . . . the petition of twenty-five percent of the resident property owners in a proposed district if the assessed valuation of the property owned by the petitioners represents at least twenty-five percent of the total assessed value of the proposed district . . .

You ask whether the word "resident" means petitioners must be residents for voting purposes. Neither the word "resident" nor the term "resident property owners" is defined in the Act. The term "resident property owners" appears in several similar statutes authorizing petitions to request establishment of various types of districts. Examples include Iowa Code § 357.1 (benefited water district), § 357C.1 (benefited street lighting district), and § 357D.2 (benefited law enforcement district).

More specific language relating to residency of petitioners appears in Iowa Code § 358.2, authorizing proceedings for establishment of a sanitary district on petition of "twenty-five or more eligible electors resident within the limits of any proposed sanitary district." The petition in chapters 357, 357C, 357D, 358 and new chapter 357E triggers proceedings that ultimately include an election, e.g., to approve the construction and financing of a proposed improvement. These chapters uniformly limit the election franchise to "qualified electors" residing in the district at the time of the election. See 1988 Iowa Acts, ch. 1194, § 8; Iowa Code §§ 357.12, 357C.7, 357D.8, 358.7. The parallels between the petition and election provisions in these chapters support an inference that the term "resident property owners" was intended to be a short-hand variant of the similar language in § 358.2 requiring that a petition be signed by eligible electors resident within the proposed district.

Similarly, Iowa Code §§ 331.203, .204 and .207 were amended by 1988 Iowa Acts, ch. 1119, to be consistent with Iowa Code § 331.306, which provides that voter petitions authorized by chapter 331 are valid if signed by eligible electors rather than qualified electors. The term "eligible elector" as defined by Iowa Code § 39.3(1) means a person who possesses all of the qualifications necessary to entitle the person to be registered to vote, whether or not the person is in fact so registered.

In contrast, § 357A.2 requires a petition for establishment of a rural water district to be signed by "the owners of at least fifty percent of all land lying within the outside perimeter of the area designated for inclusion in the proposed district . . ." The lack of a residency requirement for a rural water district petition may be related to the lack of any election provisions in chapter 357A.

Absent indicia of a contrary intent, we conclude that 1988 Iowa Acts, ch. 1194, § 3 requires that a petition requesting that the board of supervisors establish a benefited recreational lake district be signed by resident eligible electors.[1] We further

---

[1]In Pittsburgh-Des Moines Steel Co. v. Town of Clive, 249 Iowa 1346, 91 N.W.2d 602 (1958), the Iowa Supreme Court held that a Pennsylvania Corporation was a "resident property owner" authorized by former Iowa Code § 362.32 to petition a court of equity for severance of its real estate from municipal corporate limits. Construing the statutory residency requirement liberally, the court avoided the question whether the statute could deprive the corporate property owner of access to court.

(continued...)

conclude that the test for determining residency in the district is the same test that is used to determine residency for voting in elections for political office. Factors relevant to determination of residency for voting purposes are discussed in 1980 Op.Att'yGen. 169, a copy of which is enclosed.

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

---

[1](...continued)
However, a statutory residency limitation on eligibility to petition for establishment of a district does not deprive non-resident property owners of the right to appear and present information at the statutorily required hearing, and to seek judicial review if they are aggrieved by action of the board of supervisors. The power of state legislatures to create assessment, improvement, benefit, or special taxing districts has been upheld. Such enabling legislation often provides for commencement of proceedings to establish a district on petition of a limited class of persons. 14 McQuillin, Municipal Corporations § 38.47 (1987 Rev. Vol.); see also 2 McQuillin, Municipal Corporations § 7.33.10 (1988 Rev. Vol.) (commencement of annexation proceeding by petition of electors).

COUNTIES AND COUNTY OFFICERS: Conservation board; multi-county railroad right of way. 16 U.S.C. § 1247(d) (1987); Iowa Const., art. VII, § 1; Iowa Code §§ 111A.4, 111A.6 (as amended by 1988 Iowa Acts, ch. 1216, § 45) 111A.7, 331.427 (1987); Iowa Code Supp. § 111A.5 (1987), as amended by 1988 Iowa Acts, ch. 1193. A county conservation board is authorized to assume responsibility for liability arising from transfer or use of a multi-county railroad right of way acquired with approval of the Interstate Commerce Commission pursuant to 16 U.S.C. § 1247(d), but the conservation board should carefully negotiate the specific terms of any indemnification agreement with the transferor railroad. Approval of the Iowa Natural Resource Commission is required if the cost of acquisition exceeds twenty-five thousand dollars. Specific approval of the county board of supervisors is not required. But the board of supervisors has effective control of financing to the extent that acquisition is dependent on appropriations from the county general fund in excess of conservation revenues. The need for inter-agency agreements in acquisition, development and management of a multi-county recreational trail depends on the type and extent of cooperation needed from other units of government. (Smith to Siegrist, State Representative, 1-30-89) #89-1-3(L)

January 30, 1989

The Honorable Brent Siegrist
State Representative
State Capitol
L O C A L

Dear Representative Siegrist:

You have requested an opinion of the Attorney General concerning the authority of the Pottawattamie County Conservation Board to acquire and use a multi-county railroad right of way for a recreational trail with approval of the Interstate Commerce Commission pursuant to the National Trails System Act.

From your request we understand that the county conservation board is interested in acquiring a 64-mile rail corridor which is the subject of an abandonment proceeding pending before the Interstate Commerce Commission. Section 8(d) of the National Trails System Act (16 U.S.C. § 1247(d)) enables "banking" of a rail corridor proposed to be abandoned. The federal statute authorizes the Interstate Commerce Commission to approve transfer of the rail right of way for interim recreational use subject to conditions stated in the statute as follows:

> If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of

> such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

The Interstate Commerce Commission has adopted rules to implement 16 U.S.C. § 1247(d). The Commission's rules at 49 C.F.R. § 1152.29 require that a "Statement of Willingness to Assume Financial Responsibility" be filed by an organization which wishes to acquire a rail right of way for trail use under the provisions of the federal rail banking statute. The statement signed by the Executive Director of the Pottawattamie County Conservation Board attached to your opinion request is in the form prescribed by the Commission's rules.

Your request poses four specific questions concerning the authority of the county conservation board to assume the responsibility required by the federal statute and rule. We paraphrase your questions as follows:

> 1. Does a county conservation board have authority to assume responsibility required by 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 as a condition of approval of acquisition of a multi-county railroad right of way?
>
> 2. If the county conservation board assumes responsibilities required by federal law as a condition of acquiring a rail right of way for interim trail use, could any of the liabilities become liabilities of the county?
>
> 3. Does the county board of supervisors or Iowa Natural Resource Commission have authority over such an acquisition?
>
> 4. If the acquisition is legal, will a 28E agreement or other legal document between all parties be required?

Responding to your first two questions, we note preliminarily that Iowa Code § 111A.4(2) (1987) expressly authorizes a county conservation board to acquire real estate located outside the county. The statute expressly authorizes such acquisition by a variety of means, i.e., "by gift, purchase, lease, agreement, exchange, or otherwise, in fee or with conditions . . . ." Additionally, § 111A.4(4) expressly authorizes the county conservation board to "plan, develop, preserve, administer and maintain" all areas acquired. Section 111A.4 includes a broad statement of purposes for which county conservation boards may acquire and manage real estate, including "other conservation and recreation purposes." Acquisition of a recreational trail would be included in the broad statutory authorization. Thus, the location of part of the proposed trail outside the county does not affect the county conservation board's authority to assume responsibility for liability arising from transfer or use of the right of way.

Whenever a county conservation board acquires any real estate, within or without the county, the county thereby acquires potential liability arising from use of the real estate. Liability of the county in tort is limited procedurally and substantively by the Iowa Municipal Tort Claims Act codified as Iowa Code ch. 613A. If liability insurance purchased pursuant to Iowa Code § 613A.7 were insufficient to pay a settlement or judgment entered under chapter 613A, the board of supervisors would be required by § 613A.10 to budget a sufficient amount and would be authorized to levy a tax to obtain the budgeted amount.

The Interstate Commerce Commission's rules recognize that a transferee may be immune from liability. Thus, the rules require a prospective transferee to agree to indemnify the railroad against potential liability arising from "transfer or use" of the right of way.

State and county agencies should be cautious in entering indemnification agreements which, if not carefully limited, could result in assumption of liabilities of others.[1] However, filing a "Statement of Willingness to Assume Financial Responsibility" with the Interstate Commerce Commission does not impose any liability on the county; it is only a preliminary step in a process which may lead to negotiation of a transfer agreement

---

[1]Assuming the applicability of Section 1 of Article VII of the Iowa Constitution to political subdivisions, an imprudent indemnity agreement might also be unconstitutional. See Chicago & N.W. Transp. Co. v. Hurst Excavating, Inc., 498 F.Supp. 1, 4 (N.D. Iowa 1980); 1938 Op.Att'yGen. 80.

with the railroad company seeking to abandon the right of way. Indemnification provisions of the transfer agreement should be carefully negotiated to avoid assuming liabilities of the railroad.

The terms "transfer" and "use" are not defined in the federal statute or rules. Nor do they appear to have been judicially interpreted in any reported opinion. Their lack of definition leaves room for negotiation of the scope of indemnification. For example, a potential transferee should insist that indemnification expressly exclude liability arising from any hazardous condition existing before the transfer or from disposal of hazardous waste on the right-of-way property before transfer. If the railroad used hazardous waste for ballast, knowingly or unknowingly, liability for abatement of the hazard would not arise from use of the right of way as a trail or from transfer of the right of way. But a subsequent dispute over the scope of indemnification could be avoided by an express exclusion for pre-existing hazardous conditions and hazardous waste disposal.

Landowners in several jurisdictions have sued unsuccessfully to invalidate rail-to-trail conversions as violative of the takings clause of the Fifth Amendment of the United States Constitution because such conversions indefinitely postpone reversion rights, e.g., Glosemeyer v. Missouri-Kansas-Texas R. Co., 685 F.Supp. 1108 (E.D. Mo. 1988) (appeal pending). Thus, title litigation may arise after acquisition of a right-of-way interest pursuant to an order of the Interstate Commerce Commission approving a rail-to-trail transfer. However, we note that railroad corporations traditionally have refused to warrant title; they convey by quit claim deed. Therefore, the burden of defense against adverse title claims would fall on the transferee regardless of indemnification unless the railroad chose to participate in the litigation.

In response to your third question, Iowa Code § 111A.4(3) requires conservation boards to obtain approval of the Iowa Natural Resource Commission for any proposed acquisition or development if the cost exceeds twenty-five thousand dollars. The county board of supervisors does not have direct authority to approve or disapprove acquisitions by the county conservation board. The express powers of the board of supervisors over the conservation board include power to appoint its members, limited power of removal for cause, and limited control over the reserve fund created by Iowa Code § 111A.6, as amended by 1988 Iowa Acts, ch. 1216, § 45. Section 111A.6 provides that annually the board of supervisors must appropriate to the conservation board and credit to the reserve fund a combined amount which shall not be less than the revenue from specified conservation sources. However, § 331.427 vests in the board of supervisors the power to

decide whether to appropriate from the county general fund amounts in addition to the minimum required by § 111A.6. Thus, through the county budget process the board of supervisors exercises a degree of control over acquisition and development of real estate for county conservation purposes.

Your fourth question concerns the need for inter-agency agreements. We have explained that a county conservation board may acquire and manage real estate located in other counties. The need for inter-agency agreements pursuant to Iowa Code ch. 28E or § 111A.7 would depend on the need for cooperation from conservation boards or other units of government in development or management of the multi-county trail. For example, agreements under chapter 28E would be prudent to specify the conditions of any law enforcement assistance provided by other units of government for a multi-county trail corridor.

In conclusion, it is our opinion that a county conservation board is authorized to assume responsibility for liability arising from transfer or use of a multi-county railroad right of way acquired with approval of the Interstate Commerce Commission pursuant to 16 U.S.C. § 1247(d), but that the conservation board should carefully negotiate the specific terms of any indemnification agreement with the transferor railroad. Approval of the Iowa Natural Resource Commission is required if the cost of acquisition exceeds twenty-five thousand dollars. Specific approval of the county board of supervisors is not required. But the board of supervisors has effective control of financing to the extent that acquisition is dependent on appropriations from the county general fund in excess of conservation revenues. The need for inter-agency agreements in the acquisition, development and management of a multi-county recreational trail depends on the type and extent of cooperation needed from other units of government.

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

MUNICIPALITIES: Administrative Agencies; Airports. Iowa Code ch. 330 (1987); Iowa Code §§ 330.17, 330.23, 364.2(1). Airport commissions created pursuant to Iowa Code chapter 330 may only be dissolved pursuant to the election provisions of § 330.17. Recently adopted § 330.23 (1988 Iowa Acts ch. 1229, § 1) does not supersede the election provisions of § 330.17. (Krogmeier to Rensink, 1-26-89) #89-1-2(L)

January 26, 1989

Darrel W. Rensink, Director
Iowa Department of Transportation
800 Lincoln Way
Ames, Iowa
L O C A L

Dear Mr. Rensink:

You have requested an opinion of the Attorney General concerning the effect of new Iowa Code § 330.23 adopted by the 1988 Session of the 72nd General Assembly. See 1988 Iowa Acts ch. 1229, § 1. The section is as follows:

> 330.23 NO RESTRICTION ON ADMINISTRATIVE AGENCIES.
> This chapter does not prohibit a city from establishing an administrative agency pursuant to chapter 392 to manage and control all or part of its airport in lieu of an airport commission under this chapter. A city may abolish an airport commission and provide for the management and control of its airport by an administrative agency.

Iowa Code § 330.23 may have been adopted in response to an opinion of this office issued June 27, 1986, which concluded that a municipality did not have the authority to establish an administrative agency to manage and control its airport other than pursuant to chapter 330. See 1986 Op.Att'yGen. 95.

Iowa Code ch. 330 is entitled "Airports" and generally provides for the creation and establishment of airport commissions and the operation of airports by political subdivisions through airport commissions created pursuant to the chapter. Section 330.17 provides the method by which airport commissions are created and abolished. It is as follows:

> The council of any city or county which owns or acquires an airport may, and upon the council's receipt of a valid petition as provided in section 362.4, or receipt of a petition by the board of supervisors as provided in section 331.306 shall, at a regular city election or a general election if one is to be held within sixty days from the filing of the petition, or otherwise at a special election called for that purpose, submit to the voters the question as to whether the management and control of the airport shall be placed in an airport commission. If a majority of the voters favors placing the management and control of the airport in an airport commission, the commission shall be established as provided in this chapter.
>
> The management and control of an airport by an airport commission may be ended in the same manner. If a majority of the voters does not favor continuing the management and control of the airport in an airport commission, the commission shall stand abolished sixty days from and after the date of the election, and the power to maintain and operate the airport shall revert to the city or county. (Emphasis added).

The specific question you ask is whether § 330.23 supersedes § 330.17 and allows cities to abolish airport commissions in a manner other than by an election as provided for in § 330.17. A previous opinion of this office determined that the only means of creating or abolishing an airport commission was by the election provided for in § 330.17. 1978 Op.Att'yGen. 551. We believe that opinion to be a correct statement of the law in effect at the time the opinion was issued. For the reasons set forth herein, we are not of the opinion that the adoption of § 330.23 in 1988 amends or supersedes previously existing law concerning the abolishing of airport commissions.

In interpreting statutes, an attempt is made to reconcile two differing statutes and interpret them in a manner to avoid a conflict. If there is more than one statute pertaining to the same subject, or closely allied subjects, the statutes are in pari materia and must be construed, considered and examined in light of their common purposes and intent. Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co., 165 N.W.2d 771 (Iowa 1969); State v. Harrison, 325 N.W.2d 770 (Iowa Appeals, 1982). When one statute deals with a subject in a general manner and another in a

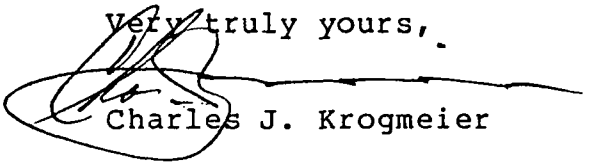
more detailed way, the two should be harmonized if possible. Northern Natural Gas Co. v. Frost, 205 N.W.2d 692 (Iowa 1973). A special statute prevails over a general provision only if the two cannot be reconciled. Iowa Code § 4.7; State v. Farley, 351 N.W.2d 537 (Iowa 1984).

Section 330.23 provides in a general manner for the abolition of airport commissions and allows for the management and control of airports by other agencies. It does not prescribe the means by which an airport commission is abolished. That is left to § 330.17. The two statutes are not in conflict and when read in pari materia prescribe both the authority for a city to operate an airport either by commission or by other administrative agencies pursuant to chapter 392 and provide the means by which an airport commission is created and abolished.

The legislature is presumed to have been aware of the existence of § 330.17 and its provisions for the creation and abolition of airport commissions at the time it adopted § 330.23. State v. Rauhauser, 272 N.W.2d 432 (Iowa 1978). Repeal of statutes by implication is not favored and will not be found unless the intent to repeal is clear and unmistakably appears from the language used. Peters v. Iowa Employment Security Commission, 235 N.W.2d 306 (1975). To constitute an implicit repeal, the new statute must cover the same subject matter as the old statute and the provisions of the statutes must be irreconcilably repugnant. State v. Rauhauser, 272 N.W.2d 432, 434 (Iowa 1978). Had it chosen to do so, the legislature could have amended § 330.17 so as to provide a different means for the abolition of an airport commission other that provided for in § 330.17. The legislature did not make that choice.

It is our opinion that § 330.23 was intended to make it clear that a city could establish an airport and operate an airport by a means other than that prescribed in chapter 330. The second sentence of § 330.23 is an attempt by the legislature to make it clear that a city may abolish an airport commission. However, § 330.23 does not prescribe the means by which an airport commission is to be abolished by a city. The legislature has chosen to vest this authority in the electors of a city and the city council is without power to terminate an airport commission without the approval of the electors. See § 364.2(1). Therefore, it is our opinion that § 330.23 (Acts of the 72nd G.A., 1988 Sess., ch. 1229) does not amend or supersede the provisions contained in § 330.17.

Very truly yours,



Charles J. Krogmeier

PAROLE: Interstate Compact Directors. Iowa Code §§ 907A.1, 907A.2, 906.1, 906.11, 905.1. The Iowa Probation and Parole Compact Director may coordinate in-state placement of persons paroled out-of-state without amendment of the parole by the Iowa Board of Parole. (McGrane to Angrick, Citizen's Aide/Ombudsman, 2-28-89) #89-2-7(L)

February 28, 1989

William P. Angrick II
Citizens' Aide/Ombudsman
515 East 12th Street
Des Moines, IA 50319

Dear Mr. Angrick:

You have requested an opinion on the following questions:

> 1. Does the Iowa Probation and Parole Compact Director, established in Iowa Code Ch. 907A (1987), have the authority to place parolees returned from states to which the Iowa Board of Parole has granted parole, with local departments of correctional services for parole supervision?
>
> 2. Can such a change be instituted without the Board amending the parole specifically to the State of Iowa?

Iowa Code ch. 907A (1987) is the Interstate Probation and Parole Compact. In the part most pertinent here it provides:

> The contracting states solemnly agree:
>
> 1. That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this compact, to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact, while on probation or parole....

Certain conditions must be met for the application of the statute.

The authority for the Interstate Compact Director is in Iowa Code § 907A.1(5) and § 907A.2. Section 907A.1(5) states:

> That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

Section 907A.2 (1987) provides in relevant part:

> [T]he person designated pursuant to section 907A.1, subsection 5, or that person's designee, shall first determine that sufficient information has been provided to permit the effective establishment of a case plan for the client.
>
> * * *
>
> If such information exists, but has not been provided, the person designated pursuant to section 907A.1, or that person's designee, may either refuse to accept the transfer request until the information has been provided or delay the acceptance until this state has obtained the information.

The Director, briefly, is to coordinate rules with other states and administer the transfer of persons into this state under the compact. He also coordinates paroles outside of the state. See Iowa Admin. Code 291-46.1-46.4; 615-5.2.

The Board of Parole has specific authority to parole persons outside of the state according to rules it may impose. Iowa Code § 906.12 (1987) provides:

> The parole may be to a place outside the state when the board of parole shall determine it to be to the best interest of the state and the prisoner, under such rules as the board of parole may impose.

The only rule the Board has promulgated on this topic provides that out-of-state paroles shall be in accord with the interstate

parole and probation compact. Iowa Admin. Code 615-5.2. No other statutes or rules speak to the Board authority to place parolees in this context.

The placement of a parolee is a condition of parole. The conditions of parole may be imposed by the Board, see Iowa Admin. Code 615-6.2, but generally and primarily the conditions are set by the supervising authority. The supervising authority is the local judicial district department of correctional services. See Iowa Code § 905.2 (1987). Section 905.1(2) provides

> Community-based correctional program means correctional programs and services designed to supervise and assist individuals who are charged with or have been convicted of a felony, an aggravated misdemeanor or a serious misdemeanor, or who are on probation or parole in lieu of or as a result of a sentence of incarceration imposed upon conviction of any of these offenses, or who are contracted to the district department for supervision and housing while on work release.

The parolee's release is ". . .subject to supervision by the district department of correctional services, and is on conditions imposed by the district department." Iowa Code § 906.1. Section 906.11 provides

> A person released on parole shall be assigned to a parole officer by the director of the judicial district department of correctional services. Both the person and the person's parole officer shall be furnished in writing with the conditions of parole including a copy of the plan of restitution and the restitution plan of payment, if any, and the regulations which the person will be required to observe. The parole officer shall explain these conditions and regulations to the person, and supervise, assist, and counsel the person during the term of the person's parole.

See also Iowa Admin. Code 615-6.2. Iowa Admin. Code Section 291-45.2(1) provides standard conditions of parole and section 291-45.2(2) provides the procedure for special conditions and adding and deleting conditions. The supervising authority is allowed to alter these conditions, and there is no requirement that the conditions be cleared with the Board. See, e.g., Iowa Code § 907.6 (1987) (conditions of probation subject to approval of the court). It thus appears that a person paroled out-of-state can be reassigned in-state, that is, the parole condition relating to the parole site can be changed.

The question then is whether this can be done by the compact director. There is no reason that the compact director cannot coordinate the change in placement. The director is in the best position and there is nothing in the statutes or rules to preclude the director's participation. But it will only be participation in the decision, since the authority to change the "condition of parole" is in the supervising persons, who have to agree to change the conditions of parole; the compact director does not have the actual authority to do so.

We conclude that the compact director can place persons who return from out-of-state parole. However this is done through the supervising authority who must approve any change in the condition of parole. The relevant statutes allow conditions of parole to be changed without a reconsideration of the parole by the Parole Board.

Sincerely,

THOMAS D. McGRANE
Assistant Attorney General

COUNTIES: County Hospital; Constitutional Law. Iowa Const. Art. III, § 31; Iowa Code § 347.14(10). A county hospital board of trustees has the authority to determine that expending hospital sums to recruit health care workers is necessary for the management of the hospital. A program that provides scholarship grants to persons in health care programs who will then work at the hospital may be found to serve a public purpose required by Art. III, § 31 of the Iowa Constitution. However, the board may not transfer assets to a foundation if the effect is to deprive future boards of trustees of control over hospital assets. (McGuire to Scieszinski, 2-28-89) #89-2-6(L)

February 28, 1989

Annette J. Scieszinski
Monroe County Attorney
One Benton Avenue East
P.O. Box 576
Albia, IA 52531

Dear Ms. Scieszinski:

You had requested an opinion from this office concerning a proposed project of the Monroe County Hospital. The hospital is proposing to establish a foundation which would utilize investment income to provide scholarship grants to students in health care programs. These grant recipients will then work for the hospital following completion of their program or pay back the money with interest.

Your specific question to us is:

> Does a county hospital's transfer of its investments, or income therefrom to a tax-exempt private foundation, of which the hospital is the only member, for the limited purpose of providing scholarship grants to students pursuing degrees in health-care fields with the promise that the student will provide a certain amount of post-degree, compensated service to the hospital, exceed the hospital's authority, violate the hospital's own tax-exempt status, run counter to the tax-supported public nature of the institution, or otherwise violate Iowa law?

1. You ask whether the hospital has the authority to undertake such a proposal. It would appear that the hospital board of trustees has the authority to provide scholarships as set forth above.

The hospital board of trustees is governed by Iowa Code Ch. 347 which gives the board a wide range of discretion in operating a Ch. 347 hospital. Iowa Code § 347.14(10) allows the board to "do all things necessary for the management, control and government of said hospital...."

Two prior opinions of this office concluded that it was within the authority of the board of trustees to expend funds to recruit and retain physicians to utilize the county hospital facilities. An opinion in 1979 determined that the board could "expend hospital sums for the solicitation of doctors to engage in private practice in the county...." 1980 Op.Att'yGen. 388, 391.

Similarly, a 1981 opinion determined that the board had the authority to develop a medical office building on hospital grounds and lease office space to physicians as an inducement to attract physicians to practice in the county. 1982 Op.Att'yGen. 180 (#81-7-19(L)).

Both of these opinions found that the expansive authority of the board of trustees as stated in Ch. 347 allowed for these actions.

There is nothing in Ch. 347 that would appear to limit the ability to solicit health care professionals to only recruiting physicians. Indeed, hospitals cannot operate without ancillary health care professionals. Therefore, it appears that the board of trustees does have the authority to expend hospital sums to recruit other health care workers to provide service to the hospital, if the board concludes that this is necessary for the management of the hospital.

2. You also ask whether these expenditures run counter to the public nature of the institution. What it appears you are asking is whether such expenditures are for a public purpose as required by Art. III, § 31 of the Iowa Constitution.

Article III, § 31 states:

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

It must, therefore, be determined whether expenditure of county funds to grant scholarships as set out in your proposal are for a public purpose.

The Iowa Supreme Court has stated that the concept of public purpose is to be given flexible and expansive scope in order "to meet the challenges of increasingly complex, social, economic, and technological conditions." John R. Grubb, Inc. v. Iowa Housing Finance Authority, 255 N.W.2d 89, 93 (Iowa 1977).

In that case, the court found that providing loans to housing sponsors by a state agency to purchase or rehabilitate housing for low-income and other specified families served a public purpose. 255 N.W.2d at 95. The court looked to the legislative findings concerning the problem of finding safe, sanitary and affordable housing and noted that the legislature declared that these were public purposes "for the benefit of the people of the State of Iowa." 255 N.W.2d at 93. The fact that these loans may be forgiven did not render this plan unconstitutional as having a clearly private purpose. Id.

A recent Attorney General Opinion addressed this issue of determining a public purpose and stated the importance of the governmental entity making findings which adequately demonstrate that the particular program furthers the public interest. 1986 Op.Att'yGen. 113, 119. If the board of trustees makes adequate findings, we believe a court would find that the public need for adequate and accessible health care could establish that the proposed program serves a public purpose.

3. While it appears that the hospital board has the authority to provide the scholarship grants, the creation of a foundation to administer and fund the grants presents problems.

In creating the foundation, the hospital board is turning over specified hospital assets and the control of those assets to the foundation for the purpose of scholarships. This would result in precluding future boards from deciding how that income is to be used.

The general rule of law is that, absent an express statutory provision to the contrary, a local govemental body may not bind its successors in matters that are essentially legislative or governmental in nature. See Sampson v. City of Cedar Falls, 231 N.W.2d 609 (Iowa 1975); 1984 Op.Att'yGen. 56 (#86-6-4(L)).

It is clear that the control of hospital assets and the determination of expenditures are functions of the hospital board. See Iowa Code § 347.13; 347.14. These determinations constitute the exercise of a governmental function. As such, future boards can not be bound in such a manner to restrict them from controlling the assets put in the foundation.

In conclusion, it is the opinion of this office that the hospital board would have the authority to establish the scholarship program and the program may be found by the board to serve a public purpose. However, the board may not transfer assets to a foundation if the effect is to deprive future boards of trustees of control over hospital assets.

Sincerely,

Maureen McGuire

MAUREEN MCGUIRE
Assistant Attorney General

MM/bjr

MILITARY; PUBLIC EMPLOYEES: military leave. Iowa Code §§ 29A.9, 29A.28, and 29A.43. Employee of State, or of subdivision of State, is entitled to take either military leave (under Iowa Code § 29A.28) or compensatory time on days when military duty interferes with scheduled work time. Employee should not return to work after earning a full day's pay from federal sources. Employer may attempt to schedule work days so as to avoid conflicts with military duty. (Galenbeck to Mann, State Senator, and Stroble, 2-16-89) #89-2-5(L)

February 16, 1989

The Honorable Thomas Mann, Jr.
State Senator
State Capitol
L O C A L

Lieutenant Colonel Edward Strobl
Office of the Advocate General
7700 Northwest Beaver Drive
Johnston, Iowa 50131-1902

Gentlemen:

You have each requested an opinion of the Attorney General relating to the provisions of Iowa Code chapter 29A (1989), and particularly section 29A.28. The first request arises from the circumstance where an employee of the state is being required to work a six hour shift during the same day he has performed eight hours of duty in the Iowa National Guard. The second circumstance concerns the Polk County Sheriff's department, which arranges its employees' non-working days to coincide with dates the employees are scheduled to be on national guard or military reserve duty. Each circumstance will be examined below.

I should note, preliminarily, that numerous opinions of this office have reviewed and applied the provisions of Iowa Code chapter 29A (1989). For that reason, resolution of the questions presented is accomplished through reference to prior opinions of the Attorney General.

I.

The first factual situation involves an Iowa department of corrections employee who works Sunday through Thursday, 4:00 p.m. to midnight. On weekends when he is required to attend Iowa National Guard drills, the employee is nevertheless expected to report to work on Sundays -- after his Iowa National Guard duty has been completed. On these occasions the employee begins work about 6:00 p.m. and continues until midnight. He receives no reduction of pay for these Sundays. However, on each day he works a reduced time period (6:00 p.m. to midnight), a full day of "military leave" is attributed to the employee on the employer's personnel records.

Iowa Code § 29A.28 (1989) provides as follows:

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

Definitions of "active state service" and "federal service" are found at Iowa Code sections 29A.1(5) and 29A.1(6) respectively. Weekend training (or "drills") which the employee attends constitute "federal service." See Op.Att'yGen. #80-11-5(L), page 7.

Prior opinions of this office have confirmed the applicability of leave provisions found in Iowa Code § 29A.28 to weekend duty or "drills."

> Ordinarily, military training requirements, such as drills and rifle marksmanship, may be met through attendance during evening hours or weekends, and most employees may require paid leave only during annual summer encampments. When a public employee works shifts that require duty during evening or weekend hours, the leave provisions of § 29A.28, the Code 1979, may take on added significance. The consistent interpretation which best effectuates the legislative intent to promote military service while protecting employees who offer such service, requires that employees be entitled to 30 days paid leave regardless of when that leave is taken. Thus, 1978 Op. Atty. Gen. 608 specifically disapproved a municipality's plan to allow police department employees leave for summer training encampments, while not permitting leave for weekend service which conflicts with weekend patrol shifts. As long as a public employee is ordered by the proper authority to duty or training which can be classified as "active state service" or "federal service", that employee is entitled to leave without loss of pay from his or her employer for the first 30 days of such service in a year.

Op.Att'yGen. #80-11-5(L).

Thus, when the employee attends a weekend drill that occurs on a scheduled work day, the employee is entitled to the benefits of Iowa Code § 29A.28 (1989) -- specifically, up to 30 days of leave without loss of pay, benefits, or status. See generally, Op.Att'yGen. #83-4-7(L) (discussion of meaning of "loss of status"). A day of such leave covers a twenty-four hour period during which the employee is not required to report for work at his civilian job.

Another provision of the Iowa Code applies to the facts described: Iowa Code § 29A.9 provides in part:

> A state employee shall take either a full day's leave or eight hours of compensatory time on any day in which the state employee receives a full day's pay from federal sources for national guard duty.

This provision requires the employee in question to take a full day's leave -- or a full eight hours of compensatory time -- on each date he receives a full day's salary from federal sources for his drill activities. Its effect is to assure that an employee does not attempt to work more than one eight-hour job per day. A full day's pay from federal sources precludes the employee from working on his state job during the twenty-four hour period for which the federal pay was received.

In light of the Iowa Code sections noted above, the department of corrections employee should take a full day's leave of absence (or compensatory time) on Iowa National Guard "drill" dates which conflict with his scheduled days of work for the state. On such days, the employee should not return to his state job during the twenty-four hour period for which he received National Guard pay from federal sources.

II.

The second factual circumstance concerns a policy of the Polk County Sheriff's department. That policy requires employees who are assigned to a division which operates seven days per week and who also serve in a national guard or military reserve unit to provide the department, in advance on a quarterly basis, a schedule of upcoming drill dates. The policy then states that monthly drill dates will then be scheduled on employees' days off. See Exhibit A hereto, a copy "Polk County Jail Policy and Procedure #312."

The question presented about this policy is whether it violates Iowa Code § 29.28 (1989). Does the policy deprive employees of the leave benefits to which they are entitled under § 29.28?

Two prior opinions of this office have responded to the question now presented. Op.Att'yGen. #80-11-5(L) notes as follows:

> 1974 Op.Att'yGen. 31 concluded that it would not be discriminatory for a public employer to require that an employee furnish it with a schedule of military training meetings which the employee plans to attend, so that the employer may determine the most efficient schedule of duty, i.e., by attempting to schedule weekend or evening shift work by an employee with military obligations to take place when no military duty or training is scheduled, as long as there is no diminution in compensation to the employee. 1974

> Op.Att'yGen. at 33. If such a schedule is not possible, however, the employee remains entitled to military leave, the first 30 days of which are to be compensated.

The policy established by the Polk County Sheriff's department appears to be no different than the policy reviewed and accepted in 1974 Op.Att'yGen. 31. That 1974 opinion was cited with approval in Op.Att'yGen. #80-11-5(L). Furthermore, no material statutory revision of Iowa Code §§ 29A.28 or 29A.43 has occurred which should prompt reversal of the opinions. We, therefore, find the Polk County Sheriff's department procedure enumerated as #312 to be in compliance with the provisions of Iowa Code chapter 29A.

Sincerely,

Scott M. Galenbeck by EMO

SCOTT M. GALENBECK
Assistant Attorney General

SMG/lm

POLK COUNTY SHERIFF'S DEPARTMENT
BOB E. RICE, Sheriff

Polk County Jail
110 6th Avenue
Des Moines, Iowa 50308

POLK COUNTY JAIL POLICY AND PROCEDURE

PCJ NUMBER	PAGES
#312	1 of 2

RELATED ACA & IOWA JAIL STANDARDS

CHAPTER:	SUBJECT
PERSONNEL	MILITARY LEAVE OF ABSENCE

I. PURPOSE:

THE PURPOSE OF THIS POLICY IS TO COOPERATE WITH EMPLOYEES OF RESERVE MILITARY AND NATIONAL GUARD COMPONENTS WHILE MAINTAINING MAXIMUM OPERATING EFFICIENCY OF THE DEPARTMENT.

II. POLICY:

REALIZING THE IMPORTANT ROLE OF RESERVE MILITARY AND NATIONAL GUARD COMPONENTS IN NATIONAL DEFENSE, POLK COUNTY WILL COOPERATE FULLY WITH MEMBERS ACTIVE IN THESE UNITS. WORK SCHEDULES WILL BE ADJUSTED SO THE MEMBER CAN ATTEND REQUIRED MILITARY SERVICE WHILE A SUFFICIENT WORKFORCE IS MAINTAINED TO FULFILL THE VITAL DEPARTMENT FUNCTIONS.

III. PROCEDURES:

A. ANNUAL TRAINING:

1. ALL MEMBERS OF RESERVE AND NATIONAL GUARD UNITS WILL SUBMIT THEIR SCHEDULE FOR ANNUAL TRAINING AT THE EARLIEST POSSIBLE DATE. THIS SHOULD BE NO LATER THAN FOUR (4) MONTHS PRIOR TO THE TIME OF THE ANNUAL TRAINING. ORDERS SHALL BE SUBMITTED TO THE MEMBER'S COMMANDING OFFICER WITHIN 45 DAYS OF THE ANNUAL TRAINING.

2. THE MEMBER'S COMMANDING OFFICER SHALL SCHEDULE THE WORKFORCE TO ALLOW THE MEMBER TO ATTEND THE NORMAL TWO (2) WEEK TRAINING PERIOD.

3. MEMBERS REQUIRED TO ATTEND AN ADDITIONAL TWO (2) WEEK TRAINING PERIOD MUST SUBMIT ORDERS FROM A MILITARY AUTHORITY IN COMMAND OF THE NEXT HIGHEST MILITARY ORGANIZATION TO WHICH THE MEMBER IS ASSIGNED. (EXAMPLE: IF THE MEMBER IS ASSIGNED TO A COMPANY LEVEL UNIT THE ORDER MUST COME FROM THE BATTALION COMMANDING AUTHORITY.) ORDERS SHOULD OUTLINE THE NEED FOR TRAINING.

4. MEMBERS REQUIRED TO ATTEND ANNUAL TRAINING FOR A PERIOD LONGER THAN TWO (2) WEEKS MUST SUBMIT ORDERS FROM A

EXHIBIT
A

MILITARY AUTHORITY IN COMMAND OF THE NEXT HIGHEST MILITARY ORGANIZATION TO WHICH THE MEMBER IS ASSIGNED. THE ORDERS SHOULD SPECIFY THE TIME REQUIRED.

B. MONTHLY TRAINING:

1. MEMBERS ASSIGNED TO A DIVISION THAT OPERATES SEVEN (7) DAYS A WEEK SHALL SUBMIT A LIST OF THEIR MONTHLY DRILL DATES FROM THE UNIT ASSIGNED BY SEPTEMBER 1ST OF EACH YEAR. THE DRILL DATES SHOULD BE FOR THE ENTIRE MILITARY FISCAL YEAR (OCTOBER 1ST TO OCTOBER 1ST) ANY CHANGE IN MONTHLY DRILL DATES SHOULD BE SUBMITTED AT THE EARLIEST POSSIBLE DATE AND NOT LESS THAN ONE (1) MONTH PRIOR TO THE ACTUAL DRILL. THE MONTHLY DRILL DATES SHALL BE SUBMITTED TO THE MEMBER'S COMMANDING OFFICER. SCHEDULES FOR ALL EMPLOYEES WILL BE PREPARED AND POSTED AT LEAST FOUR (4) MONTHS IN ADVANCE.

2. MEMBERS ASSIGNED TO A DIVISION THAT OPERATES SEVEN (7) DAYS A WEEK SHALL BE SCHEDULED SO THAT THEIR MONTHLY TRAINING AND SCHEDULED DAYS OFF COINCIDE. EMPLOYEES SHALL REPORT FOR WORK AT THE BEGINNING OF THE NEXT REGULARLY SCHEDULED WORKING PERIOD AFTER EXPIRATION OF THE LAST CALENDAR DAY NECESSARY TO TRAVEL FROM THE PLACE OF TRAINING TO THE PLACE OF EMPLOYMENT FOLLOWING SUCH EMPLOYEE'S RELEASE OR WITHIN A REASONABLE TIME THEREAFTER IF DELAYED RETURN IS DUE TO FACTORS BEYOND THE EMPLOYEE'S CONTROL. MEMBERS ASSIGNED TO A SEVEN (7) DAY A WEEK DIVISION MAY REQUEST TO COMPLETE A WORK SHIFT FOLLOWING A MILITARY DRILL RATHER THAN HAVE THE SCHEDULE ADJUSTED, UPON APPROVAL OF THE RESPECTIVE WATCH COMMANDER, AND CHIEF JAIL ADMINISTRATOR.

C. SCHEDULING:

THE DEPARTMENT SHALL RETAIN THE DUTY AND RIGHT TO SCHEDULE WORKING DAYS AND HOURS TO MAINTAIN THE MAXIMUM EFFICIENCY OF THE PUBLIC SAFETY FUNCTION.

MUNICIPALITIES: Civil Service; Classification of Employees; Exemptions. Iowa Code Ch. 400 (1987); Iowa Code §§ 364.2(1), 372.5, 400.6, and 400.27 (1987); 1988 Acts, Ch. 1058, § 1. A city governed by the commission form of government is limited to the five departments listed in § 372.5. The applicability of civil service to a particular position is determined by state law, and not by city ordinance. Determination as to the applicability of civil service, in the administration of Ch. 400, is determined by the city council, which could elect to delegate, by ordinance, that authority internally to a municipal entity which would decide the issue. One possible alternative would be the city's personnel department. Review of the internal administrative decision as to the applicability of civil service to a particular office would be subject to review by the civil service commission; appeal therefrom would be to the district court, after the commission has ruled. (Walding to Angrick, State Ombudsman, 2-16-89) #89-2-4(L)

February 16, 1989

Mr. William P. Angrick, II
State Ombudsman
Citizen's Aide Office
L O C A L

Dear Mr. Angrick:

We are in receipt of your request for an opinion of the Attorney General regarding the applicability and enforcement of Iowa Code Ch. 400, Civil Service. Specifically, the questions you have posed are:

1. When a city has selected the commission form of government as defined by Iowa Code Section 372.5, is the city limited to the five departments listed in that section?

2. In a city with a population of fifteen thousand or more people, who is responsible for determining whether Iowa Code Section 400.6 applies to a particular position in city government?

3. If the person or entity responsible for determining whether a position is subject to Iowa Code Section 400 declines to do so, who is responsible for enforcement of that chapter?

In your request, you note that the opinion is being requested in regard to an inquiry your office has made into the practices of the city of Cedar Rapids, Iowa. The Cedar Rapids Civil Service Commission, you state, declined your request to review the classification of employees in the city, claiming an absence of authority.

I.

A response to your first inquiry can be found in a prior opinion of the Attorney General. In 1978 Op.Att'y Gen 161, we stated that:

> Section 372.5 . . . provides for the commission form of government. Pursuant to that section there are five departments. The mayor administers the department of public affairs and the four councilmembers (sic) administer each of the four remaining departments.

[Emphasis added.] 1978 Op.Att'y Gen 161, 161-162.

And, according to Iowa Code § 372.5 (1987):

> A city governed by the commission form [of government] has five departments as follows:
>
> 1. Department of public affairs.
> 2. Department of accounts and finances.
> 3. Department of public safety.
> 4. Department of streets and public improvements.
> 5. Department of parks and public property.

Accordingly, a city governed by the commission form of government is limited to the five departments listed in § 372.5.[1]

II.

A review of your second question begins with Iowa Code § 400.6 (1987). That section, as amended by 1988 Acts, Ch. 1058, § 1, provides:

> This chapter applies to permanent full-time police officers and fire fighters in cities having a population of more than eight thousand, and to all appointive permanent full-time employees in cities having a

---

[1] The Cedar Rapids city solicitor, David McGuire, informs this office that the city of Cedar Rapids is, in fact, governed by five departments, and thus is in compliance with the requirements of § 372.5.

> population of more than fifteen thousand except:
>
> 1. Persons appointed to fill vacancies in elective offices and members of boards and commissions and the clerk to the civil service commission.
>
> 2. The city clerk, chief deputy city clerk, city attorneys, city treasurer, city assessor, city auditor, city engineer, and city health officer.
>
> 3. The city manager and city administrator and assistant city managers or assistant city administrators.
>
> 4. The head and principal assistant of each department and the head of each division. This exclusion does not apply to assistant fire chiefs and to assistant police chiefs in cities with police departments of two hundred fifty or fewer members. However, sections 400.13 and 400.14 apply to police and fire chiefs.
>
> 5. The principal secretary to the city manager and city administrator, the principal secretary to the mayor, and the principal secretary to each of the department heads.
>
> 6. Employees of boards of trustees or commissions established pursuant to state law or city ordinances.
>
> 7. Employees whose positions are funded by state or federal grants or other temporary revenues. **However, a city may use state and federal grants or other temporary revenue to fund a position under civil service if the position is a permanent position which will be maintained for at least one year after expiration of the grants or temporary revenues.**

[Emphasis added.][Amendment in bold.]

Thus, the applicability of civil service to a particular position is determined by state law, and not by city ordinance. In determining the civil service status of particular positions,

cases and prior opinions have examined the language of § 400.6. See, e.g., Airport Comm'n for Cedar Rapids v. Schade, 257 N.W.2d 500, 502 (Iowa 1977); Romine v. Civil Service Comm'n of Urbandale, 181 N.W.2d 431, 433 (Iowa 1970). See also 1978 Op.Att'yGen. 530, 1976 Op.Att'yGen. 382, 1972 Op.Att'yGen. 773 and 1966 Op.Att'yGen. 46.

In the administration of Iowa Code Chapter 400, the determination as to the applicability of civil service is not clearly set forth in the Code. Therefore, a city council, pursuant to its home rule authority and Iowa Code § 364.2(1) (1987),[2] would be authorizes to internally decide the issue. Of course, the city council could elect to delegate, by ordinance, determination as to the applicability of civil service, internally to a municipal entity which would decide the issue. One possible alternative would be the city's personnel department.

III.

Finally, your third question concerns how an individual challenges the determination of the city as to the civil service status of a particular position. The answer to that inquiry is found in Iowa Code § 400.27 (1987). That section, in pertinent part, provides:

> The civil service commission has jurisdiction to hear and determine matters involving the rights of civil service employees under this chapter, and may affirm, modify, or reverse any case on its merits.
>
> * * *
>
> The city or any civil service employee shall have a right to appeal to the district court from the final ruling or decision of the civil service commission. The appeal shall be taken within thirty days from the filing of the formal decision of the commission. The district court of the county in which the city is located shall have full

---

[2] Iowa Code § 364.2 (1) (1987) provides : "A power of a city is vested in the city council except as otherwise provided by a state law." The council, under the commission form of government, is composed of the mayor and either two or four council members elected at large. § 372.5.

> jurisdiction of the appeal and the said appeal shall be a trial de novo as an equitable action in the district court.

* * *

Accordingly, review of the city's decision as to the applicability of civil service to a particular office would be subject to review by the civil service commission; appeal therefrom would be to the district court, after the commission has ruled.

In summary, it is our judgment that a city governed by the commission form of government is limited to the five departments listed in § 372.5. The applicability of civil service to a particular position is determined by state law, and not by city ordinance. Determination as to the applicability of civil service, in the administration of Ch. 400, is determined by the city council, which could elect to delegate, by ordinance, that authority internally to a municipal entity which would decide the issue. One possible alternative would be the city's personnel department. Review of the internal administrative decision as to the applicability of civil service to a particular office would be subject to review by the civil service commission; appeal therefrom would be to the district court, after the commission has ruled.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

COUNTIES AND COUNTY OFFICERS: County Attorney; County Conference Board. Legal Counsel for County Conference Board. Iowa Code ch. 21: §§ 21.5, 21.6; §§ 331.756; 331.756(6)-(7); 331.759; 441.16; 441.41 (1987); Iowa Code of Professional Responsibility for Lawyers, Canon 5, DR 5-101(C), 5-102(A)-(B), EC 5-14, EC 5-18. The duty of the county attorney to legally defend all actions in which the county is interested pursuant to Iowa Code section 331.756(6), includes law suits filed against the county conference board. The county attorney also has the duty, under Iowa Code section 331.756(7), to give advice or a written opinion to the board on contract matters. However, that duty does not include the drafting of contracts, unless the contract is related to litigation involving the county conference board.

The county attorney does not have a conflict of interest in defending the conference board against an individual who brings an open meetings law violation, following a refusal by the county attorney to undertake such action.

The mere possibility that the county attorney may be called as a witness does not preclude representation of the board.

Finally, the county conference board has the power to employ private counsel to assist the county attorney in defending the board in open meetings lawsuits. Such expense should be paid from the general fund of the county appropriated pursuant to Iowa Code section 441.16. If fiscally impossible, section 331.756(6) still enables the board to utilize the services of the county attorney. (Zbieroski to Martens, Iowa County Attorney, 2-14-89) #89-2-2(L)

February 14, 1989

Mr. Kenneth R. Martens
Iowa County Attorney
1017 Court Avenue
Marengo, Iowa 52301

Dear Mr. Martens:

You have requested an Attorney General's opinion on a series of questions which essentially pertain to whether the county attorney is required to legally represent the county conference board. First, you ask two related questions:

> Since the conference board consists of school board directors, city mayors, and county supervisors and there is no code section specifically so providing, is the county attorney required to represent the conference board?
>
> If so, is the county attorney required to represent the county conference board in a contract matter?

You note that Iowa Code section 441.41 provides that the "county attorney shall represent the assessor and board of review in all litigation dealing with assessments," but is silent as to whether the county attorney is required to legally represent the county conference board. See Iowa Code § 441.41 (1987).

We tend to read section 441.41 expansively and view it as clarifying the county attorney's role in such matters. In turn, we do not view its silence as relieving the county attorney from any of the general duties listed under Iowa Code section 331.756 (1987). Among the duties listed is the following: "The county attorney shall: . . . (6) Commence, prosecute, and defend all actions and proceedings in which a county officer, in the officer's official capacity, or the county is interested or a party." Iowa Code § 331.756(6) (1987).

Although the county conference board consists of school board members and city mayors (along with county supervisors), in their performance as board members they not only act as representatives of their respective governmental body, but, perhaps more importantly, act in the interest and on behalf of the county. We believe that section 331.756(6) enables the board to utilize the services of the county attorney. Thus, we are of the opinion that since the county attorney has the duty and power to legally defend all actions in which the county is interested pursuant to Iowa Code section 331.756(6), that authority includes defending against law suits filed against the county conference board.[1]

In addition, under Iowa Code section 331.756(7), the county attorney has the duty to give advice or a written opinion to the board on contract matters. However, that duty does not include the drafting of contracts or other similar documents, unless those documents are related to litigation involving the county conference board. See Iowa Code § 331.756(7) (1987); 1982 Op.Att'yGen. 496 (#82-8-6(L)).

Your next question asks:

> If an individual requests that an open meetings law violation be enforced by the county attorney against the county conference board, and the county attorney exercises his or her discretion and refuses to bring said open meetings law action against the conference board, then does the county attorney have a conflict of interest in defending the conference board

---

[1]We believe that this opinion is consistent with our earlier opinion, which states that "[i]f a County Conference Board and its individual members are sued in tort, the county attorney shall defend the board and the members of the Board of Supervisors. The cities and school districts shall provide defense for the mayors and school board directors that sit on the board." 1982 Op.Att'yGen. 188 (#81-7-29(L))(attached).

against this same individual bringing an open meetings law violation in his or her own name?

We are of the opinion that a conflict does not exist, because the county attorney does not appear to have been placed in a position where he or she attempts at the same time to represent two clients. Once the county board is sued the county attorney has authority to defend the board and choose not to undertake a complaint that a citizen perceives to be in the interests of the people.

The county attorney has discretion to enforce the open meetings law. See Iowa Code § 21.6 (1987) ("[a]ny aggrieved person, taxpayer to, or citizen of, the state of Iowa, or the attorney general or county attorney, may seek judicial enforcement of the requirements of" the open meetings law). If, in the exercise of that discretion, the county attorney declines to prosecute, the county attorney cannot be said to have represented two or more clients having differing interests. Cf. Iowa Code of Professional Responsibility for Lawyers, Canon 5, EC 5-14, EC 5-18. This is because, there appears to be no attorney-client relationship between this individual and the county attorney.

The complainant sought to have the county attorney prosecute an alleged violation of law. In considering whether to prosecute the complaint, the county attorney is exercising one of the functions of the office and is not representing the complainant. The complainant was not a client of the county attorney. Where the county attorney decided not to prosecute, we see no conflict in the county attorney then defending the board it sued. See also Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977) (for the relationship to exist the attorney agrees to give or actually gives the desired advice or assistance).

In choosing not to undertake an enforcement action, there still remains the county attorney's authority to defend the board in litigation against such charges. Iowa Code § 331.756(6) (1987). Accordingly, we are led to the opinion that the county attorney does not per se have a conflict of interest in defending the conference board against an open meetings law violation, following a refusal by the county attorney to undertake such action.[2]

---

[2]We note that a different question could arise if the county attorney is convinced that the position of the board conflicts with the public interest. See generally Motor Club of Iowa v. Department of Transportation, 251 N.W.2d 510, 513-16 (Iowa 1977)

(continued...)

Next you ask:

> If the county attorney was personally present at a meeting during which an alleged violation of the open meetings law occurred and the county attorney's advice was solicited and the possibility that the county attorney may be a witness based on advice given, is the county attorney precluded from representing the board to whom the advice was given?

In answering this question we look for guidance from the Iowa Code of Professional Responsibility for Lawyers, Canon 5, DR 5-102.[3] In pertinent part, DR 5-102(A) provides that the lawyer shall withdraw when the lawyer learns or it is obvious that the lawyer ought to be called as a witness on behalf of the client. In pertinent part, DR 5-102(B) provides that the lawyer may continue the representation, if the lawyer learns or it is obvious that the lawyer ought to be called as a witness other than on behalf of the client. It is not clear from your question whether the County Attorney may be called as a witness on behalf of his client or other than on behalf of his client. As is evident, this distinction is important under DR 5-102.

If you are asking whether the county attorney is precluded from representing the board because the lawyer may be called as a witness on behalf of the board, DR 5-102(A) needs to be examined. In that circumstance, it is our opinion that the county attorney should withdraw upon finding it necessary to be called as a witness for the board, except when such testimony is merely formal in nature or in those extreme cases where the urgency of the client's interests demands such conduct. See State v. King, 256 N.W.2d 1, 15 (Iowa 1977); cf. Storbeck v. Fridley, 240 Iowa 879, 38 N.W.2d 163 (1949) (Although defendant did not prevail in a challenge to the opposing attorney testifying for his client, the court noted that it was "a grave breach of professional ethics for an attorney of a party to testify as to anything other

---

[2](...continued)
(discussing the attorney general's relationship to departments of state government and the interests of the state in general).

[3]We note that DR 5-101(C) does not apply in this example. That disciplinary rule involves the acceptance of employment when a lawyer knows or it is obvious the lawyer ought to be called as a witness. Case law instructs that the county attorney is already employed to represent the county. See State v. Fitz, 265 N.W.2d 896, 901 (Iowa 1978) (construing DR 5-101(B), the predecessor to DR 5-101(C)).

than matters of a formal nature without withdrawing from the litigation, . . .").

On the other hand, if you are asking whether the county attorney is precluded from representing the board because the attorney may be called as a witness other than on behalf of the client, the Iowa Supreme Court has made it clear that withdrawal is not required. See State v. Fitz, 265 N.W.2d 896, 901 (Iowa 1978); State v. King, 256 N.W.2d 1, 15 (Iowa 1977); see also Nassar v. Sissel, 792 F.2d 119 (8th Cir. 1986) (prosecutor not required to withdraw if called to testify for defense). Under DR 5-102(B), the lawyer "may continue the representation until it is apparent that his testimony is or may be prejudicial to his client." Should this matter reach the court, the determination rests in the discretion of the trial court, which in turn is governed by the status of the evidence. See State v. Fitz, 265 N.W.2d 896, 901 (Iowa 1978); Iowa Code § 331.759 (1987).[4]

In summary, the mere possibility that the county attorney may be called as a witness does not preclude representation of the board.

Finally you ask:

> Does the conference board have authority to retain a private attorney to defend them from an open meetings lawsuit and, if so, where will the funds come from if the conference board does not have such funds budgeted?

You note our office previously opined that the conference board has authority to hire counsel. See 1972 Op.Att'yGen. 386. In that opinion we also opined that the funds for such employment are to be paid under Iowa Code § 441.41 rather than from the court fund. Id.

We find no reason to deviate from our earlier opinion. We are of the opinion that the county conference board has the power to employ private legal counsel to assist the county attorney in defending the board in open meetings lawsuits. We believe that authority is found under Iowa Code section 441.41, which provides that: "The conference board may employ special counsel to assist

---

[4]Of course, there are many factors to consider in deciding whether to withdraw, some of which include: the advice that is given, whether the board heeds that advice or not, whether the communication is protected by the attorney-client privilege, and whether the communications will remain sealed pursuant to Iowa Code § 21.5 (1987). We were unable to determine from your question whether any of these factors may have come into play.

the city legal department or county attorney as the case may be." Iowa Code § 441.41 (1987).

We are also of the opinion that such expense should be paid from the general fund of the county appropriated pursuant to section 441.16. This is because counsel is representing the interests of the county not the State. It seems to us, that the use of court funds are appropriate only when the county attorney or his replacement stands as a representative of the State, i.e., in criminal matters.

If, because of budget restrictions, the conference board is precluded from hiring private counsel, section 331.756(6) still enables the board to utilize the services of the county attorney. See Iowa Code section 331.759 (1987). In the event the county attorney must withdraw, the district court is likely to appoint private counsel, the cost of which may come from the general fund of the county. See Iowa Code § 331.759 (1987).

In summary, the duty of the county attorney to legally defend all actions in which the county is interested pursuant to Iowa Code section 331.756(6), includes law suits filed against the county conference board. The county attorney also has the duty, under Iowa Code section 331.756(7), to give advice or a written opinion to the board on contract matters. However, that duty does not include the drafting of contracts, unless the contract is related to litigation involving the county conference board.

The county attorney does not have a conflict of interest in defending the conference board against an individual who is bringing an open meetings law violation, following the county attorney's refusal to undertake such action.

The mere possibility that the county attorney may be called as a witness does not preclude representation of the board.

Finally, the county conference board has the power to employ private counsel to assist the county attorney in defending the board in open meetings lawsuits. Such expense should be paid from the general fund of the county appropriated pursuant to Iowa Code section 441.16. If fiscally impossible, section 331.756(6) still enables the board to utilize the services of the county attorney.

Sincerely,

Mark J. Zbieroski

MARK J. ZBIEROSKI
Assistant Attorney General

COUNTY ATTORNEY, SMOKING; Charging and prosecution of smoking law violations: Iowa Code §§ 98A.6, 331.756, 805.6 (1989). Actions to enforce the smoking law under Iowa Code § 98A.6 (1989) are initiated in the same manner as an unindictable traffic charge and are to be prosecuted by the county attorney. (Hayward to Beres, Hardin County Attorney, 5-24-89) #89-5-5(L)

May 24, 1989

Mr. James L. Beres
Hardin County Attorney
Post Office Box 129
Eldora, Iowa 50627

Dear Mr. Beres:

You have asked this office for its opinion on two aspects of the enforcement of Iowa Code ch. 98A (1989), Iowa's smoking law. Specifically you have asked these questions:

1. Are violations of Iowa Code §§ 98A.2 and 98A.4 chargeable by small claims petition, complaint and affidavit, or uniform citations, and

2. Is the county attorney responsible for prosecuting violations of those sections?

Iowa Code §§ 98A.2 and 98A.4 (1989) set forth the restrictions on smoking in certain places and requirements for posting of signs by the persons in charge of those places. In regard to the violations of these restrictions and requirements, § 98A.6 states:

> A person who smokes in those areas prohibited in section 98A.2, or who violates section 98A.4, shall pay a civil fine pursuant to section 805.8, subsection 11 for each violation.
>
> Judicial magistrates shall hear and determine violations of this chapter. The civil penalties paid pursuant to this chapter shall be deposited in the county treasury.

In response to your first question, we have recently issued an opinion stating that violations of chapter 98A are chargeable in the same manner as unindictable traffic offenses (i.e., by swearing out a complaint before a magistrate, by uniform citation and complaint, or by a county attorney's information). Op.Att'yGen. #89-5-1(L).

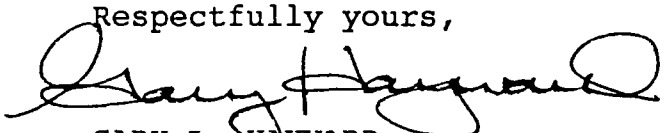
The answer to your second question requires an exercise of statutory construction. The duties of the county attorney are set forth in Iowa Code § 331.756, which provides in pertinent part:

> The county attorney shall:
>
> 1. Diligently enforce or cause to be enforced in the county, state laws and county ordinances, violations of which may be commenced or prosecuted in the name of the state, county, or as county attorney, except as otherwise provided.
>
> 2. Appear for the state and the county in all proceedings in the courts of the county to which the state or county is a party (exceptions not applicable to this opinion omitted) . . .
>
> * * * *

The issue to be determined is whether chapter 98A creates a private cause of action or is a means of affecting state policy. The county attorney is not required by § 331.756 to represent private interests in his or her official capacity. However, the county attorney is to represent the State when the action is, or may be, brought in its name, and is to enforce its law.

Section 98A.6 does not appear to create a private cause of action. It states that a violation of the smoking law results in a "civil fine" payable to the county. It does not create a right to damages payable to an injured individual. It is charged in the same manner as certain misdemeanors. Thus, an action under § 98A.6 is an action to enforce the law, brought in the name of the State, rather than a private action for redress, and its prosecution falls within the statutory obligation of the various county attorneys in this State.

Respectfully yours,



GARY L. HAYWARD
Assistant Attorney General

GLH:mjs

WORKER'S COMPENSATION: Community service. Iowa Code §§ 85.59, 321J.2(2)(a), 903.1, 907.13, 910.2. Defendant sentenced to perform unpaid community service under either the provisions of § 321J.2(2)(a) (operating while intoxicated) or § 903.1 (simple misdemeanors) is not covered by the state for payment of worker's compensation benefits unless such community service is also a condition of probation under chapter 907. (Kelinson to Hindt, Lyon County Attorney, 5-10-89) #89-5-4(L)

May 10, 1989

Mr. Noel C. Hindt
Lyon County Attorney
Lyon County Courthouse
Rock Rapids, Iowa 51246

Dear Mr. Hindt:

You have requested an opinion regarding whether or not the State of Iowa would be responsible for the payment of worker's compensation benefits under Iowa Code section 85.59 "benefits for inmates and offenders" for those defendants sentenced to perform unpaid community service under section 321J.2(2)(a) or after conviction of a simple misdemeanor. It is our conclusion that such defendants would not be persons covered by sections 907.13(6) or 85.59. The subject of tort or worker's compensation liability for offenders performing community service was earlier discussed in an opinion issued December 14, 1984, Peters to Herrig (#84-12-5(L)) (a copy is enclosed).

Iowa Code section 907.13(6) (1989) provides that the State of Iowa is exclusively liable for and shall pay any compensation becoming due any person under section 85.59. This latter section provides:

> "For the purposes of this section, the term "inmate" includes a person confined in a reformatory, state penitentiary, release center, or other state penal or correctional institution while that person works in connection with the maintenance of the institution or in an industry maintained therein or while on detail to perform services on a public works project.
>
> For purposes of this section, "inmate" includes a person who is performing unpaid community services under sections 907.13 and

910.2 or a work assignment of value to the state or the public under Chapter 232.

A defendant performing community service pursuant to section 321J.2(2)(a) or after being convicted of a simple misdemeanor is clearly not confined in a reformatory, state penitentiary, release center, or other state penal or correctional institution. Neither are they performing a work assignment under chapter 232, the Juvenile Justice Code.

Section 85.59 does reference community service under sections 907.13 and 910.2. Iowa Code section 907.13 provides for community service as "a condition of probation." If an offender is not reasonably able to pay all or part of the court costs, court appointed attorney's fees, or the expense of a public defender, if applicable, they may be sentenced to provide community service in lieu of those payments under section 910.2. This section provides that such public service will be for a governmental agency or a private, non-profit agency which provides services to the youth, elderly or poor of the community.

A defendant convicted of operating while intoxicated may be sentenced, as an alternative to a portion or all of the fine imposed, to perform unpaid community service pursuant to section 321J.2(2)(a). This authority is independent of the court's authority under chapter 907, and specifically section 907.13, to order community service as a condition of probation. Also, as such sentence of community service is in lieu of a fine, it does not fall within the community services provision of section 910.2, dealing with the repayment of court costs and attorney's fees. Thus, a defendant sentenced to community service under the operating while intoxicated statute would not be an inmate for purposes of worker's compensation under section 85.59 -- unless such community service was also a condition of probation under chapter 907.

Section 903.1 does provide that a person under 18 years of age convicted of a simple misdemeanor under the enumerated chapters may be required to perform community service as ordered by the court. This is, again, independent of the provisions of chapter 907. Also, as such order would be in lieu of payment of a fine, community service under section 910.2 would not apply. Thus, a defendant sentenced under section 903.1(3) to perform community service would not be an inmate for the purposes of worker's compensation. If a simple misdemeanant is placed on probation under chapter 907, then an order for community service under section 907.13 in lieu of a fine or jail term would make such a defendant an inmate for purposes of worker's compensation.

Section 85.59 is specific in providing that worker's compensation benefits are provided to community service worker's when it is ordered under sections 907.13 and 910.2. Had the legislature intended that all community service be included, it could have said unpaid community service without a reference to these particular sections. As such Code sections are referenced it must be our conclusion that community service ordered under any another provision of the Code was not intended to be included. See In re Estate of Wilson, 202 N.W.2d 41, 44 (Iowa 1972). Again, however, if such community service is also ordered as a condition of probation, whether on a conviction of drunk driving or on a simple misdemeanor in lieu of fine or jail, then the provisions of section 85.59 would apply.

Sincerely,

CRAIG KELINSON
Special Assistant
Attorney General

CK/lsh

ADMINISTRATIVE LAW; HEALTH: Inspections for no-smoking violations. Iowa Code §§ 98A.2, 98A.6, 804.1, 805.8, 808.14. Inspections for violations of chapter 98A regulating smoking in public places can be conducted with other authorized inspections. Additionally, inspectors may observe violations in any place which the general public may enter and observe. If the civil fine is not timely paid, a citation may be issued by a magistrate under § 804.1. As a scheduled violation, a violation may also be charged by uniform citation and complaint under § 805.6. The Department of Public Health should take the lead in providing information about chapter 98A. (Osenbaugh to Ellis, Director, Department of Public Health, 5-1-89) #89-5-1(L)

May 1, 1989

Ms. Mary L. Ellis
Director
Iowa Department of Public Health
Lucas State Office Building
L O C A L

Dear Ms. Ellis:

We have received your request for an opinion concerning chapter 98A, a law regulating smoking in public places.

You ask who is authorized to inspect for violations and to issue citations for violations. You also ask what state department should take the lead in providing public information about the bill.

1. Inspection authority

Iowa Code section 98A.2(1) prohibits smoking in public places and meetings except in designated areas and various other exempted locations. Iowa Code §§ 98A.1(2), 98A.2(1). Persons in charge or in custody of premises subject to the smoking prohibition must post signs in appropriate places advising patrons that smoking is not permitted. Iowa Code § 98A.4. After a magistrate hears and determines violations, a ten dollar civil fine is imposed on those who violate the smoking or the posting provisions. Iowa Code §§ 98A.6, 805.8(11).

The first question posed by your agency concerns authorization to inspect premises for compliance with chapter 98A. Iowa Code section 98A.2(3) authorizes inspection for compliance during any other unrelated, mandated inspection. For instance, a health care facility is subject to yearly, unannounced inspection by the Department of Inspections and Appeals. Iowa Code § 135C.16(1). The person making a health care facility inspec-

tion may also check smoking area signs pursuant to Iowa Code section 98A.2(3).

Locations not subject to inspections under section 98A.2(3) may be checked for compliance where consent is given.

Inspection of premises generally requires either consent or a search warrant because the Fourth Amendment protects persons and places from "unreasonable searches." U.S. Const., Amendment IV. A reasonable search occurs where a valid warrant is obtained or where the search falls within various recognized exceptions such as consent, incident to lawful arrest, or exigent circumstances. Katz v. United States, 389 U.S. 347, 350, 88 S.Ct. 507, 511, 19 L.Ed.2d 576, 581 (1967).

No warrant is necessary to observe what is observable by the general public. Marshall v. Barlow's Inc., 436 U.S. 307, 315, 56 L.Ed.2d 305, 313, 98 S.Ct. 1816 (1978). See also, State v. Dickerson, 313 N.W.2d 526, 531-32 (Iowa 1981). Thus Health Department employees, other governmental inspectors, or peace officers may enter and observe "the enclosed indoor area[s] used by the general public" covered by the act, and no warrant is necessary for such entry. However, chapter 98A also applies to "any enclosed indoor area . . . serving as a place of work . . . ." § 98A.1(2). The fact that employees are permitted in an area does not mean that an employer has no expectations of privacy protected by the Fourth Amendment. Marshall v. Barlow's Inc., 436 U.S. at 315, 56 L.Ed.2d at 313. To enter these areas there must be some constitutionally permissible basis, such as consent or a warrant.

Authority for obtaining an administrative warrant is outlined in Iowa Code § 808.14 as follows:

> The courts . . . may issue administrative search warrants, in accordance with the statutory and common law requirements for the issuance of such warrants, to all governmental agencies or bodies expressly or impliedly provided with statutory or constitutional home rule authority for inspections to the extent necessary for the agency or body to carry out such authority, to be executed or otherwise carried out by an officer or employee of the agency or body.

This provision was enacted following an Iowa Supreme Court decision denying an inspection warrant to an Iowa Department of Labor commissioner because there was no statutory or common law

authority to issue an administrative warrant for work place inspections. Meier v. Sulfhoff, 360 N.W.2d 722, 725 (Iowa 1985).

Thus, in order to obtain a warrant under section 808.14 the agency must have express or implied statutory authority or constitutional home rule authority to conduct the inspection.

Section 98A.2(3) expressly provides for inspections to be done with other state inspections. That section states in part:

> If the public place is subject to any state inspection process or under contract with the state, the person performing the inspection shall check for compliance with the posting requirement.

No other authority for inspections is granted in chapter 98A. It would appear that the mention of inspections in § 98A.2(3) would preclude implication of additional authority to inspect areas not open to the general public.

In conclusion, any governmental entity can inspect for violations of chapter 98A by entering and observing areas which are open to the general public without a warrant. Additionally any state inspector must inspect for compliance with the posting requirements while conducting an inspection under any other state statute.

2. Citations

Proceedings to determine violations of chapter 98A are commenced by a complaint before the magistrate under § 804.1, even though the penalty is civil, not criminal. Because the penalty is civil, this office concluded in 1980 that proceedings should be heard in small claims court rather than through criminal proceedings. 1980 Op.Att'yGen. 14. However, the legislature subsequently amended the statute to specifically incorporate criminal procedure before a judicial magistrate as the means for resolving charges of violation of chapter 98A.

Iowa Code section 98A.6 provides for a "civil fine" as follows:

> A person who smokes in those areas prohibited in section 98A.2, or who violates section 98A.4 [regarding posting of smoking areas], shall pay a civil fine pursuant to section 805.8, subsection 11 for each violation.

The second sentence of § 805.8(11) states, "If the civil fine is not paid in a timely manner, a citation shall be issued for the violation in the manner provided in section 804.1." Section 804.1 is the procedure for the issuance of a citation by a magistrate upon the filing of a complaint.

Additionally, the ten dollar civil fine imposed by § 805.8(11) is a scheduled violation, and a scheduled violation may be cited pursuant to the procedures outlined in Iowa Code § 805.6(1) as follows:

> [A] uniform, combined citation and complaint . . . shall be used for charging all . . . violations which are designated by section 805.8 to be scheduled violations . . . . This subsection does not prevent the charging of any of those violations by information [or] by private complaint filed under chapter 804. . . .

Thus, under the foregoing section, there are three ways to initiate the penalty process for violations of chapter 98A: (1) A peace officer may issue a uniform citation. Iowa Code 805.1(1), 805.6(1). (2) A county attorney may issue an information. 5 Iowa R. Crim. P. (3) A person may file a complaint before a magistrate. Iowa Code section 804.1 (1987).

3. Public Information

Among the duties of the Iowa Department of Public Health are the following:

> Issue monthly health bulletins containing fundamental health principles and other health data deemed of public interest.

Iowa Code 135.11(3).

The purpose of the legislation is to protect public health. Providing information concerning the smoking prohibitions is within the duty of providing "health data deemed of public interest."

In conclusion, inspections for violations of chapter 98A regulating smoking in public places can be conducted with other authorized inspections. Additionally, inspectors may observe violations in any place which the general public may enter and observe. If the civil fine is not timely paid, a citation may be issued by a magistrate under § 804.1. As a scheduled violation, a violation may also be charged by uniform citation and complaint

under § 805.6. The Department of Public Health should take the lead in providing information about chapter 98A.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

GOVERNOR; Appropriations; Statutes; Allotments: Iowa Code §§ 8.3, 8.30, 8.31. The principles articulated in our 1980 opinions remain effective. 1980 Op.Att'yGen. 786 and 1980 Op.Att'yGen. 805. The Governor may not make selective mandatory reductions in appropriations through the practice of targeted reversions without compliance with section 8.31. As long as the legislative goals will be achieved, the Governor may eliminate waste and unnecessary spending in state government. (Morgan to Hatch, State Representative, and Varn, State Senator, 6-30-89) #89-6-10(L)

June 30, 1989

Representative Jack Hatch and
Senator Richard Varn
Co-chairpersons, Education
Appropriations Subcommittee
Legislative Fiscal Bureau
State Capitol
Des Moines, IA 50319

Dear Representative Hatch and Senator Varn:

You have requested the opinion of the Attorney General regarding the practice of the Department of Management targeting reversion amounts for state agencies and ask whether this practice is violative of Iowa Code Section 8.31.

Iowa Code Section 8.31 establishes a procedure for making reductions in the quarterly allotments to state agencies if revenues do not materialize to support amounts appropriated by the General Assembly for the budget. It states in relevant part:

> If the governor determines that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, the reductions shall be uniform and prorated between all departments, agencies and establishments upon the basis of their respective appropriations.

Iowa Code Section 8.31, last unnumbered paragraph.

Your letter asks whether targeted reversions differ from the mandatory cuts of an executive order which would be uniform to each line item of the annual appropriation. You state that

certain departments have met reversions targets by allowing needs for which the legislature appropriated funds to go unfunded.

Important legal principles for the resolution of this question were articulated in an earlier opinion from this office. In 1980, at the time that the farm crisis was beginning to affect State government revenues, we opined that the Governor is not free to refuse to spend funds for the purpose of amending or defeating legislative objectives. 1980 Op.Att'y.Gen. 786, 792.

The task of the Executive Branch of Government is to faithfully execute the laws adopted by the legislature. The principles articulated in our 1980 opinion continue to be valid in light of subsequent case law. We believe that the questions you raise are most appropriately evaluated in light of the principles articulated in our 1980 opinion.

A threshold question which arises when the chief executive of the State requests "targeted reversions" from State agencies is the extent to which the targets are in fact a method of imposing mandatory reductions of the amounts appropriated to agencies. If in practice these "targets" are in fact mandatory, then the Governor has imposed a mandatory reduction without benefit of the statutory constraints imposed by Section 8.31. Such targets would be illegal. 1980 Op.Att'y.Gen. 805,808.

If, instead of imposing mandatory reductions, the Governor and department heads simply develop more efficient ways to administer state government and if the targets are not mandatory or imposed against a department with fear of sanctions, then the targeted guidelines could be within gubernatorial authority to eliminate waste or unnecessary spending. 1980 Op.Att'y.Gen. 786.

By statute the General Assembly has laid out the duties of the Governor:

> The Governor of the state shall have:
>
> 1. Direct and effective financial supervision over all departments and establishments, and every state agency by whatever name now or hereafter called, including the same power and supervision over such private corporations, persons and organizations that may receive, pursuant to statute, any funds either appropriated by or collected for, the state, or any of its

departments, boards, commissions, institutions, divisions and agencies.

2. The efficient and economical administration of all departments and establishments of the government.

3. The initiation and preparation of a balanced budget of nay and all revenues and expenditures for each regular session of the legislature.

Iowa Code Section 8.3.

Under the State Constitution the Governor may exercise judgment in accomplishing the legislated policy for less money than is appropriated by the legislature. 1980 Op.Att'y.Gen. 792. If reductions are made in expenditures but the legislative intent is not thwarted, but rather is served, then the Governor is appropriately exercising executive branch authority.

The balance of power in virtually every state between the legislative and executive branches is described here by the Colorado Supreme Court:

> The citizens of this state have concluded that the tension [between the executive and legislative spending] is essential to guarantee the maximum realization of their fundamental political aspirations. (Citation omitted.) When confronted by the necessity of exploring this twilight zone of competing constitutional authority, courts must measure the extent of the Governor's authority to administer by the extent of the General Assembly's authority to appropriate.

Colorado General Assembly v. Lamm, 700 P.2d 508, 519 (Colo. 1985).

In that case, Governor Lamm had taken money which would otherwise be reverted from several agencies for the purpose of building a prison to satisfy the requirements of a Federal court decision. In commenting on the use of the appropriation transfers in this manner, the Court stated:

> The transfers challenged here altered dramatically the objectives which the General

> Assembly had determined were to be achieved through the use of state monies. We conclude that whatever inherent authority to administer the executive budget may exist in the office of the chief executive, such authority may not normally be invoked to contradict major legislative budget determinations. In our view, the initial appropriations to the departments involved here constituted such major legislative budgetary determinations.

700 P.2d at p. 521.

This office has previously opined that the Governor has no authority to promulgate a blanket requirement to reduce the funds available for a legislatively appropriated purpose. 1980 Op.Att'y.Gen. at 792. Thus, the Governor cannot mandate that an agency reduce its expenditures by a specified percentage below its appropriations except as provided in Section 8.31. The Governor can, however, prevent unnecessary and wasteful spending above that necessary to achieve the legislative purpose. An executive mandate that an agency reduce its expenditures by a specified percentage would likely be found to be an impermissible impoundment if not done in accordance with statutory authority.

Sincerely,

Candy Morgan

CANDY MORGAN
Assistant Attorney General

CM/mo

COURTS: Iowa Code §§ 602.9107; 97B.49(5); 97A.1(12) (1989). For purposes of calculating the annuity pursuant to Iowa Code § 602.9107, the phrase "annual basic salary" means the annual gross salary in the fiscal year in which the judge becomes separated from service. (Skinner to Nystrom, State Senator, 6-30-89) #89-6-9(L)

June 30, 1989

The Honorable Jack N. Nystrom
State Senator
State House
Des Moines, Iowa 50319

Dear Senator Nystrom:

This is in response to your request for an opinion from the Attorney General regarding the procedure for calculating the annual annuity for retiring Iowa judges.

The judicial pension statute reads:

> The annual annuity of a judge under this system is an amount equal to three percent of the judge's average annual basic salary for the judge's last three years as a judge of one or more of the courts included in this article, multiplied by the judge's years of service as a judge of one or more of the courts for which contributions were made to the system. However, an annual annuity shall not exceed an amount equal to fifty percent of the basic annual salary which the judge is receiving at the time the judge becomes separated from service.... (emphasis added).

Iowa Code § 602.9107.

The first sentence of the above section directs the calculation of the annuity; the second sentence places a maximum on the annual annuity a judge can receive. This opinion first addresses the calculation of the annuity, and secondly addresses the maximum.

Calculations of the annuity are determined by the definition of "annual basic salary". Currently the practice of calculating the annuity is to define this phrase as "the salary for 365 consecutive days". (See method 1). The other possible method

uses the "total earnings per fiscal year" (regardless of whether the judge is employed the entire year). (See method 2).

Method 1

To determine the average of the annual basic salary for the last three years, calculate the salary for the last 1095 days (365 x 3) before the date of retirement, and divide by three.

Method 2

To determine the average of the annual basic salary combine the salary amounts for the last three fiscal years, including the fiscal year in which the judge retires, and divide by three.

We note that two other state pension statutes operate under different language than that used for the judicial annuity.

The Iowa Public Employees retirement system uses the term "three year average covered wage". Iowa Code § 97B.49(5). This means a "member's covered wages averaged for the highest three years of a member's service. The highest three years shall be determined using calendar years. However, if a member's final quarter of a year of employment does not occur at the end of a calendar year, the department may determine the wages for the third year by combining the wages from the highest quarter or quarters not being used in the selection of the two highest years with the final quarter or quarters of the member's service to create a full year". Iowa Code § 97B.41(19).

Iowa's peace officers' benefits are calculated by using the term "average earnable compensation" during the highest three years of service. Iowa Code § 97A.1(12). We are advised that this is calculated by finding the salary for the last 78 pay periods (plus any extra days if employment is terminated in the middle of a pay period) and dividing by three years.

The term "annual basic salary" used in the judicial pension statute is not used in the other state statutes above. In all of state government, the year for accounting purposes is the "fiscal year" defined as commencing on the first day of July and ending on the thirtieth day of June. "This fiscal year shall be used for purposes of making appropriations and of financial reporting and establishments of the government". Iowa Code § 8.36 (1989).

In the absence of a specific and different definition for the phrase "annual basic salary," we search for the plain meaning. When a statute is plain and its meaning is clear, courts are not permitted to search for meaning beyond its express

terms. State v. Rich, 305 N.W.2d 739 (Iowa 1981); State v. Sunclades, 305 N.W.2d 491 (Iowa 1981). Using the fiscal year as a basis, the plain meaning is the stated gross salary to be earned in the fiscal year during which the judge retires. This interpretation necessitates using Method 2 above to calculate the three-year average. That is, to combine the salary amounts for the last three fiscal years including the year in which the judge retires, and divide by three.

The second part of Iowa Code § 602.9107 refers to a maximum amount of the basic annual salary at the time the judge becomes separated from service. This provision limits the impact of any interpretation of the phrase "annual basic salary." Consistent with other pension plans, a point is reached at which the pension is at a maximum and will not increase even if the judge continues employment for a longer period of time. Therefore, the annuity cannot exceed fifty percent of the salary for the fiscal year in which the judge is separated from service.

In summary, we conclude that the phrase "annual basic salary" is unique to the judge's pension statute and is interpreted according to its plain meaning. For purposes of calculating the annuity pursuant to Iowa Code § 602.9107, the phrase means the annual gross salary in the fiscal year in which the judge becomes separated from service.

Sincerely,

Kathy Skinner

Kathy Mace Skinner
Assistant Attorney General

KMS/jam

FORCIBLE ENTRY AND DETAINER; COUNTIES: Sheriff's Disposition of Mobile Home. Iowa Code §§ 562C.2, 648.22, 331.653, 723.4(7) (1989). The real property owner and not the sheriff has the duty to place in storage a mobile home removed pursuant to the execution of a writ of forcible entry and detainer. The sheriff may not leave the mobile home at curbside on a public street. (Forsythe to Westfall, Pottawattamie County Attorney, **6-15-89**) **#89-6-6(L)**

June 15, 1989

E.A. (Penny) Westfall
Pottawattamie County Attorney
227 So. 6th St.
Council Bluffs, Iowa 51501

Dear Ms. Westfall:

We have received your request for an opinion on whether Iowa Code § 562C.2 (1989) imposes a duty on a county sheriff to place in storage a mobile home that has been removed from real property pursuant to the execution of a writ of forcible entry and detainer.

Forcible entry and detainer actions are governed by Iowa Code chapter 648 (1989). Hillview Associates v. Bloomquist, __ N.W.2d __ (Iowa Sup. Ct. May 17, 1989). In addition, the disposal of abandoned mobile homes and personal property is governed by Iowa Code chapter 562C. A forcible entry and detainer action is used to obtain possession of real property and is often used by landlords to evict tenants who remain in possession after expiration of a lease. A judgment for such an action requires "that the defendant be removed from the premises, and that the plaintiff be put in possession of the premises." Iowa Code § 648.22 (1989). The removal of the defendant's personal property located on or in the real estate is included in this removal. RESTATEMENT (SECOND) OF PROPERTY § 12.3 comment l (1977); See also Usailis v. Jasper, 222 Iowa 1360, 1367, 271 N.W. 524 (1937); 1986 Op.Att'yGen. 133 (#86-12-11 (L)).

The duties of a county sheriff are set forth in Iowa Code sections 331.651 to 331.660. These duties include executing all writs and other legal process issued to the sheriff by legal authority. Iowa Code § 331.653 (1). Iowa Code chapter 648 does not specifically address how the sheriff disposes of personal property. However, Iowa Code chapter 562C does address the issue of removal of mobile homes and personal property.

Chapter 562C allows the real property owner to remove or cause to be removed and placed in storage a mobile home and other

personal property. Iowa Code § 562C.2 (1989). This can entail the sheriff removing and storing the mobile home and property. Iowa Code ch. 562C (1989). However, the duty to remove and store the mobile home is clearly placed on the real property owner. Iowa Code § 562 (1989).

The legislature apparently envisioned that an action for removal of the mobile home and disposal of personal property would be brought in connection with an action for forcible entry and detainer. Iowa Code § 562C.7 (1989). However, Iowa Code § 648.19 provides:

> An action of this kind shall not be brought in connection with any other action, with the exception of a claim for rent or recovery as provided in sections 562A.24, 562A.32, 562B.22, 562B.25, or 562B.27, nor shall it be made the subject of a counterclaim.

Where statutory provisions relate to the same subject and have identical purposes or objects, they should be read in pari materia and harmonized if possible. Metier v. Cooper Transport Co., Inc., 378 N.W.2d 907 (Iowa 1985). Section 562B.27 requires the landlord to follow the procedure in chapter 562C to dispose of the mobile home. Therefore, it would appear that chapter 562C is controlling and the real property owner is responsible for removal and storage.

If a duty to store the mobile home did not exist, you asked whether the sheriff could leave the mobile home on a public street within the city. A prior attorney general opinion addresses the issue of the county sheriff leaving personal property at the curbside when executing a valid writ of forcible entry and detainer. That opinion concluded that the sheriff could temporarily place the personal property at the curbside. 1986 Op.Att'yGen. 133 (#86-12-11(L)). The opinion, however, did not specifically address mobile homes. Unlike the personal property discussed in the opinion, the mobile home would obstruct the public way in a hazardous manner. Consequently it would be a violation of Iowa Code § 723.4(7) (1989). 1986 Op.Att'yGen. 133 (86-12-11(L)).

Further, the enactment of 562C was after the issuance of the attorney general opinion. Consequently, chapter 562C would control in a situation where abandoned mobile homes and personal property is being disposed of. Section 562C.2 requires removal and storage of a mobile home. Cf. 1986 Op.Att'y.Gen. 133 (#86-12-11(L)). Therefore the mobile home could not be left on the public street.

In summary, it is our conclusion that the real property owner, and not the sheriff has the duty to place in storage a

mobile home removed pursuant to the execution of a writ of forcible entry and detainer under Iowa Code §562C.2. Further, the sheriff may not leave the mobile home at curbside on a public street.

Sincerely,

Cynthia A. Forsythe

CYNTHIA A. FORSYTHE
Assistant Attorney General

/mr

MUNICIPALITIES; Benefits for surviving spouses: Iowa Code § 411.6(8)(b), § 411.6(8)(c), § 411.6(11)(a). Accordingly, we are of the opinion that the 1988 amendment to § 411.6(8)(c) does not apply to a surviving spouse of a firefighter who had remarried and thus was no longer receiving a benefit on July 1, 1988. (Osenbaugh to Horn, State Senator, 6-15-89) #89-6-5(L)

June 15, 1989

The Honorable Wally Horn
State Senator
116-2nd Street SW
Cedar Rapids, Iowa 52404

Dear Senator Horn:

We have received your opinion request regarding the amendment to Iowa Code § 411.6(8)(c) (1989) by 1988 Iowa Acts, ch. 1242, § 57. Pursuant to your statement of the facts, a firefighter's widow was receiving a benefit under section 411.6. She subsequently remarried and thus became ineligible for benefits under Iowa Code § 411.6(8)(c) (1987). This second marriage has now ended, and she wants to again receive benefits as the surviving spouse to her first marriage.

Prior to the amendment, § 411.6(8)(c) provided that upon the death of a member, a benefit shall be paid to "the spouse to continue so long as said party remains unmarried . . . ." In a previous opinion, 1980 Op.Att'yGen. 882 (#80-12-5(L)), we held that the surviving spouse shall receive a benefit until remarriage, at which time the benefit ends. In 1988, the general assembly amended § 411.6(8)(c) to read that upon the death of a member there shall be paid a benefit to "the spouse"; this amendment struck the language requiring that the spouse "remains unmarried." Thus, the key to the resolution of this question is whether the amendment to § 411.6(8)(c) is retroactive.

The Act specifically states that the amendments to § 411.6(8)(b), and § 411.6(11)(a), apply beginning July 1, 1988, to persons who are beneficiaries on that date and those who become beneficiaries on or after that date. 1988 Iowa Acts, ch. 1242, § 64. By contrast, the act specifies that an amendment to § 411.6(11)(a), that relates to the definition of a child

eligible for benefits, is retroactive to January 1, 1987. 1988 Iowa Acts, ch. 1242, § 64.

The question of retroactivity is one of legislative intent, and it is not necessary to resort to rules of statutory construction when the legislature has clearly expressed its intent as to the prospective application of the statute. First National Bank in Fairfield v. Diers, 430 N.W.2d 412, 414-415 (Iowa 1988). Here the legislature specifically provided that the Act applies to those who are beneficiaries on its effective date or who become beneficiaries thereafter. "Beneficiary" is defined in § 411.1(8) as "any person receiving a retirement allowance or other benefit as provided by this chapter." (emphasis added). As the widow in question had ceased to be eligible to receive a benefit prior to the effective date of the act, the amendment to § 411.6(8)(c) would not apply to her.

Accordingly, we are of the opinion that the 1988 amendment to § 411.6(8)(c) does not apply to a surviving spouse of a firefighter who had remarried and thus was no longer receiving a benefit on July 1, 1988.

Sincerely,

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

SCHOOLS: Bond Elections; Iowa Code §§ 75.1, 296.2, 296.3, 296.6. (1989). A school board has discretion to determine how soon an election on a bond petition must be held. Petitions should be acted upon in the order they are filed and elections should be scheduled within ten days of receipt. There is some discretion on the part of the board to refuse petitions or to condition an election if the board determines that an election on the petition to be "contrary to the needs of the school district." Once a petition has been approved at an election, the board is obligated to comply with the proposal's directive, and does not have discretion to delay action pending an election on a conflicting proposal. Where the ultimate objective of two proposals are the same, so that approval of one would defeat the objective of another, the subsequent proposal "incorporates a portion" of the first, and is subject to a six-month delay after the election of the first proposal. (Donner to Garman, State Representative, 6-13-89) #89-6-4(L)

June 13, 1989

The Honorable Teresa Garman
State Representative
Rural Route 2
Ames, Iowa 50010

Dear Representative Garman:

We have received your request for an Attorney General's opinion concerning the responsibilities of the Ballard Community School District and the District's Board of Directors in regard to the filing of successive and multiple petitions seeking elections on the issuance of bonds. Specifically, your first four questions were:

> 1. When a school district receives a petition which satisfies the requirements of section 296.2 and meets to call an election on such proposition, how soon must the election be held?
>
> 2. When a school district receives two or more petitions which satisfy the requirements of section 296.2 in what order must the Board act on such petitions? If the propositions are similar enough to require a six-month wait between elections (section 75.1, Iowa Code) does the Board have the discretion to choose an election order on the propositions which is different than the order in which the petitions were received? Must the Board actually set an election date on a proposition within 10 days of receipt of

a petition if there is an election on a similar proposition already scheduled or can the Board defer action on the petition until the result of the scheduled election is known?

3. If a school district has called elections on different dates on two or more propositions which propose the same or similar school building programs and one proposition receives the required percentage of favorable votes must the subsequently scheduled elections be held? If the subsequently scheduled elections are held and two or more propositions receive the required percentage of favorable votes does the Board have the discretion to choose among the programs which received the required percentage of favorable votes?

4. Does a successful election on a school building program require the school district to proceed with such program or merely authorize the school district to proceed with such program?

Your final question requests an application of the law and our responses to the first four questions to the facts relating to the Ballard Community School District which encompasses the communities of Cambridge, Huxley, Kelley and Slater. Those facts, as you described them, indicate that on February 14, 1989, an election for a $4,995,000 bond issuance for elementary school facilities in Slater and Cambridge failed; on February 27, 1989, a petition was filed seeking an election for $5,100,000 bond issuance for elementary school facilities in Slater and Cambridge; on March 6, 1989, a petition was filed seeking an election for a $5,000,000 bond issuance for elementary school facilities in Cambridge, Kelley, and Slater; and on March 10, 1989, a petition was filed seeking an election for a $4,980,000 bond issuance for elementary school facilities in Huxley.

The relevant statutes which must be considered are Iowa Code chapters 75 and 296 (1989). The third unnumbered paragraph of section 75.1 provides:

When a proposition to authorize an issuance of bonds [by a school corporation] has been submitted to the electors under this section and that proposal fails to gain

> approval by the required percentage of votes, such proposal, or any proposal which incorporates any portion of the defeated proposal, shall not be submitted to the electors for a period of six months from the date of such regular or special election.

Iowa Code section 296.2 provides:

> Before indebtedness can be contracted in excess of one and one-quarter percent of the assessed value of the taxable property, a petition signed by a number equal to twenty-five percent of those voting at the last election of school officials shall be filed with the president of the board of directors, asking that an election be called, stating the amount of bonds proposed to be issued and the purpose or purposes for which the indebtedness is to be created, and that the purpose or purposes cannot be accomplished within the limit of one and one-quarter percent of the valuation. The petition may request the calling of an election on one or more propositions and a proposition may include one or more purposes.

Iowa Code section 296.3 provides:

> The president of the board of directors, within ten days of receipt of a petition under section 296.2, shall call a meeting of the board which shall call the election, fixing the time of the election, which my be at a time and place of holding the regular school election, unless the board determines by unanimous vote that the proposition or propositions requested by a petition to be submitted at an election are grossly unrealistic or contrary to the needs of the school district. The decision of the board may be appealed to the state board of education as provided in chapter 290. The president shall notify the county commission of elections of the time of the election.

I.

Your first question asks how soon an election must be held on a properly filed petition. Section 296.3, while requiring the board of directors to schedule the election within ten days of receipt of the properly filed petition, is silent as to how soon that election must be held. This silence conveys discretion to the school board to make the determination as to how soon the actual election must be held. An exercise of discretion will be upheld unless that exercise constitutes arbitrary and capricious action. Gibson v. Winterset Comm. School Dist., 138 N.W.2d 112, 115 (Iowa 1965). However, practically, a special election can not be called sooner than thirty days after approval and notice to the election commissioner. Iowa Code § 47.6(1) (1989). Also, the scheduling of a petition election to coincide with the next general election cannot be accomplished without at least fifty-five days notice to the election commissioner. Iowa Code §§ 44.4; 47.6(1) (1989). Where a school board consistently applies the same scheduling criteria to all petitions filed, it seems extremely unlikely that the board's action could be construed as arbitrary or capricious.

II. & III.

Your second and third questions concern the order in which multiple petitions must be handled and the discretion of the board in matters of scheduling an election and acting on the results of the election. These issues are interrelated and multifaceted. Many of the issues were contemplated by this office in 1964 Op.Att'yGen. 340, which opined that "the [school] board has no right to refuse a legal petition; and when two petitions are submitted, the board is obligated to vote on the first one submitted." In its analysis of those matters, that opinion relied exclusively on two prior opinions: 1936 Op.Att'yGen. 196, stating that, "if section [296.2] is complied with . . . the election must be had"; and 1916 Op.Att'yGen. 168, stating that "it is incumbent upon the board to submit each of the propositions properly petitioned for even though they may be, to some extent, conflicting, and, in such case, neither petition or proposition would take precedence over the other."

In contrast, in 1965 the Iowa Supreme Court was presented the question of the mandatory nature of section 296.3 in Gibson v. Winterset Comm. School Dist., 138 N.W.2d 112, and failed to mention any of these opinions. Rather, the Court stated, "the existence of two or more petitions before the board at the same time seeking, in different ways, to solve the same problem, may well be a factual circumstance which removes the duty of the

board from the ministerial category. In view of our ultimate holding, we do not pass on the mandatory nature of the statute in the present factual situation." 138 N.W.2d at 115. The Court proceeded under the assumption that the board did have discretion to choose between the proposals contending for submission to the voters, but found that the submission and defeat of six petitions for large bond issuances while repeatedly rejecting petitions for smaller bond issuances in a short period of time was arbitrary and capricious action. Id. The interpretation that the school board does have some discretion in regard to multiple petitions is supported by the fact that section 296.3 was amended in 1983 to provide the board with the power to refuse petitions upon unanimous vote that the proposition is "grossly unrealistic or contrary to the needs of the school district."

In Harney v. Clear Creek Comm. School Dist., 154 N.W.2d 88, 92 (Iowa 1967), the Court declined to determine whether the ten-day period in § 296.3 is mandatory, finding that the provision had been met. Again, in Brutsche v. Coon Rapids Comm. Sch. Dist., 255 N.W.2d 337, 339 (Iowa 1977), the Court noted that the section "requires the election be set within 10 days after the electors' petition was filed", and determined that "[t]he board set the election as directed by law."

To reconcile these authorities and answer both your second and third questions, we conclude that a school board must schedule elections on multiple properly filed petitions in the order the petitions are filed unless the board can make the unanimous finding required by § 296.3. Unless the board can validly reject the petition at the time of filing, scheduling the election date within ten days of receipt is a mandatory duty in relation to the petitioners. However, if there is an election on a similar provision already scheduled, the board's scheduling of the second election can be contingent upon the failure of the first, with a finding that the success of the first would make the second "contrary to the needs of the school district." As a final caveat, in the event that a second petition is adequately dissimilar to the first, and the first petition for an election cannot be submitted for at least six months, it would be within the discretion of the board to submit the second petition prior to the election on the first.

The ability to disapprove a petition for good cause implies the ability to withdraw a proposal for good cause. Even without a preliminary finding by the board, action such as approval of one proposal at an election can render subsequent further elections "contrary to the needs of the school district," enabling the school district to cancel the election. The 1916 opinion itself contemplated at least a modification of a second

proposition upon success of the first proposition in order to avoid indebtedness in excess of the statutory limit. As stated in that opinion, submission of inconsistent multiple propositions at the same election remains an option. 1916 Op.Att'yGen. 168. If more than one conflicting proposal were approved at a joint election, the board may be required to exercise some discretion and choose which proposal to issue. Choosing the proposal with the largest approval would not be an abuse of discretion. However, due to the analysis set forth below, we do not find any discretion on the part of the board to delay acting on an approved proposal until the subsequent passage of one or more conflicting proposals, and to then choose among the conflicting proposals.

IV.

Your fourth question, asking the extent of the board's discretion to act following a successful election, is answered by the terms of Iowa Code section 296.6 (1989):

> If the vote in favor of the issuance of such bonds is equal to at least sixty percent of the total vote cast for and against said proposition at said election, the board of directors shall issue the same and make provision for payment thereof. [Emphasis added.]

"Shall" is ordinarily construed as mandatory, not permissive, and excludes the idea of discretion. Gibson v. Winterset Comm. School Dist., 138 N.W.2d 112, 115 (Iowa 1965), citing Hansen v. Henderson, 244 Iowa 650, 56 N.W.2d 59 (1952). In contrast, approval upon election of a proposal relating to a city utility authorizes but does not require a city council to act, where the statute provides that "[i]f a majority . . . approves the proposal, the city may proceed as proposed. " Iowa Code § 388.2 (1989) [Emphasis added.] See also, Baird v. Webster City, 130 N.W.2d 432, 442 (Iowa 1964). Assuming the section 296.3 determination of unreasonableness has not been made, it is our opinion that the mandatory construction applies to § 296.6.

V.

Your fifth question implicitly asks how "close" can two proposals be without mandating the six-month delay provided in section 75.1. That section requires that a defeated proposal "or any proposal which incorporates any portion of the defeated

proposal, shall not be submitted to the electors for a period of six months . . . ." Your actual question is, what does "incorporate any portion" mean. There has been no prior case law or Attorney General's opinion interpreting this language. By inference, it appears that variations in the dollar amount alone is not a sufficient distinction to render the proposal adequately independent from the prior proposal. Harney v. Clear Creek Comm. School Dist., 154 N.W.2d 88, 91 (Iowa 1967).

Section 296.2 requires two essential elements to a petition for election: the proposed amount of the bonds, and the purpose for which the indebtedness is created. We opine that where the purpose is not clearly distinguishable and approval of one proposal would conflict with the approval of another, section 75.1 is triggered and the six-month delay must be observed. Therefore, where the ultimate objective is to provide for elementary school facilities within a school district, and where there are variations in proposals as to the amount of the bonds or the location of the facilities, the subsequent petitions "incorporate a portion" of the prior proposal. There must be at least six months intervening between elections for that purpose.

CONCLUSION

In summary, the school board has discretion to determine how soon an election on a bond petition must be held, and if all petitions are treated equally, an abuse of that discretion is unlikely. Petitions should be acted upon in the order they are filed and elections should be scheduled within ten days of receipt. There is some discretion on the part of the board to refuse petitions or to condition an election if the board determines that an election on the petition to be "contrary to the needs of the school district." However, once a petition has been approved at an election, the board is obligated to comply with the proposal's directive, and does not have discretion to delay action pending an election on a conflicting proposal. Finally, where, such as here, the ultimate purpose of two proposals are the same, so that approval of one would defeat the objective of another, the subsequent objective "incorporates a portion" of the first and is subject to a six month delay after the election of the first proposal.

Sincerely,

Lynette A. F. Donner

LYNETTE A. F. DONNER
Assistant Attorney General

LAFD:bac

SCHOOLS; Insurance: Iowa Code § 294.16. School districts may not limit the number of authorized annuity and mutual fund providers with which its employees may contract. (Scase to Poncy, State Representative, 6-5-89) #89-6-1(L)

June 5, 1989

The Honorable Charles N. Poncy
State Representative
653 N. Court Street
Ottumwa, Iowa 52501

Dear Representative Poncy:

You have requested an opinion of the Attorney General regarding whether Iowa Code § 294.16 (1989) allows a school district to limit the number of authorized insurance companies from which its employees may select annuity contracts.

You also requested clarification of provisions of IRC § 403(b) which concern "minimum participation and nondiscrimination, relating to tax sheltered annuities." We are unable to respond to this question at this time as it appears to require interpretation and application of a federal tax statute. An opinion of this office would not bind the United States Internal Revenue Service. School districts and their employees should obtain tax advice from the attorneys who represent them.

As to the availability of annuity contracts, § 294.16 contains the following provisions for selection of annuity contracts by school district employees:

> At the request of an employee through contractual agreement a school district may purchase group or individual annuity contracts for employees, from an insurance organization or mutual fund the employee chooses that is authorized to do business in the state and through an Iowa-licensed insurance agent or from a securities dealer, salesperson, or mutual fund registered in this state <u>that the employee selects</u>, for retirement or other purposes, and may make payroll deductions in accordance with the arrangements for the

purpose of paying the entire premium due and to become due under the contract. (emphasis added)

This office issued a formal opinion interpreting these selection provisions shortly after this Code section was enacted in 1965. See 1966 Op.Att'yGen. 211. While the Code section has been amended several times since its enactment, none of the amendments have substantially altered the selection provisions set forth above. Therefore, the conclusion of our prior opinion remains in force.

> It is our opinion that [§ 294.16] does not authorize school districts to select or place a limit on the number of insurance companies to which it will remit premiums. The tax sheltered annuity program has been set up for the benefit of the school teacher and other employees performing services for public schools. [Code § 294.16] specifically states ". . . a school district may purchase an individual annuity contract for an employee from such insurance organization authorized to do business in this state and through an Iowa licensed insurance agent as the employee may select . . ." Thus, the employee may select the insurance agent and company. He [or she] is limited only by the legislative pronouncement that the agent must be licenced in Iowa and [the] company must be authorized to do business in the State of Iowa. The school district must ". . . make payroll deductions in accordance with such arrangements . . .".

1966 Op.Att'yGen. at p. 215.

In conclusion, it is the continued opinion of this office that school districts may not limit the number of authorized annuity or mutual fund providers with which its employees may contract.

Sincerely,

Christie J. Scase

CHRISTIE J. SCASE
Assistant Attorney General

/km

MAGISTRATE NOMINATING COMMISSIONS; Open Meetings Law. Iowa Code ch. 21; § 21.2(1); Iowa Code ch. 602; §§ 602.6403, 602.6501. The Open Meetings Law is applicable to county magistrate nominating commissions established under Iowa Code § 602.6501. (Pottorff to Scieszinski, Monroe County Attorney, 7-21-89) #89-7-7(L)

July 21, 1989

Annette J. Scieszinski
Monroe County Attorney
One Benton Avenue East
P.O. Box 576
Albia, Iowa 52531

Dear Ms. Scieszinski:

You have requested an opinion of the Attorney General concerning application of the Open Meetings Law, Iowa Code chapter 21, to magistrate appointing commissions. You recite facts surrounding a meeting of the Monroe County Magistrate Appointing Commission in April and summarize the views of both the chairman and you on the application of the Open Meetings Law. Against this background, you specifically inquire whether meetings of county magistrate appointing commissions are subject to the Open Meetings Law. It is our opinion that these bodies are subject to the Open Meetings Law.

Initially, I point out that we do not utilize the opinion process to determine specific violations of statute. See 1982 Op.Att'yGen. 162 (#81-7-4(L)). We do not, therefore, resolve through this opinion whether violations of the Open Meetings Law have occurred in the past. We will, however, address the underlying legal issue.

County magistrate appointing commissions are established under chapter 602 of the Iowa Code. Section 602.6501 provides:

> 1. A magistrate appointing commission is established in each county. The commission shall be composed of the following members:

> a. A district judge designated by the chief judge of the judicial district to serve until a successor is designated.
>
> b. Three members appointed by the board of supervisors, or the lesser number provided in section 602.6503, subsection 1.
>
> c. Two attorneys elected by the attorneys in the county, or the lesser number provided in section 602.6504, subsection 1.

Iowa Code § 602.6501 (1989). This language establishes a magistrate appointing commission in each county and delineates the composition of the membership.

A commission established under § 602.6501 is vested with the power to appoint the number of magistrates apportioned to the county under law. Iowa Code § 602.6403(1). In carrying out this function, the commission prescribes the contents of an application for appointment, publicizes notice of any vacancy, and accepts applications for a minimum of fifteen days prior to making an appointment. Iowa Code § 602.6403(2).

In order to determine whether the Open Meetings Law applies to these commissions, we turn to the statutory provisions of chapter 21. The application of chapter 21 is limited to "governmental bodies." A "governmental body," in turn, is defined to include:

> 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.
>
> 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 intercol-

legiate athletic programs at the state universities.

Iowa Code § 21.2(1)(a)-(d). This language sets out four alternative definitions of a "governmental body," any of which trigger application of the Open Meetings Law.[1]

Reviewing these alternative definitions, we consider subsection (a) to be the most clearly applicable. In order to satisfy the definition of a "governmental body" under this subsection, the body must be: 1) a board, council, commission or other governing body; and 2) expressly created by the statutes of this state or by executive order. In our view a county magistrate appointing commission satisfies both of these elements.

There is little doubt that the commissions are "governing" bodies within the scope of § 21.2(a). We have consistently construed a "governmental body" under § 21.2(1)(a)-(d) to be a "governing" body. A "governing" body, in turn, must be vested with some decisionmaking or policymaking authority. 1984 Op.Att'yGen. 152 (#84-8-1(L)); 1980 Op.Att'yGen. 148, 151. The commissions meet this criteria because they are vested with the decisionmaking authority both to prescribe the process for selection and to select the magistrates for their respective counties. See Iowa Code § 602.6501(1)-(2).

Under subsection (a) a commission or other governing body must be "expressly created" by the statutes of this state or by executive order. In previous opinions we have construed the terms "expressly created" to mean that the statute directed the constitution of the body rather than authorized or permitted discretion for the body to form. 1980 Op.Att'yGen. at 150-51. Applying this construction of subsection (a), we believe § 602.6501 "expressly creates" the magistrate appointing commissions. Section 602.6501(1) states that a magistrate appointing commission "is established in each county." This phrase clearly directs the constitution of the commissions rather authorizes or permits the commissions to form.

---

[1]This year the General Assembly added a fifth definition of "governmental body" to include "[a]n advisory board, advisory commission, or task force created by the governor or the general assembly to develop and make recommendations on public policy issues." House File 647, 73rd G.A., 1st Sess., § 1 (Iowa 1989). This provision, however, is not relevant to our analysis.

We note that state and district judicial nominating commissions are in a different position under this provision of the Open Meetings Law. These bodies are created by the Iowa Constitution. Iowa Const. art. V, § 16. Subsection 21.2(1)(a), which defines as governmental bodies commissions expressly created by statute or by executive order, therefore, is not applicable. See 1978 Op.Att'yGen. 850, 851.

In conclusion, it is our opinion that county magistrate appointing commissions established under § 602.6501 are subject to the Open Meetings Law.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:mlr

COUNTIES AND COUNTY OFFICERS: Civil Service Commission; Compensation of county personnel director; Compensation for added duties. Iowa Code §§ 331.904, 331.907, 341A.5 (1989). A presently employed county employee or officer appointed by the civil service commission to serve as county personnel director, pursuant to Iowa Code § 341A.5 (1989) may receive additional compensation for the performance of duties associated with that position if the amount of additional compensation is awarded in accordance with the general code provisions for determination of county officer and employee salaries. (Scase to Thole, 7-21-89) #89-7-6(L)

July 21, 1989

Michael E. Thole
Osceola County Attorney
315 Ninth Street
Sibley, Iowa 51249

Dear Mr. Thole:

You have requested an opinion of the Attorney General regarding whether a presently employed county employee may receive additional compensation if appointed to serve as personnel director for the civil service commission. As you note, Iowa Code § 341A.5 (1989), includes a provision for the appointment of a personnel director by the county civil service commission. This code section provides, in relevant part, as follows:

> The [civil service] commission shall appoint a personnel director who shall act as its secretary and such other personnel as may be necessary. The personnel director shall keep and preserve all records of the commission, including reports submitted to it and examinations held under its direction, advise the commission in all matters pertaining to the civil service system, and perform such other duties as the commission may prescribe. The commission may add the personnel director's duties to a presently employed county employee.

In light of the final clause of this provision, you inquire:

> If the Commission adds the personnel director's duties to a presently employed county employee, such as the County Auditor, can that individual receive additional compensation for the performance of the personnel director's duties?

We believe that, absent specific statutory mandate to the contrary, a presently employed county employee may be awarded additional compensation for services rendered as personnel director. Additional compensation for such services must, however, be awarded pursuant to the general procedural guidelines of Iowa Code § 331.904 or § 331.907, whichever is applicable.

In a 1926 opinion, this office addressed the question of whether deputy county officers were entitled to receive additional compensation for working overtime in the discharge of the prescribed duties of their offices. Our opinion that overtime compensation could not be awarded for such service was based upon recognition that, "while a county officer may receive extra compensation for services rendered outside of the duties vested in him by the law, he may not be paid extra compensation for performing the prescribed duties of his office." 1926 Op.Att'yGen. 244.

Service as the county personnel director does not fall within the regularly prescribed duties of any particular county employee. Rather, Code § 341A.5 allows the civil service commission to appoint either an individual not employed by the county or a presently employed county employee to this position. It follows that a county employee may receive extra compensation if appointed by the commission to serve as personnel director.[1]

The amount of additional compensation to be received by a county employee so appointed must be determined in accordance with applicable statutory provisions. If the auditor or another county officer is appointed to act as personnel director, compensation for his/her duties as personnel director must be determined by the county compensation board. See Iowa Code § 331.907 (1989). That board may take the appointment into consideration when preparing their recommended compensation schedule. Similarly, the principal officer or board of

---

[1] The legislature has, on occasion, chosen to add the duties of a newly created position to those of an existing county employee, specifically providing that such duties shall be performed without additional compensation to that employee. See e.g. Iowa Code § 250.6 (1989) (deputy county auditor shall be appointed to serve as administrative assistant to the county commission of veteran's affairs, "to serve without additional compensation."); Iowa Code § 333A.3 (1989) (full-time elected county official serving as member of the county finance committee shall not receive per diem for that service). No such restriction on compensation appears in Iowa Code § 341A.5.

supervisors may consider the additional duties involved when establishing the salary of a deputy[2], assistant, clerk, or other county employee chosen to serve as personnel director. See Iowa Code § 331.904 (1989).

In conclusion, it is our opinion that a presently employed county employee appointed by the civil service commission to serve as county personnel director, pursuant to Iowa Code § 341A.5 (1989), may receive additional compensation for the performance of duties associated with that position. The amount of additional compensation must be awarded in accordance with the general code provisions for determination of county officer and employee salaries.

Sincerely,

CHRISTIE J. SCASE
Assistant Attorney General

---

[2] The salary received by a deputy officer may not exceed the limits set forth in Iowa Code § 331.904(1).

CONSERVATION: Nonresident hunting laws. House File 88, 73rd G.A., 1st Sess. (Iowa 1989); 1989 Iowa Acts, ch. ___; Iowa Code §§ 109.1(26), 109.39 (1989). The zoned biological balance limitations of House File 88 could reasonably be construed not to apply to nonresident wild turkey and deer hunting licenses issued in 1989. Ambiguity in House File 88 should be resolved by the Natural Resource Commission through rulemaking. (Smith to Hutchins, State Senator, 7-10-89) #89-7-5(L)

July 10, 1989

The Honorable Bill Hutchins
State Senator
306 S. Division
Audubon, IA 50025

Dear Senator Hutchins:

You have requested an opinion of the Attorney General concerning House File 88, 73rd G.A., 1st Sess. (Iowa 1989), which authorizes the Department of Natural Resources to issue licenses to nonresidents for hunting deer and wild turkey. The Act sets numerical limits on the maximum numbers of nonresident wild turkey and deer hunting licenses that may be issued in 1989 but does not set numerical limits for subsequent years. The Act also imposes additional limitations requiring the Natural Resource Commission to apply a zoned "biological balance" formula before issuing nonresident wild turkey and deer hunting licenses. Your question is whether the zoned biological balance formula was intended to apply only after 1989, i.e., in place of the numerical limits. It is our opinion that the statute is somewhat ambiguous concerning the applicability of the formula in 1989 and that the ambiguity should be resolved by rulemaking.

Our analysis focuses on sections 2 and 3 of H.F. 88, which respectively amend Iowa Code sections 110.7 and 110.8 to authorize issuance of wild turkey and deer hunting licenses to nonresidents beginning in 1989. The separate provisions relating to wild turkey and deer are identical except the maximum number of nonresident deer hunting licenses to be issued in 1989 is

1,000, twice the maximum authorization for 1989 wild turkey hunting licenses. Section 2, relating to wild turkeys, provides as follows:

> [1] A nonresident hunting wild turkey is required to have only a nonresident wild turkey hunting license and a wildlife habitat stamp. [2] The [Natural Resource] commission shall limit to five hundred licenses the number of nonresidents allowed to have wild turkey hunting licenses for the year 1989 and establish application procedures. [3] For subsequent years, the number of nonresident wild turkey hunting licenses shall be determined as provided in section 109.38. [4] The commission shall allocate the nonresident wild turkey hunting licenses issued among the zones based on the populations of wild turkey, but nonresident wild turkey hunting licenses shall not be issued for a zone that has an estimated wild turkey population of less than one hundred ten percent of the minimum population required for a biological balance to exist. [5] The hunting zones for wild turkey shall be the same as for deer. [6] A nonresident applying for a wild turkey hunting license must exhibit proof of having successfully completed a hunter safety and ethics education program as provided in section 110.27 or its equivalent as determined by the department before the license is issued.[1]

For the purpose of clarity we have numbered each sentence separately in brackets.

Under this statutory scheme nonresident hunting is authorized but the nonresident must have a nonresident wild turkey or deer hunting license and a wildlife habitat stamp. The second sentence expressly imposes a maximum number of licenses

---

[1]You do not specifically inquire whether the sixth sentence, which requires completion of an approved safety and ethics program by nonresident applicants, is applicable both in 1989 and future years. We have little doubt, however, that the legislature's interest in promoting safe hunting is applicable as much in 1989 as in future years.

for 1989. The third sentence refers to Iowa Code § 109.38 to determine the maximum number of licenses in future years. The ambiguity arises in determining the applicability of the fourth and fifth sentences. These sentences direct that the commission shall allocate nonresident hunting licenses "among the zones."[2] The zones for wild turkey and deer, in turn, are to be the same. More importantly, however, the fourth sentence states that licenses "shall not be issued for a zone that has an estimated wild turkey population of less than one hundred ten percent of the minimum population required for a biological balance to exist." It is unclear from the statute whether the limitation on licenses imposed by the zoned "biological balance" restricts licenses issued only in future years under the third sentence or also restricts licenses issued in 1989 under the second sentence.

In order to resolve ambiguity in statutes, we rely on principles of statutory construction. In construing statutes the ultimate goal is to ascertain the intent of the legislature. Emmetsburg Ready Mix Co. v. Norris, 362 N.W.2d 498, 499 (Iowa 1985). A sensible, workable, practical and logical construction should be given. Id. at 499. Applying these principles, we believe it unlikely that the legislature intended both the numerical limitation in the second sentence and the zoned biological balance limitation in the fourth sentence to apply in 1989. We note that the biological balance of any particular zone is not determined by a precise mathematic formula. Biological balance is defined in § 109.1(26) as "that condition when the number of animals present over the long term is at or near the number of animals of a particular species that the available habitat is capable of supporting." The biological balance, therefore, allows nonresident licenses to be issued only when the target species exceeds the carrying capacity of available

---

[2]The express references in the fourth and fifth sentences to hunting zones are the first such references enacted by the General Assembly. However, the Natural Resource Commission and its statutory predecessor long ago established zones for wild turkey and deer hunting by administrative rule pursuant to the mandate for "territorial limitations" in Iowa Code § 109.39. House File 88 requires new zones for nonresident deer and turkey hunting because the Commission's rules establish different zoning boundaries for the two species. Compare zones described in 571-chapter 99, Iowa Admin. Code (Wild Turkey Fall Hunting) with 571-chapter 106, Iowa Admin. Code (Deer Hunting Regulations).

habitat.[3] It is difficult to tell from the statutes whether this determination bears any relationship to the limitation of 500 nonresident wild turkey hunting licenses or the 1000 nonresident deer hunting licenses established for 1989.

Because the numerical and biological balance limitations appear unrelated, we believe it unlikely the legislature intended both limitations to be applied in combination for 1989. Rather, it is likely the legislature determined that an initial season of 500 nonresident wild turkey hunting licenses and 1000 nonresident deer hunting licenses would have an insignificant impact on wild turkey and deer populations.[4] An initial year under this numerical limitation, moreover, would allow the Commission more time to establish zones and determine the biological balance for future years.

The statute can be reasonably construed as applying only the numerical limitation in 1989. However, ultimate resolution of this issue inextricably involves the Commission's expertise. An agency is entitled to limited deference on matters of law, including statutory construction. Norland v. Iowa Department of Job Service, 412 N.W.2d 904, 908 (Iowa 1987). The Commission has both the factual information and express delegation of legislative authority to determine the zoned biological balance and how, if at all, that determination relates to the numerical limitations for 1989. For these reasons, we believe the agency should promulgate interpretive rules to resolve this issue. In doing so, the agency may promulgate rules which a rational agency could conclude are within its delegated authority and which do not contravene statutory provisions. Hiserote Homes, Inc. v. Riedmann, 277 N.W.2d 911, 913 (Iowa 1979).

In conclusion, it is our opinion that 1989 Iowa Acts, House File 88, is ambiguous concerning whether the Natural Resource

---

[3]The formula allowing nonresident hunting only when the population of the target species is at least 110 percent of the minimum required for "biological balance" may be unworkable. It could be interpreted to authorize nonresident hunting only in zones where wild turkey or deer are overcrowded.

[4]Such a legislative view would be supported by reports from the Department of Natural Resources that approximately 170 thousand resident deer hunting licenses were issued for the 1988 deer hunting season and approximately 23 thousand resident wild turkey hunting licenses were issued for the spring 1989 wild turkey hunting season.

Commission must apply a zoned biological balance formula before issuing 1989 nonresident wild turkey and deer hunting licenses. The Commission should use its rulemaking authority to promulgate interpretive rules resolving the ambiguity in light of this opinion.

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

MUNICIPALITIES: Library Board of Trustees; Petitions. Sufficiency. Iowa Code ch. 392 (1989); Iowa Code ch 378 (1971); Iowa Code §§ 376.3, 392.1, 392.5 and 392.6 (1989); Iowa Code §§ 378.3 and 378.10 (1971). 1985 Iowa Acts, ch. 203, § 39. 1975 Iowa Acts, ch. 203, § 39; 1972 Iowa Acts, ch. 1088, §§ 192, 196 and 199. Submission of a proposal to elect library board of trustees to the voters is not authorized in § 392.5. A proposal to replace a library board with an alternate form of administrative agency, the members of which are elected, is authorized by § 392.5. The proposal, however, must describe the action proposed with reasonable detail. Reasonable detail, minimally, would include the title, powers and duties of the agency, the method of appointment or election, qualifications, compensation and terms of members. Any proposal for election should provide for adoption by ordinance of existing statutory election provisions. A proposal which fails to satisfy the requirements of § 392.5 is void and may not be altered nor submitted in part to the voters by the city council. (Walding to Chapman, State Representative, 7-5-89) #89-7-4(L)

July 5, 1989

The Honorable Kay Chapman
State Representative
900 The Center
Cedar Rapids, Iowa 52401

Dear Representative Chapman:

We are in receipt of your request for an opinion of the Attorney General regarding an interpretation of Iowa Code § 392.5 (1989). Section 392.5 authorizes, inter alia, submission to the voters of a proposal to alter the manner of selection of a library board. You indicate that a petition has been filed with the city of Cedar Rapids pursuant to § 392.5. The following language constitutes the entire text of the petition, with the exception of signatures, addresses and telephone numbers:

ELECT YOUR LIBRARY TRUSTEES

> We, the undersigned citizens of Cedar Rapids, request that the City Council of Cedar Rapids present to the voters a proposal to elect the members of the Board of Library Trustees for the Cedar Rapids Public Library. This proposal shall be presented at the nearest appropriate City election and shall include: (1) a method by which all quadrants of the City are represented by an elected Trustee, and (2) a statement of the Trustee's responsibility to the people of Cedar Rapids.
>
> Signers must be at least 18 years old and residents of Cedar Rapids.

Specifically, you pose fourteen questions related to this petition:

1. As an alternative to election by a City Council or Mayoral appointment (with or without approval of the City Council), does the City Code of Iowa, including Iowa Code Section 392.1, authorize the election of the members of a city administrative agency, e.g. a City Library Board of Trustees, by a City's voters where there is no specific statutory authorization for election by the voters such as is set forth in Iowa Code Section 392.6 with respect to hospital trustees?

2. If the answer to question 1 is in the affirmative and the members of a city administrative agency, e.g. a City Library Board of Trustees, are elected from separate districts must the districts be established and members of the administrative agency be elected on a basis that satisfies the "one person, one vote" requirement as applicable to local governmental bodies.

3. Does Iowa Code Section 392.5 require that the petition signed by eligible electors set forth the specific form of the proposal to alter the manner of selection or the charge of a City Library Board of Trustees to be submitted to the voters?

4. Does Iowa Code Section 392.5 require a City Council to submit to the voters any proposal received by petition if the petition does not set forth the specific form of the proposal to alter the manner of selection or the charge of a City Library Board of Trustees?

5. Does Iowa Code Section 392.5 require that the petition set forth at least the reasonable details of the proposal to alter the manner of selection or the charge of a City Library Board of Trustees which proposal is to be submitted to the voters?

6. Does Iowa Code Section 392.5 require a City Council to submit to the voters any proposal received by petition that does not set forth a least reasonable details of the proposal to alter the manner of selection or the charge of a City Library Board of Trustees?

7. Does a petition as set forth above satisfy the requirements of Iowa Code Section 392.5 as to the

content of a petition to alter the manner of selection of a City Library Board of Trustees?

8. If the answer to question 7 is in the negative, is the City Council required, in response to the petition, to prepare a sufficiently detailed proposal with respect to altering the manner of selecting a City Library Board of Trustees and submit the City Council prepared proposal to the voters?

9. Is a request for a proposal to include "a statement of the Trustee's responsibility to the people of Cedar Rapids" a request for a proposal to alter the "charge of a library board" within the meaning of Section 392.5?

10. Does a petition as set forth above satisfy the requirements of Iowa Code Section 392.5 as to the content of a petition to alter the charge of a Library Board of Trustees?

11. If the answer to question 10 is in the negative, is the City Council required, in response to the petition, to prepare a sufficiently detailed proposal to alter the charge of a City Library Board of Trustees and submit the City Council prepared proposal to the voters?

12. If Iowa Code Section 392.5 requires a City Council to submit to the voters a proposal to alter the manner of selection of and/or the charge of a City Library Board of Trustees under circumstances where a "petition" does not set forth the specific form of the proposal(s) or reasonable details of the proposal(s) and if the City Council is not required to prepare a sufficiently detailed proposal as to either or both to be submitted to the voters, is the City Council then empowered to effectuate what it believes to be the intent of the proposal(s) without further submission to the voters upon approval of the proposal(s) by the voters?

13. In the event your answers to questions 4, 6, 7, 8, 10 or 11 are in the negative, does Iowa Code Section 392.5 and any related statutes require that the defects in the petition be cured by an amendment to the original petition submitted by the sponsors of the petition without obtaining anew the number of signatures required on a petition under Iowa Code Section 362.4?

14. If a petition received by a City Council purports to request a proposal to alter the manner of selection of a Library Board and also purports to alter the charge of a Library Board but one of the proposals is not set forth with sufficient detail to be submitted to the voters must the remaining proposal be submitted to the voters?

Section 392.5, under which the petition was filed, in pertinent part, provides:

> A proposal to alter the composition, manner of selection, or charge of a library board, or to replace it with an alternative form of administrative agency, is subject to the approval of the voters of the city.
>
> The proposal may be submitted to the voters at any city election by the council on its own motion. Upon receipt of a valid petition as defined in section 362.4, requesting that a proposal be submitted to the voters, the council shall submit the proposal at the next regular city election. A proposal submitted to the voters must describe with reasonable detail the action proposed.

Iowa Code § 392.5 (1989) (unnumbered paragraphs 4 and 5).[1]

A response to your series of questions begins with a review of the legislative history of § 392.5. A discussion of the legislative history of that section is contained in a prior opinion of this office. See, 1988 Op. Att'yGen. 67 (#88-1-9(L)). In that opinion, we observed that "section 392.5, which became effective on July 1, 1972, was one of the sections added with the adoption of the Home Rule amendment. See, 1972 Iowa Acts, ch. 1088, § 196."[2] Prior to home rule, Iowa Code chapter 378 governed public libraries for Iowa municipalities. See, Iowa Code §§ 378.3 and 378.10 (1971). Under this chapter the libraries were governed by library boards. Iowa Code § 378.3 (1971). Section 392.5 expressly continued the functioning of

---

[1]Approval of a majority of those voting is required for passage. Iowa Code § 392.5. A defeated proposal may not be submitted to the voters for four years. Id.

[2]Section 392.5, since enactment, has not been amended.

library boards after the passage of home rule and "until altered or discontinued as provided in this section."

As part of the transition between these provisions of the Iowa Code, section 392.5 directed that the city council "retain all applicable ordinances, and . . . adopt as ordinances all applicable state statutes repealed" in 1972 in implementing home rule for cities. Iowa Code § 392.5 (1989) (unnumbered paragraph 2). Chapter 378 was included in the statutes repealed in that legislation. 1972 Iowa Acts, ch. 1088, § 199. Under chapter 378, the board of library trustees had been appointed by the mayor with approval by the city council. Iowa Code § 378.3 (1971). Accordingly, you indicate that the Cedar Rapids city council, in compliance with § 392.5, adopted as an ordinance provision for appointment of board members by the mayor with approval by the city council.

With home rule enactment, provision was also made for an alternative form of administrative agency to govern libraries. See, 1972 Iowa Acts, ch. 1088, § 192. Iowa Code § 392.1 (1989) provides, in part:

> If the council wishes to establish an administrative agency, it shall do so by an ordinance which indicates the title, powers, and duties of the agency, the method of appointment or election, qualifications, compensation, and term of members, and other appropriate matters relating to the agency. [Emphasis added].

In 1986 Op. Att'yGen 95 (#86-6-5 (L)), citing to Iowa Code § 392.1, we opined that "[a] city establishing or operating a municipal library may establish an administrative agency pursuant to Iowa Code chapter 392 (1985) to administer that library." Provision for election of members, underscored above, was added in 1975. See, 1975 Iowa Acts, ch. 203, § 39.

The voters have a significant role in the alteration of the library board or discontinuance of the library board in favor of an administrative agency. Section 392.5 provides that "[a] proposal to alter the composition, manner of selection, or charge of a library board, or to replace it with an alternate form of administrative agency, is subject to the approval of the voters of the city." Iowa Code § 392.5 (1989) (unnumbered paragraph 4). A proposal, as described, may be submitted to the voters at any city election by the council on its own motion or shall be submitted to the voters at the next regular city election upon receipt of a valid petition. Iowa Code § 392.5 (1989) (unnumbered paragraph 5).

Initially, we note that the proposal described in § 392.5 may focus on either the library board or an alternate form of administrative agency. The specific language of § 392.5 provides that a proposal may be made "to alter the composition, manner of selection, or charge of a library board, or to replace it [the library board] with an alternate form of administrative agency." Iowa Code § 392.5 (1989) (unnumbered paragraph 4) (emphasis added). Ordinarily, the term "or" is construed to be disjunctive unless that construction is contrary to legislative intent. See, Koethe v. Johnson, 328 N.W.2d 293, 299 (Iowa 1982). In this statute, we believe the term "or" is disjunctive and separates significantly different options for proposals.

Chapter 392 authorizes a proposal to elect members of an administrative agency but not to elect members of a library board. Statutes in chapter 392 relating to the alternate form of administrative agency should be read together. See, Messina v. Iowa Department of Job Service, 341 N.W.2d 52, 56 (Iowa 1983). Authorization of a proposal under § 392.5 "to replace it [a library board] with an alternative form of administrative agency" refers to § 392.1. Section 392.1, in turn, authorizes the city council to establish an administrative agency by ordinance which indicates, inter alia, "the method of appointment or election" of its members. Iowa Code § 392.1 (1989). Reading these statutes together, we believe that a proposal under § 392.5 to replace the library board with an alternate form of administrative agency means the administrative agency referred to in § 392.1, which by the terms of that section, may have elected members.

No similar authorization appears in chapter 392 to propose election of members of the library board. Section 392.5, itself, authorizes a proposal only "to alter the composition, manner of selection, or charge of a library board." Iowa Code § 392.5 (1989) (unnumbered paragraph 4) (emphasis added). The phrase "manner of selection" falls short of authorizing a proposal for "election" of the library board by the voters.

Our conclusion that a proposal to alter the "manner of selection" of the members of the library board falls short of authorizing a proposal for election of the library board by the voters is supported by two related principles. First, we have opined that the system of election laws are uniform statewide and under the control of the legislature. 1980 Op. Att'yGen. 829 (#80-10-4(L)). A city may not, therefore, under municipal home rule, hold elections not authorized by the legislature. Id. In our view, the phrase "manner of selection" is insufficient to constitute a legislative authorization for an election.

Second, under principles of statutory construction, the same phrases which appear in a statute are generally given consistent meaning. Kehde v. Iowa Department of Job Service, 318 N.W.2d 202 (Iowa 1982). Conversely, different phrases should be given different meaning. Applying this principle, we note that the term "election" is used specifically in § 392.1 when referring to the administrative agency. Section 395.5, by contrast, permits a proposal only to alter the "manner of selection" of library board members. Had the legislature also intended to authorize a proposal for election of library board members, we believe the specific term "election" would have been used in § 392.5 as well.

With the foregoing analysis in mind, we turn to the specific questions which you pose. In view of our conclusion that a proposal for election of members of a library board is not authorized, we believe the pending petition is invalid. A proposal to replace the library board with an alternate form of administrative agency the members of which are elected would be authorized. The proposal, however, would require more detail.

Section 392.5 states that a proposal submitted to the voters "must describe with reasonable detail the action proposed." Iowa Code § 392.5 (1989) (unnumbered paragraph 5). Where a petition requesting a proposal for establishment of an administrative agency be submitted to the voters is filed, we believe "reasonable detail" must, minimally, address the elements set out in § 392.1. That is, the proposal must include "the title, powers, and duties of the agency, the method of appointment or election, qualifications, compensation, and terms of members." Iowa Code § 392.1 (1989).

Where reasonable details are not included the petition may not be amended by the city council itself, nor may the council submit any portion of a deficient proposal. Similarly, a deficient petition may not be substantially amended by the filer without recirculating the petition. Authorities focusing on analogous provisions for initiatives and referendums suggest that subsequent amendment is not appropriate. According to 42 Am. Jur. 2d, Initiative and Referendum, § 26:

> Officers having charge of the machinery for bringing an initiative petition to a vote of the electors cannot alter the petition. If a portion of an initiative measure is void, the election authorities are not empowered to strike the void parts and submit the parts which are not void to the voters, at least where the enactment of the valid portions would result in a regulatory enactment

> entirely different from an enactment including the void portion. [Footnotes omitted].

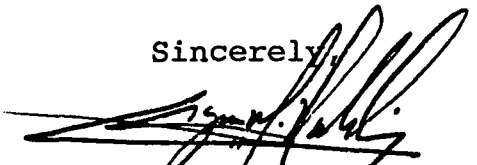
This language does not suggest, nor do we, that minor corrections to a petition are foreclosed. See, 1974 Op. Att'yGen. 266, 270 (nominating papers for municipal office bearing candidate's affidavit invalid but subject to correction after filing). But see, 1976 Op. Att'yGen. 274, 278 "(nominating papers for municipal office with insufficient signatures invalid and not subject to amendment by adding signatures after filing deadline). Any attempts to make corrections would need to be assessed on a case-by-case basis. Of course, a new petition which complies with § 392.5 could be recirculated.

Finally, we note that, if a proposal for election of administrative agency members were submitted, it is unlikely that the legislature intended a proposal to include the full panoply of provisions that creation of elected office would necessarily require. See, generally, Iowa Code ch. 39-49 (1989). Cf. Iowa Code § 392.6 (1989). A proposal for election, more likely, should provide for adoption by ordinance of existing statutory election provisions. Such "options" for municipalities are not uncommon. See, e.g., Iowa Code § 376.3 (1989) (candidates for elective city office nominated under procedures in chapter 376 unless city opts by ordinance to follow chapters 44 and 45). If election from districts is desired, utilization of existing city council wards, if any, would insure compliance with the population equality requirements of the equal protection clause. See, Board of Estimate v. Morris, 489 U.S. ____, 109 S.Ct. 1433, 103 L.Ed.2d 717 (1989).

In summary, it is our opinion that submission of a proposal to elect library board of trustees to the voters is not authorized in § 392.5. A proposal to replace a library board with an alternate form of administrative agency, the members of which are elected, is authorized by § 392.5. The proposal, however, must describe the action proposed with reasonable detail. Reasonable detail, minimally, would include the title, powers and duties of the agency, the method of appointment or election, qualifications, compensation and terms of members. Any proposal for election should provide for adoption by ordinance of existing statutory election provisions. A proposal

which fails to satisfy the requirements of § 392.5 is void and may not be altered nor submitted in part to the voters by the city council.

Sincerely,



LYNN M. WALDING
Assistant Attorney General

MUNICIPALITIES: Civil Service; Diminution of Employees; Seniority. Iowa Code §§ 19A.9(5) and 400.28 (1989). A person removed or suspended pursuant to § 400.28 continues to be eligible for appointments and promotions for a period of not less than three years even if he or she has declined to accept a prior offer of employment. The name of a person who declines an appointment or promotion under § 400.28 should remain on the § 400.28 preferred list for the entire statutory period. (Walding to Connors, State Representative, 7-3-89) #89-7-3(L)

July 3, 1989

The Honorable John H. Connors
State Representative
1316 East 22nd Street
Des Moines, Iowa 50317

Dear Representative Connors:

We are in receipt of your request for an opinion of the Attorney General regarding an interpretation of Iowa Code § 400.28 (1989). Specifically, the question you have posed is whether a person removed or suspended pursuant to § 400.28 continues to be eligible for appointments or promotions if he or she has declined to accept a prior offer of employment. In our opinion a person removed or suspended pursuant to § 400.28 continues to be eligible for appointments and promotions for a period of not less than three years even if he or she has declined to accept a prior offer of employment.

By separate letter, we are informed of the following facts. On July 1, 1988, the police department in Fort Madison, Iowa, laid off three police officers pursuant to § 400.28. On September 9, 1988, the city council, at the request of the police chief, restored one of the positions on a temporary basis for a period of two months. That temporary position was initially offered to the officer certified with the greatest seniority who declined the position. The temporary position was filled instead by the officer certified with the second highest seniority. In

November, the position was extended for a period of six months.[1] On that occasion, the senior officer, who had earlier declined the two-month temporary appointment, accepted the position. We have also been informed orally that the senior officer has since been recalled to fill a permanent position vacated by a disabled officer.

At the outset we note that, while it is appropriate for this office to express an opinion on legal issues, it is improper for us to engage in judicial fact-finding in the context of an opinion. 1982 Op.Att'yGen. 353, 353-354. Accordingly, our discussion will be limited to matters of law, not fact.

Section 400.28 authorizes a city council, when in the public interest, to diminish the number of civil service employees in a classification or grade.[2] Determination as to which employees to remove or suspend is based upon seniority in the classifications or grades affected. Id. Upon the diminution of employees, § 400.28 provides, in relevant part:

> In the case of such removal or suspension, the civil service commission shall issue to each person affected one certificate showing the person's comparative seniority or length of service in each of the classifications or grades from which the person is so removed and the fact that the person has been honorably removed. The certificate shall also list each classification or grade in which the person was previously employed. The person's name shall be carried for a period of not less than three years after the suspension or removal on a preferred list and appointments or promotions made during that period to the person's former duties in the classification or grade shall be made in the order of greater seniority from the preferred lists.

---

[1]A difference of opinion apparently exists as to whether the original position was extended or, rather, whether a separate temporary position was subsequently offered at the expiration of the original temporary position. City officials contend that the latter is, in fact, the case.

[2]The authority to remove civil service employees has long been recognized by the Iowa Supreme Court where such removal is made in good faith for reasons of economy. See, Lyon v. Civil Service Commission, 203 Iowa 1203, 212 N.W. 579 (1927).

[Emphasis added].

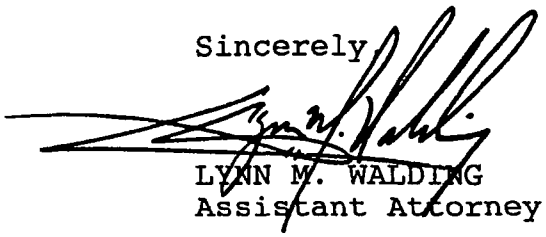
In construing the aforementioned section, familiar principles of statutory construction are applicable. The polestar of statutory construction is legislative intent. See, Doe v. Ray, 251 N.W.2d 496, 500 (Iowa 1977). The construction of any statute must be reasonable and must be sensibly and fairly made with a view of carrying out the obvious intentions of the legislature. See, Janson v. Fulton, 162 N.W.2d 438, 442 (Iowa 1968). When a statute is plain and its meaning is clear, a search for a meaning beyond its express terms is not permitted. See, State v. Sunclades, 305 N.W.2d 491, 494 (Iowa 1981). Unless otherwise defined by the legislature or the law, terms in a statute are to be attributed their ordinary meaning. See, State v. Jackson, 305 N.W.2d 420, 422 (Iowa 1981).

The plain language of § 400.28, emphasized above, provides that a civil service commission is to maintain a person's name on a preferred list "for a period of not less than three years after the suspension or removal." Further, § 400.28, in express terms, states that all appointments and promotions during that three-year period "shall be made in order of greater seniority from the preferred list." No express limitation is provided in § 400.28 on the period during which a person is eligible to have his or her name on a preferred list.

In other analogous situations, agencies have adopted rules to omit names of applicants from further consideration for employment when the applicant has previously declined job offers for the job class. Applicants on eligible lists in the Iowa Department of Personnel, for example, remain on lists "for at least one year and not longer than three years." Iowa Code § 19A.9(5) (1989). The Department, however, has promulgated specific rules which authorize the employer to request that the Department not refer an applicant who has declined or failed to respond to three offers to interview for the same job class. 581 Iowa Admin. Code § 7.7(2). In the absence of such express provision, we do not construe § 400.28 to prohibit an employer from offering a position to a person who has previously declined to accept the position.

Accordingly, it is our judgment that a person removed or suspended pursuant to § 400.28 continues to be eligible for appointments and promotions for a period of not less than three years even if he or she has declined to accept a prior offer of employment. The name of a person who declines an appointment or promotion under § 400.28 should remain on the preferred list for the entire statutory period.

Sincerely,



LYNN M. WALDING
Assistant Attorney General

AGRICULTURE: Grain Warehouse; Grain Indemnity Fund. Iowa Code §§ 543A.1(9), 543A.6, as amended by 1989 Iowa Acts, Ch. _____, § 908 (House File 533). Each depositor and seller who suffers a loss in relation to a particular grain dealer or warehouse operator is subject to the $150,000 and the ninety percent limitations on recovery from the Fund. The limitations apply to restrict the total recovery by the person from the Fund, regardless of the number of transactions between the person and the licensee. Recovery by a particular person for a loss relating to one licensee does not bar recovery by the same person for a subsequent loss relating to a different licensee. Both limitations provide for payment from the Fund for a portion of the loss. The "loss" excludes other recovery through means such as receivership; therefore, the limitations do not restrict the aggregate recovery by the person from all sources. (Donner to Halvorson, State Representative, 8-30-89) #89-8-6(L)

August 30, 1989

The Honorable Roger A. Halvorson
State Representative
P.O. Box 627
Monona, Iowa 52159

Dear Representative Halvorson:

We are in receipt of your request for an Attorney General's opinion regarding the limitation of liability of the Iowa Grain Depositors and Sellers Indemnity Fund (the Fund). You note that there is both a $150,000 and a ninety percent limitation on liability on the part of the Fund. The question you raise is how the $150,000 limitation is to be applied.

We find that the $150,000 limitation, as well as the ninety percent limit, applies to limit recovery to a person, as compared to a transaction, in relation to a particular grain dealer or warehouse operator. Therefore, recovery in relation to one licensee does not bar recovery by the same person relating to a different licensee. The limitations both apply after the person has had the opportunity to seek other recovery, such as from a receivership, and does not limit the total recovery the person may obtain from multiple sources.

The Code section you refer to, § 543A.6, has been modified by 1989 Iowa Acts, House File 533. The language pertaining to limitations on claims now appears in § 543A.6(7), providing that "[u]pon a determination that the claim is eligible for payment, the board shall provide for payment of ninety percent of the loss, as determined under subsection 4, but not more than one hundred fifty thousand dollars per claimant."

Neither the term "claim" nor the word "claimant" are defined in chapter 543A. However, in § 543A.6, subsections 4 and 5, "warehouse claims" and "grain dealer claims" are discussed. Under

"warehouse claim" the focus is on "a claim incurred by a depositor holding a warehouse receipt or a scale weight ticket for grain that the depositor delivered for storage to the licensed warehouse operator." Under "grain dealer claim" the focus is on "a claim incurred by a seller who has sold grain or delivered grain for sale or exchange and who is a creditor of the licensed grain dealer".

Further, § 543A.6(3) describes "eligible claims". One criteria is that the "claimant qualifies as a depositor or seller." Another is that the claim "derives from a covered transaction. . . a claim derives from a covered transaction if the claimant is a seller who transferred title to the grain to the grain dealer other than by credit sale contract within six months of the incurrence date, or if the claimant is a depositor who delivered the grain to the warehouse operator."

The rules of the Indemnity Fund board provide that "a claim" may be filed against the Fund and provide for a claim form. "Use of this claim form shall be the exclusive manner of filing a claim against the fund." 21 IAC 94.3 (543A) (emphasis added).

It appears then that a "claimant" is a depositor or a seller with a "a claim" arising from a transaction or multiple transactions conducted with a particular warehouse operator or a grain dealer, respectively. In this context, the claim against the Fund is the net result of that person's business dealings with that licensee. The limitation of recovery specifically relates to restricting recovery by "the claimant," which as shown is the individual depositor or seller. There is no limitation on "a claim." Iowa Code § 543A.6(7) (1989). See also, Marolf v. Iowa Grain Indemnity Fund Board, _____ N.W.2d _____, No. 88-1489 (Iowa, filed July 19, 1989) (Multiple checks issued by grain dealer to seller for multiple sales transactions considered as one claim against Fund; some of the transactions included in claim held not covered due to fact they occurred before the enactment of the Fund -- those portions of the claim did not "arise under" the Fund.)

Further support for the contention that the limitation applies to the person and not the transaction is found in examining the definition and use of the term "loss." "Loss" is defined in § 543A.1(9), not amended by the 1989 legislation, to mean "the amount of a claim held by a seller or depositor against a grain dealer or warehouse operator which has not been recovered through other legal and equitable remedies including the liquidation of assets." In newly amended § 543A.6(4) and (5) is the language that "[t]he value of the loss is the outstanding balance on the validated claim at the time of payment from the Fund." This would apply, for instance, where the Department of Agriculture and Land Stewardship, the regulatory agency over grain dealers and warehouse operators, is appointed by the

district court to act as receiver of grain in storage in a warehouse under the provisions of Iowa Code §§ 543.3 and 543.4 (1989). In that situation, the depositors would receive a pro rata distribution of the proceeds of the grain.

The claim period for the receivership and for filing claims with the Fund is virtually simultaneous (120 days). Iowa Code §§ 543.4(2); 543A.6(1) (1989). In effect, the receivership values the grain, and makes a distribution in at least partial settlement of the depositors' claims. Iowa Code § 543A.6(4) (1989). The receivership distribution is a recovery "through other legal and equitable remedies including the liquidation of assets" and thus reduces the "loss" which is payable from the Fund and subject to its limits. For example, if a depositor has grain in storage worth $200,000, and, as is typical, the receivership is able to make pro rata distribution of ninety percent of the warehouse operator's obligations, the resulting "loss" against the Fund is only $20,000. Ninety percent of that loss, $18,000, would be paid from the Fund. The total recovery by the depositor would be $198,000.

Chapter 543A consistently discusses "claim", "claimant", "depositor" and "seller" in the context of the transactions with the particular licensee. Therefore, a subsequent claim by the same individual depositor or seller in relation to transactions with a different licensee would not be precluded.

In summary, we opine that each depositor and seller who suffers a loss in relation to a particular grain dealer or warehouse operator is subject to the $150,000 and the ninety percent limitations on recovery from the Fund. The limitations apply to restrict the total recovery by the person from the Fund, regardless of the number of transactions between the person and the licensee. Recovery by a particular person for a loss relating to one licensee does not bar recovery by the same person for a subsequent loss relating to a different licensee. Both limitations provide for payment from the Fund for a portion of the loss. The "loss" excludes other recovery through means such as receivership; therefore, the limitations do not restrict the aggregate recovery by the person from all sources.

Sincerely,

Lynette A F Donner

LYNETTE A. F. DONNER
Assistant Attorney General

LAFD:bac

COUNTIES; Health: Iowa Code § 137.6(4), § 331.324(1)(o). The county board of health has the authority to set raises for county health department employees. (McGuire to Short, Lee County Attorney, 8-16-89) #89-8-3(L)

August 16, 1989

Mr. Michael P. Short
Lee County Attorney
609 Blondeau Street
Keokuk, Iowa 52632

Dear Mr. Short:

You have requested an opinion of this office regarding the powers of the county board of health to set raises for its employees. You point out that the county health department receives funds from the county general fund. In addition, however, the county health department receives "substantial payment for services . . . from clients and third party payors, including insurance companies, title XIX and Medicare benefits." In view of this mixed source of funds, you ask whether the county board of health or the county board of supervisors has the authority to set raises for employees of the county health department. It is our opinion that the county board of health has the authority to set raises for the county health department employees.

Iowa Code chapter 137 establishes local boards of health. Local boards of health include county, city, or district boards of health. Iowa Code § 137.2(5) (1989). Pursuant to § 137.6(4), the board of health may "[e]mploy persons as necessary for the efficient discharge of its duties." The employment practices of the boards "shall meet the requirements of the personnel commission or any civil service provision" under Iowa Code chapter 400. Iowa Code § 137.6(4).

The legislature has separately addressed the issue of establishing wages for county employees. Under chapter 331 the county board of supervisors shall "fix the compensation for services of county and township officers and employees if not otherwise fixed by state law." Iowa Code § 331.324(1)(o).

In order to determine whether § 137.6(4) authorizes the board of health to set raises or whether § 331.324(1)(o) authorizes the board of supervisors to set raises, we turn to principles of statutory construction. When possible, conflicting statutes should be harmonized in order to carry out the meaning and purpose of both statutes. Dillon v. City of Davenport, 366 N.W.2d 918, 922 (Iowa 1985). If the statutes cannot be harmonized, a specific statute prevails over a general statute. Doe v. Ray, 251 N.W.2d 496, 501 (Iowa 1977); Iowa Code § 47. Applying these principles, we believe § 137.6(4) authorizes the board of health to set raises.

Initially we question whether the authority to "employ" persons, standing alone, would confer authority to set raises where a separate body is authorized to "fix compensation." Notably, other state statutes expressly authorize a body both to employ and to fix compensation where these powers are in one body. See, e.g., Iowa Code § 111A.4(6) (county conservation board authorized to employ and fix compensation of a director and assistants and employees); Iowa Code § 230A.10(2) (community mental health center board shall employ a director and staff and fix their compensation); Iowa Code § 347.13(5) (board of hospital trustees shall employ an administrator and necessary assistants and employees and fix their compensation); Iowa Code § 358B.8(3) (board of library trustees shall have power to employ a librarian, assistants and employees and fix their compensation). The term "employ" in these statutes is augmented by express authority to "fix compensation."

We need not decide whether authority to employ, standing alone, would be sufficient to authorize the county board of health to set raises. The second sentence of § 137.6(4) additionally states that employment practices shall meet the requirements of the personnel commission or any civil service provision adopted under chapter 400. In our view the second sentence significantly expands the authority of the board of health.

The personnel commission, a body whose employment practices the board of health is directed to meet, is empowered to adopt rules for "pay plans" for state employees. Iowa Code § 19A.9(2). The "pay plans" include not only minimum and maximum pay rates for job classes but also criteria and amount for pay raises. See Iowa Admin. Code § 4.5. The employment practices of the personnel commission, therefore, include creation of pay plans.

We do not suggest that the board of health is obligated to comply with every rule promulgated by the personnel commission. In 1974 the Attorney General construed the statutory predecessor

in the second sentence includes the pay plan adopted by the Iowa Merit Employment Commission.[1] The opinion concluded that a local board of health "need not adopt a pay plan, nor establish its own merit commission, nor do any other affirmative acts other than those necessary to bring their employment practices within the parameters" of the personnel commissioner or the civil service commission. 1974 Op.Att'yGen. 372. Consistent with this opinion, we do not consider the board of health bound by the rules of the personnel commission but do consider the board of health authorized to implement a pay plan consistent with chapter 19A.

Viewed in this light, § 137.6(4) may be harmonized with the power conferred on the board of supervisors under § 331.324(1)(o). The board of supervisors is authorized to "fix the compensation" for county officers and employees "if not otherwise fixed by state law." Insofar as § 137.6(4) authorizes the board of health to implement employment practices on matters which include pay, compensation of employees of the board of health may be deemed "fixed by state law." Even if these statutes could not be harmonized, § 137.6(4) is the more specific because it addresses a subset of county employees and, therefore, prevails.[2]

Based on the foregoing analysis, therefore, it is our opinion that, within budgetary constraints, the county board of health has the authority to set raises for county health department employees. Nothing in this opinion should be construed as questioning the authority of the county board of supervisors to set salaries where the board of health has acquiesced or otherwise agrees or to question the validity of existing collective bargaining agreements.

Sincerely,

Maureen McGuire

MAUREEN McGUIRE
Assistant Attorney General

MM:mlr

---

[1]The Iowa Merit Employment Commission became the personnel commission in 1986. 1986 Iowa Acts, ch. 1245 § 201.

[2]We assume without deciding that county board of health employees are county employees for the purposes of § 331.324(1)(o).

SCHOOLS: Conflict of interest, employment of school board member's spouse. Iowa Code § 227.27 (1989). The spouse of a member of the board of directors of a school district may be employed by or contract with that school district. A board member whose spouse is so employed or contracted with should abstain from voting on issues where actual or potential conflicts of interest exist. (Scase to Frisk, Harrison County Attorney, 8-16-89) #89-8-2(L)

August 16, 1989

Judson L. Frisk
Harrison County Attorney
207 E. 7th Street
Logan, Iowa 51546

Dear Mr. Frisk:

We have received your request for an opinion concerning whether the spouse of a member of the board of directors of a school district may be employed by or contract with that school district. You have also asked, if a board member's spouse may be so employed or contract, must the board member abstain from any action that may involve the pecuniary interest of his or her spouse.

As you noted in your request, prior to 1987 amendment, Iowa Code section 277.27 contained an express prohibition against the employment of the spouse of a school board member, providing as follows:

> 277.27 Qualification.
> A school officer or member of the board shall, at the time of election or appointment, be an eligible elector of the corporation or subdistrict. Notwithstanding any contrary provision of the Code, no member of the board of directors of any school district, or director's spouse, shall receive compensation directly from the school board. No director or spouse affected by this provision on July 1, 1972, whose term of office for which elected has not expired, or whose contract of employment has a fixed date of expiration and has not expired, shall be affected by this provision until the expiration of the term of office to which

> elected, or the expiration of the contract for which employed.

Iowa Code § 277.27 (1985) (emphasis added). The underscored provisions of this code section were stricken by 1987 legislative amendment. 1987 Iowa Acts Ch. 224, § 46. Because the legislature removed that portion of § 277.27 specifically prohibiting compensation of the spouse of a school board director, it may be concluded that the legislature intended to allow such compensation.

While the Iowa Code no longer contains a statutory prohibition upon the payment of compensation to a school board member's spouse by the school board, the potential for a conflict of interest exists any time a school board employs or contracts with the spouse of one of its directors. Conflict of interest is generally defined as existing "whenever an person serving in public office may gain any private advantage, financial or otherwise, from such service." 1982 Op.Att'yGen. 220, 221. "We have previously held that a mere familial relationship does not create a per se conflict of interest at common law, but that there may be specific facts in a particular situation by which a familial relationship results in a conflict of interest." Op.Att'yGen. # 87-11-10(L), citing 1984 Op.Att'yGen. 78; 1980 Op.Att'yGen. 300; 1972 Op.Att'yGen. 338, 1966 Op.Att'yGen. 38.

The determination of whether a conflict of interest actually exists in a given situation involves an analysis of the particular facts of the case and the actions taken by the office holder. 1982 Op.Att'yGen. at 223. As a general rule, such evidentiary issues cannot be resolved in an Attorney General's opinion. Op.Att'yGen. #87-1-15(L).

Because the board of directors has primary responsibility for the hiring, evaluation, and termination of all teachers and administrators employed by the school district (see Iowa Code Chapter 279), it is impossible to detail all board actions which may give rise to a conflict of interest. Nevertheless, a few general comments may assist in resolution of the questions posed. A school board is no longer statutorily precluded from employing or contracting with a board member's spouse. Nor does any per se rule preclude such actions.[1] However, if a school board chooses

---

[1] In reaching this conclusion, we have considered the 1987 Attorney General's opinion cited in your request. Op.Att'yGen. # 87-11-10(L) addressed the issue of whether 1987 amendment to Iowa Code § 331.905, which removed a statutory prohibition

(continued...)

to employ or contract with the spouse of one of its members, the board member whose spouse is so employed or contracted with must exercise care to avoid actual and potential conflicts of interest. This is especially true where the employee or contractee is a spouse whose finances are intertwined with those of the board member. Conflicts may be avoided if the board member abstains from voting on issues where a conflict or potential conflict exists. We cannot, in an opinion, outline all points on which the board member should abstain from voting.

In conclusion, it is our opinion that the spouse of a member of the board of directors of a school district may be employed by or contract with that school district. A board member whose spouse is so employed or contracted with should abstain from voting on issues where actual or potential conflicts of interest exist.

Sincerely,

CHRISTIE J. SCASE
Assistant Attorney General

/km

---

[1](...continued)
against relatives of state and local governmental officers or employees serving on the county compensation board, allowed selection of such spouse or relative to that board. That opinion concluded that, despite the amendment of § 331.905, the spouse of a county official whose salary is reviewed by the county compensation board should not be selected to serve on the county compensation board. Op.Att'yGen. # 87-11-10(L). That opinion was based largely upon the fact that the county compensation board has only one function -- to set the salary for county officers. Additionally, it should be noted that Iowa Code § 331.907 (1989) requires that the compensation board's recommendations rise or fall together. Therefore, it would be difficult if not impossible for a compensation board member to avoid potential conflict by abstaining from recommendations relating to his or her spouse's salary. We believe that the unique function of the county compensation board distinguishes the issue resolved in Op.Att'yGen. # 87-11-10(L) from the issue addressed herein.

COUNTIES; JOINING AIRPORT AUTHORITIES: Iowa Code §330A.6 & .7(2). The County in its ordinance joining an airport authority should follow the provisions of its resolution and may not put conditions on its membership. The County may use Rural Services Funds for its contribution to the Airport Authority. A commitment by the Airport Authority to keep an airport open for 20 years is an outstanding obligation of the authority. (Peters to Martin, Dickinson County Attorney, 8-8-89) #89-8-1(L)

August 8, 1989

Mr. Jon M. Martin
Dickinson County Attorney
Dickinson County Courthouse
Spirit Lake, IA 51360

Dear Mr. Martin:

You have requested advice concerning the Dickinson County Board of Supervisor's desire to join the Dickinson County Airport Authority. I will address each question separately:

I

1. Is the authorizing ordinance a valid one to satisfy the requirements of Section 330A.7(2) to effectuate the joining of the existing Airport Authority?

An Attorney General's opinion resolves issues of general impact arising under state law. It is not a mechanism to review specific agreements or ordinances to test their validity. We will therefore address the issue of the general requirements for a valid ordinance under § 330A.7(2).

The question requires us to construe several statutory provisions. In reading statutes, every attempt should be made to give effect to each statute. Iowa Code § 4.7. The starting point in any case involving interpretation of a statute is the statute itself. United States v. Hepp, 497 F.Supp. 348, 349 (N.D. Iowa 1980), aff'd 656 F.2d 350 (8th Cir. 1981). "When a statute is

plain and its meaning is clear, we do not search for meaning beyond its express terms." State v. Tuitjer, 385 N.W.2d 246, 247 (Iowa 1986) (citations omitted).

The creation and powers of airport authorities are controlled by Iowa Code Chapter 330A, which was modified by House File 551, 73rd G.A., 1st Session. (Iowa 1989). While Chapter 330A speaks of "municipalities", the term includes counties, § 330A.2(3), and thus is applicable to the Dickinson County Board of Supervisors.

Section 330A.7(2) provides that the resolution stating the intent of the county to join an existing airport authority contain the following information as required by §330A.6:

> a. Intention to join in the creation of an authority pursuant to the provisions of this chapter.
> b. The names of other municipalities which have expressed their intention to join in the creation of the authority.
> c. Number of board members to be appointed by the municipality.
> d. Name of authority.
> e. Place, date and time of hearing.

A distinction must be made between a "resolution" and an "ordinance." The former is a statement of policy, §331.101(12), while the latter is "a county law of a general or permanent nature." § 331.101(10).

Section 330A.6(2) simply requires:

> After the hearing, and if in the best interests of the municipality, the municipality shall enact an ordinance authorizing the creation of the authority.

While the resolution and ordinance have different legal consequences, the language in the resolution necessarily affects the ordinance. The requirements of § 330A.6(1) are intended to set limits on the language used in the ordinance. The public at the hearing is given an opportunity to comment on the resolution. To allow the ordinance to ignore completely the resolution language would lead to the illogical result of a hearing being held on one set of language, and the supervisors adopting a different ordinance. Therefore, the provisions § 330A.6(1)(a-d) cited above should be read as requirements for the ordinance.

The determination of whether the ordinance language meets the requirements of the § 330A.6(1)(a-d) is analogous to the standard

used to review the notice requirements of § 17A.4(1)(a). That provision requires an administrative agency to give the public notice of the contents of a proposed administrative rule and the opportunity to comment on the proposal. The Iowa Supreme Court has held that the notice must be "sufficiently informative to assure interested persons an opportunity to participate intelligently . . ." Iowa Cit./Labor Energy Coal. v. Iowa St. Com, 335 N.W.2d 178, 181 (Iowa 1983). Similarly, we have argued that the resolution required by § 330A.7(2) provides the means for intelligent public comment on the proposed airport authority membership.

The Iowa Court, however, has also held that a change in an administrative rule after notice does not require a new hearing. Id. The change must simply be "in character" or "a logical outgrowth of the prior notices and public hearings," in order to uphold the validity of the modified rule. Id. Following the analogy, the adopted ordinance under § 330A.7 should substantially follow the information contained in the resolution.

The ordinance language, however, can not be contrary to other statutory provisions. For example, the language of §330A.7 provides that the withdrawal of a municipality from the authority be reviewed by the entire authority board and that it be permitted only if certain conditions are met at the time of withdrawal. To allow a municipality to join the authority subject to certain conditions, would also permit the municipality to withdraw, based on deviation from a condition, without fulfilling the conditions of §330A.7. This would result in the authority never being entirely free to make its own decisions. The authority's discretion to address a specific issue may not be restrained by a condition in the ordinance. Section 330A.7 allows the authority to act independently and to be sure of the support of each member. Withdrawal is allowed only by review of the circumstances at the time of the request. A member cannot circumvent that provision by placing conditions on its membership.

Therefore the resolution provisions of § 330A.6 set out the general standard for a § 330A.7(2) ordinance which authorizes a county to join an existing airport authority. The ordinance language, however, must be in character with the resolution and can not limit the powers of the airport authority.

II

2. From what funds may the County make the contributions, contemplating use of Section 331.27 general funds or Section 331.428 rural

> services funds and being aware of the provisions of Section 330A.15, which allows a county to levy a tax for an airport authority only on property in the unincorporated area of such county?

Iowa Code § 330A.15 provides in relevant part: "A county which is a member municipality may levy such tax only upon the property in the unincorporated area of such county."

It is impossible to anticipate every source of funding which may be available to the county for its contributions to the authority. Therefore, this response is limited to the funding sources mentioned in your question. A specific provision of the Rural Services Fund, § 331.428(2)(d), allows for funding of services listed under §331.424(2). Subsection b of the latter provision, allows for county contributions to an aviation authority. Therefore, the Rural Services Fund is a source of funding. Section 331.428(3)states: "Appropriations specifically authorized to be made from the rural services fund shall not be made from the general fund, but may be made from other sources." This precludes using the County General Fund, §331.427 for this purpose, but does not foreclose funds from other sources.

III

> 3. Does an agreement by an airport authority to keep an airport open for 20 years in exchange for government grant monies constitute a continuing outstanding obligation incurred by the authority which would prohibit a member of an authority from withdrawing during the 20 year period?

"Obligation" is not defined by the statute. The Iowa Supreme Court in the context of Iowa Const. Article 1, §21, the state constitutional prohibition against laws impairing contract obligations, construed the term as follows:

> Obligation is correlative with right. Obligation rests upon one party, right belongs to the other.
>
> Perhaps as good a definition of obligation as can be given is that contained in the recent case of Lasley v. Phipps, in the Supreme Court of Mississippi, reported in 13

> American Law Register, 236, as follows: "The obligation of a contract is the duty of performance according to its terms, the means of enforcement being a part of the obligation, which the states cannot by legislation impair."
>
> It has also been said that the obligation of a contract is its binding power, that which compels its performance, or as defined by the Supreme Court of the United States, 2 Wheaton, 197, the law of the contract. See Blair v. Williams and Lapsley v. Brashear, 4 Littell, 66.
>
> This obligation, this duty of performance, this binding power which compels performance, this law of the contract, the constitution declares shall not be impaired.

Holland v. Dickerson, 41 Iowa 367, 370-71 (1875).

Black's Law Dictionary (5th ed.) defines obligation as "A generic word, derived from the Latin substantive 'obligato', having many, wide and varied meanings, according to the context in which it is used. That which a person is bound to do or forbear; any duty imposed by law, promise, contract, relations of society, courtesy, kindness, etc."

In the facts you recite, the aviation authority has agreed to keep an airport open for 20 years. This is an ongoing duty and could be construed as an outstanding obligation. This duty does not prohibit the withdrawal of a member municipality. The member's share of the obligation, however, must be met before the member can withdraw. §330A.7.

IV

> 4. May the authority agreement validly provide that the county may withdraw from the authority at any time, regardless of the 20 year grant commitment, as a predetermined "satisfactory provision" for the payment of outstanding obligations contemplated by Section 330A.7(2) as amended by House File 551 as long as all other outstanding obligations are provided for?

Your fourth question is addressed in parts one and three above. There is no meaningful distinction between a "predetermined satisfaction" and a limitation on a county's membership in the authority. Both seek to limit the authority's powers contrary to the statutory provisions. The 20 year grant is an outstanding obligation. Under § 330A.7(2-3), the authority reviews a request to withdraw and all outstanding obligations must be provided for. This would include looking at provisions for the 20 year operation under the grant agreement. In order for the authority's review to be meaningful, it must be based on the circumstances at the time of the request. To allow a means for the county to withdraw on some other basis, would circumvent the provisions of § 330A.7(2-3). The statutory scheme does not allow a county to place limitations on its membership or to seek a predetermined approval of its withdrawal.

Sincerely,

Merrell M Peters

MERRELL M. PETERS
Assistant Attorney General

MMP/mm

TAXATION: Real Estate Transfer Tax; Taxation of Deeds Involving Exchanges of Real Property and Cash Payment. Iowa Code § 428A.1 (1989). A grantor who transfers real property and cash in exchange for real property is liable for the real estate transfer tax calculated on the fair market value of the real property transferred. (Griger to Schröeder, Keokuk County Attorney, 9-12-89) # 89-9-2(L)

September 12, 1989

John E. Schröeder
Keokuk County Attorney
Keokuk County Court House Annex
101 ½ South Jefferson
P. O. Box 231
Sigourney, Iowa 52591

Dear Mr. Schröeder:

You have requested an opinion of the Attorney General with respect to the consideration that would be the basis for imposition of the Iowa real estate transfer tax in Iowa Code ch. 428A. In the situation posed, Jones owns a town house that has been valued at $10,000. Smith owns a farm that has been valued at $60,000. Smith and Jones exchange the properties and Smith also receives $60,000 cash from Jones. You inquire what value, for real estate transfer tax purposes, should be used for the town house deed.

The tax is imposed in Iowa Code § 428A.1 (1989), first paragraph, which provides:

> There is imposed on each deed, instrument, or writing by which any lands, tenements, or other realty in this state shall be granted, assigned, transferred, or otherwise conveyed, a tax determined in the following manner: When there is no consideration or when the deed instrument or writing is executed and tendered for recording as an instrument corrective of title, and so states, there shall be no tax. When there is consideration and the actual market value of the real property transferred is in excess of five hundred dollars, the tax shall be fifty-five cents for each five hundred dollars or fractional part of five hundred dollars in excess of five hundred dollars. The term "consideration" as used in this

> chapter, means the full amount of the actual sale price of the real property involved, paid or to be paid, including the amount of an incumbrance or lien on the property, whether assumed or not by the grantee. It shall be presumed that the sale price so stated shall include the value of all personal property transferred as part of the sale unless the dollar value of said personal property is stated on the instrument of conveyance. When the dollar value of the personal property included in the sale is so stated, it shall be deducted from the consideration shown on the instrument for the purpose of determining the tax.

Section 428A.1 imposes the tax upon deeds which convey realty as long as there is consideration. The concept of "consideration" upon which the tax is calculated is "the full amount of the actual sale price of the real property involved, paid or to be paid." The grantor is liable for payment of the tax. Iowa Code § 428A.3 (1989). In the example posed, Jones is liable for any tax upon the town house deed.

The tax applies where, as in the situation posed, there is an exchange of realty. 1972 Op.Att'yGen. 654. If a situation merely involved exchanges of realty, "the consideration is in actuality the specific property received by the grantor in exchange for the transferred property." Id. at 655. Where such exchanges occur, "the grantor's liability for the documentary stamp tax should be computed upon the fair market value of the property he has received as consideration for the transfer." Id. at 656. In the event that the exchange also involves cash paid or to be paid, "the tax is figured on the basis of the value of the property plus any cash payments." Id.

If your question dealt with the tax on the farm deed and if the fair market value of the town house was $10,000, then the consideration, that is the actual sale price of the farm, would have been $70,000, which includes the value of the town house property and the cash received. As grantor, Smith would be liable for a tax upon this $70,000 consideration. That consideration would be the actual sale price for the conveyance of the farm.

However, your question concerns the tax on the town house deed. The issue is what is the "actual sale price" of the town house. Assuming that the fair market value of the town house is

$10,000, the sale price of that property is $10,000 and the tax is imposed upon that figure.

One might argue that since the situation involved an exchange of realty and since Jones received a farm with a value of $60,000, the actual sale price of the town house was $60,000, not $10,000. This argument, however, overlooks the fact that Jones did not sell the town house, itself, for $60,000 since Jones had to pay $60,000 cash and convey the town house to receive the farm. To state that the actual sale price of the town house was $60,000 would treat the cash payment as though it, itself, was real property involved in an exchange for other real property.

Moreover, placing a value on the town house deed, for tax purposes, of a figure greater than its fair market value, presumably $10,000 here, leads to absurd results. Thus, if a person transferred real property valued at $600 and made a cash payment of $999,400 in exchange for real property valued at $1,000,000, the tax on the $600 property would exceed the fair market value of that property. Also, if Jones had simply paid Smith $60,000 (or $70,000) cash for the real property, and not conveyed the town house, Jones would not be liable for any tax. The fact that Jones is a grantor in that a portion of the consideration which was paid to Smith consisted of the town house of substantially less value than the farm should not convert the sale price of the town house to the market value of the farm. Interpretations of statutes producing absurd results should be avoided. Isaacson v. Iowa State Tax Commission, 183 N.W.2d 693, 695 (Iowa 1971).

Accordingly, in our opinion, a grantor who transfers real property and cash in exchange for real property is liable for the real estate transfer tax calculated on the fair market value of the real property transferred. In the situation posed, if the fair market value of the town house is $10,000, the tax on the town house deed is imposed upon that figure as the sales price of the town house.

Very truly yours,

Harry M Griger

Harry M. Griger
Special Assistant Attorney General

HMG:cml

COUNTY OFFICERS: Vacancies; Special Election; STATUTES: Effective Date. Iowa Const. art. III, § 26. Iowa Code §§ 3.7, 69.2, 69.4, 69.8, 69.14A. A vacancy created by the resignation of the county attorney effective at the stroke of midnight in the final moment of June 30, 1989, is subject to § 69.14A and a special election may be requested by petition. (Pottorff to Thole, Osceola County Attorney, and Honrath, Lyon County Attorney, 9-13-89) #89-9-3(L)

September 13, 1989

Michael E. Thole
Osceola County Attorney
Sibley, Iowa 51249

Francis A. Honrath
Lyon County Attorney
318 Main, Box 249
Inwood, Iowa 51240

Dear Mr. Thole and Mr. Honrath:

You have requested an opinion of the Attorney General concerning application of House File 522 which authorizes special elections to fill vacancies in county offices. Prior to enactment of House File 522, vacancies in the office of county attorney were filled by appointment and the balance of an unexpired term was placed on the general election ballot under certain circumstances. See Iowa Code §§ 69.8(3), 69.13(2) (1989). House File 522 enacted § 69.14A which provides that vacancies in county offices may be filled either by appointment or by special election. If appointment is utilized, voters may request a special election by petition. Iowa Code § 69.14A(2)-(3) (1989) (Election Laws Supp.).

Your questions revolve around the determination of whether House File 522 controls the method of filling the vacancy in the office of county attorney in Lyon County. You indicate that the Lyon County Attorney submitted a letter of resignation on June 5, 1989. This letter stated that the resignation would become effective July 3, 1989. The board of supervisors, however, expressed a preference to make the resignation congruent with the fiscal year. The board of supervisors voted on June 8, 1989, to accept the resignation effective on June 30, 1989, at 12:00 p.m. and to appoint a new county attorney effective on July 1, 1989,

at 12:01 a.m.[1] The resigning county attorney concurred verbally in this new resignation date. The appointee, Mr. Honrath, was sworn into office on June 26, 1989. The new appointee assumed some investigative and research duties immediately but did not receive pay for the position until July 1, 1989. In accordance with House File 522, notice of the appointment was published on July 5 and 6, 1989, in two newspapers. Thereafter, on July 19, 1989, a petition to request a special election was filed in the office of the Lyon County Auditor.

In view of this sequence of events, you ask whether § 69.14A is applicable to the vacancy and whether the special election requested by petition must be held. It is our opinion that § 69.14A does apply to the vacancy and a special election may be requested by petition.

Under Iowa Code chapter 69 a resignation of an incumbent creates a vacancy. Iowa Code § 69.2(4) (1989). County and township officers submit their resignations in writing to the county auditor. The county auditor submits his or her resignation to the county board of supervisors. Iowa Code § 69.4(4) (1989). Prior to enactment of House File 522, the vacancy was filled by appointment by the board of supervisors. Iowa Code § 69.8(3) (1989). The position might, nevertheless, be placed on the ballot later under certain circumstances. If the vacancy occurred sixty or more days prior to a general election and the unexpired term had more than seventy days to run after the date of the general election, the vacancy would be filled for the balance of the unexpired term at the general election. The person elected would assume office as soon as the certificate of election issued and the person elected had qualified. Iowa Code § 69.13(2) (1989).

House File 522 essentially created additional circumstances under which the position could be placed on an election ballot. Section 69.14A now provides in relevant part:

---

[1]The minutes from the June 8, 1989, meeting of the board of supervisors indicate that the resignation was verbally modified to 12:00 p.m. on June 30, 1989. Ordinarily we do not resolve factual issues in the opinion process. We assume for the purpose of this opinion, however, that the resignation was intended to be effective at the stroke of 12 o'clock midnight in the final moment of June 30, 1989. This construction is consistent with the stated justification of making the resignation congruent with the fiscal year and is consistent with information provided to us by the resigning county attorney.

. . . .

2. When a vacancy exists in an elected county office, the board of supervisors shall publish notice as provided in section 331.305 indicating the method, appointment or special election, by which the board intends to fill the vacancy. If appointment is selected by the board, the appointment may be made before publication of the notice, but the appointment shall be made within forty days after the vacancy occurs. However, if within fourteen days after the date of the notice or within fourteen days after the appointment is made, whichever date is later, a petition requesting a special election to fill the vacancy is filed with the county auditor, the appointment is temporary and a special election shall be called as provided in subsection 3. The petition shall meet the requirements of section 331.306.

3. The committee of county officers or board of supervisors as applicable may, on its own motion, or shall, upon receipt of a petition as provided in this section, call for a special election to fill the vacancy in lieu of appointment if section 69.13, subsection 2, does not apply. The committee or board shall order the special election at the earliest practicable date, but giving at least thirty days' notice of the election. A special election called under this section shall be held on a Tuesday and shall not be held on the same day as a school election within the county.

Iowa Code § 69.14A (2)-(3) (1989) (Election Laws Supp.).

Under the terms of subsections 2 and 3, if § 69.13(2) does not require the position to be placed on the general election ballot, the board of supervisors on its own motion may, or upon receipt of a petition shall, call for a special election to fill the vacancy. In either case, the board of supervisors shall publish notice indicating the method by which the board intends to fill the vacancy. If the board of supervisors proceeds by appointment, the appointment shall be made "within forty days after the vacancy occurs." A petition to request a special election must be filed within fourteen days after the date of the

notice or fourteen days after the appointment is made, whichever date is later.

In order to determine whether House File 522 applies to the situation which you describe, we must first ascertain when House File 522 became effective. Under Iowa law acts passed at regular sessions of the general assembly take effect on the first day of July following their passage unless a different effective date is stated in an act of the general assembly. Iowa Const. art. III, § 26. See Iowa Code § 3.7(1) (1989). No express provision has been made by the general assembly for a different effective date for this bill. House File 522, 73rd G.A., 1st Sess., (1989). House File 522, therefore, became effective on July 1, 1989, by operation of law.

Because the resignation and appointment were timed to the minute, precision in applying the statute is important. Generally, when an effective date for legislation is specified by constitution or statute the legislation is regarded as effective from the first moment of the day specified. See 1 Sutherland Statutory Construction § 33.10 (4th ed. 1986). See also Central Maryland Lines, Inc., 240 F.Supp. 254, 257 (D.C. Md. 1965). The day is not fractionalized unless there is some basis for distinguishing between parts of the day. See, e.g., United States v. Casson, 434 F.2d 415, 418 (D.C. Cir. 1970) (criminal statute effective on approval by President takes effect at actual time signed by President); In re Grant's Estate, 377 Pa. 264, 105 A.2d 80 (1954) (tax statute effective on approval by governor takes effect at actual time signed by governor). We perceive no basis to fractionalize the effective date of July 1, 1989. In our view, therefore, § 69.14A became effective from the first moment of July 1, 1989.

Applying this effective date to the factual situation which you pose, we believe the dispositive issue is whether the vacancy occurred before or after July 1, 1989. The vacancy was created when the resignation became effective. Iowa Code § 69.2(4) (1989). Ordinarily the date specified in a written resignation is pivotal in deciding when a resignation becomes effective. We have previously observed that once a written resignation is submitted pursuant to § 69.4, "the mandatory provisions of § 69.2(4) operate to create a vacancy upon the date specified in the resignation." After the date specified has passed, "there are no statutory provisions allowing for withdrawal or modification" of the resignation. We have concluded, therefore, that "a resignation, once submitted, is final on the date designated." 1982 Op.Att'yGen. 446, 448.

This principle applies differently where withdrawal or modification occurs before the resignation date accrues. In 1975 this office opined that the authority to whom a resignation is submitted may permit a withdrawal of the resignation prior to its effective date. 1976 Op.Att'yGen. 72, 75. Minutes from a meeting of the board of supervisors indicate that the resignation date was verbally modified on June 8, 1989, nearly one month prior to the specified resignation date. Although you also relate that the board of supervisors "accepted" the resignation to be effective at midnight, we do not view the acceptance as determinative.[2] We have previously observed that a resignation need not be accepted formally before a vacancy is created. 1982 Op.Att'yGen. at 448; 1938 Op.Att'yGen. 1, 2; 1904 Op.Att'yGen. 343, 344. The modification of the resignation date, therefore, is significant only insofar as the county attorney sought to verbally modify the date.

Assuming that the verbal modification changed the resignation date to midnight, the change does not affect the application of House File 522. Because the resignation was not effective until midnight, any vacancy occurred on the following day -- July 1, 1989, at which time § 69.14A was effective. Accordingly we conclude that § 69.14A is applicable to determine the manner in which the vacancy should be filled.

Our conclusion concerning the point in time at which the vacancy was created is not affected by the fact that the new appointee was sworn in on June 26, 1989. This occurred several days before either the date in the resignation letter or the date as verbally modified. Because the resignation is effective on the date specified, the early swearing in of the new appointee could not "create" the vacancy at an earlier point in time. See 1982 Op.Att'yGen. at 448.

In summary, it is our opinion that a vacancy created by the resignation of the county attorney effective at the stroke of

---

[2]We note that the resignation letter attached to the opinion request was addressed to the board of supervisors. Apparently a copy was forwarded to the county auditor as required by § 69.4(4).

midnight in the final moment of June 30, 1989, is subject to § 69.14A and a special election may be requested by petition.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:mlr

STATE OFFICERS AND DEPARTMENTS: Corrections; payment of housing allowance to deputy wardens. Iowa Code § 246.305 (1989) and § 246.7 (1979). After the repeal of Iowa Code § 246.7, deputy wardens may not be paid housing allowances. The salaries of the deputy wardens could be changed by legislation. In the absence of legislation, the Department sets the salaries of the individuals subject to the approval of the Department of Personnel and budgetary restraints. (Parmeter to McKean, State Representative, 9-14-89) #89-9-4(L)

September 14, 1989

Honorable Andy McKean
State Representative
District 44
509 South Oak Street
Anamosa, IA 52205

Dear Representative McKean:

You have requested an opinion from this office concerning whether the amendment of § 246.7 in 1980 operated to terminate housing allowances for deputy wardens who had been receiving such allowance prior to the date of the amendment. Second, if the amendment of § 246.7 did terminate such housing allowances, you inquire as to whether adjustments can be made to the salaries of those employees to reflect the decrease in income.

Prior to 1980, § 246.7 provided that:

> Each deputy warden shall be furnished with a dwelling house by the state director, or house rent, and also furnished with water, heat, ice, and lights and domestic service in his family by not more than one prisoner at one time.

Iowa Code § 246.7 (1979). In 1980, this section was repealed. At the same time, § 218.14 was amended to allow the provision of housing to assistant superintendents and is in essence the language which is currently in Iowa Code § 246.305 (1989), and which provides in pertinent part:

> The director may furnish assistant superintendents or other employees, or both, with dwelling houses or with appropriate quarters, owned by the state. The assistant superintendent or employee, who is so furnished shall pay rent for the dwelling house or quarters in an amount to be determined by the superintendent of the institution, which shall be the fair market rental value of the

> house or quarters. If an assistant superintendent or employee is furnished with a dwelling house or quarters either of which is owned by the state, the assistant superintendent or employee may also be furnished with water, heat, and electricity. However, the furnishing of these utilities shall be considered in determining the fair market rental value of the house or quarters.

Iowa Code § 246.305 (1989).

As a general rule, when a statutory provision is repealed, the rescinded act is deemed to have never existed. Women Aware v. Reagen, 331 N.W.2d 88, 91 (Iowa 1983); In Re Estate of Hoover, 251 N.W.2d 529, 530 (Iowa 1977); Buchhop v. General Growth Properties, 235 N.W.2d 301, 304 (Iowa 1975). There are several exceptions to this rule: where the reenactment of the statute is in substantially the same terms; where there is a specific savings provision in the statute; where a general savings statute exists which limits the effect of the repeal or amendment; or where an action involves a right which has accrued or become vested before the statute was repealed or amended. In Re Estate of Hoover, 251 N.W.2d at 530.

Here, the repeal of § 246.7 by 1980 Iowa Acts, Ch. 1059, § 1, and the subsequent language which currently appears in Iowa Code § 246.305 (1989), clearly demonstrate that the statute was not reenacted in substantially the same terms and that the legislation does not contain a specific savings clause. The Code of Iowa does contain a general savings statute which provides in pertinent part:

> The re-enactment, revision, amendment, or repeal of this a statute does not affect:
>
> 1. The prior operation of the statute or any prior action taken thereunder;
>
> 2. Any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;

Iowa Code § 4.13 (1989).

The purpose of these provisions is to save accrued rights and previously commenced proceedings. In Re Estate of Hoover, 251 N.W.2d at 531. The statute in question did not create a vested interest or accrued right on behalf of the deputy wardens. The legislature may increase or diminish the salary of state

employees or abolish the position completely unless there is a specific constitutional prohibition. Bryan v. Cattell, 15 Iowa 538, 540 (1864); Iowa City v. Foster, 10 Iowa 189, 191-192 (1859); 63A Am.Jur.2d Public Officers and Employees § 441 at 990-991 (1964); cf. Kellogg v. Story County, 219 Iowa 399, 257 N.W.2d 778 (1935). The fact that the housing allowance was paid in the past does not create a vested right. Brightman v. Civil Service Commission, 204 N.W.2d 588, 591 (Iowa 1973). As a result, we believe that the repeal of § 246.7 in April of 1980 operated to terminate the housing allowance for all deputy wardens, including those who were receiving it prior to the repeal of that section.

Your second inquiry was concerning what adjustments can be made in the salaries of the deputy wardens who were previously paid housing allowances to reflect the decrease in income. Clearly, the legislature has the authority to statutorily change the salaries of the affected deputy wardens. See Iowa Code § 79.1 (1989). In the absence of legislation, the Department of Corrections sets the salaries of these individuals with the approval of the Department of Personnel (see Iowa Code § 19A.9 (1989)) and subject to budget restraints (see Iowa Code § 8.38 (1989)).

Sincerely,

John M. Parmeter
Assistant Attorney General

JMP/jam

TORT CLAIMS ACT: Care Review Committee members; Care Review County Coordinators; Iowa Code §§ 25A.2(3), 25A.14, 25A.21, 25A.23, 25A.24, 135C.25(4), 249D.44(4)(1989). Volunteer Care Review Committee members and County Coordinators are considered state employees and would be defended and indemnified by the state under the Tort Claims Act, Iowa Code chapter 25A. The personal liability of volunteers is limited by §§ 25A.23 and 25A.24. (Forsythe to Grandquist, Executive Director, Department of Elder Affairs, 9-14-89) #89-9-5(L)

September 14, 1989

Betty L. Grandquist
Executive Director
Department of Elder Affairs
236 Jewett Building
914 Grand Avenue
Des Moines, Iowa 50319

Dear Ms. Grandquist:

You asked the opinion of our office as to whether volunteers serving as Care Review Committee members or Care Review Committee County Coordinators (County Coordinators) are considered state employees and whether they would be defended and indemnified as such under the Tort Claims Act, Iowa Code, Chapter 25A.

Your question will be answered as to Care Review Committee members first and then as to County Coordinators. The legislature has spoken to the issue of Care Review Committee members liability. Iowa Code § 135C.25(4) provides:

> Neither the state nor any care review committee member is liable for an action by a care review committee member in the performance of duty, if the action is undertaken and carried out in good faith.

This same language also appears in Iowa Code § 249D.44(4).

In addition, 25A.14 in relevant part states:

> The provisions of this chapter shall not apply with respect to any claim against the state, to:
>
> 12. Any claim based upon the actions of a care review committee member in the performance of duty if the action is undertaken and carried out in good faith.

Finally, 25A.23 provides:

> Employees of the state are not personally liable for any claim which is exempted under section 25A.14.

It is clear from this language that care review committee members are not personally liable nor is the state liable, for any claim based upon the action of the care review committee member if the action is undertaken and carried out in good faith.

You also asked whether the care review committee members would be defended by the state. Iowa Code § 25A.21 (1989) states:

> The state shall defend any employee, and shall indemnify and hold harmless an employee against any claim as defined in section 25A.2, subsection 5, paragraph "b", including claims arising under the Constitution, statutes or rules of the United States or of any state. The duty to indemnify and hold harmless shall not apply and the state shall be entitled to restitution from an employee if, in an action against the employee, it is determined that the conduct of the employee upon which a tort claim or demand was based constituted a willful and wanton act or omission or malfeasance in office.

Section 25A.2(5) defines claim in pertinent part:

> b. Any claim against an employee of the state for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state while acting within the scope of the employee's office or employment.

Where statutory provisions relate to the same subject and have identical purposes or objects, they should be read in pari materia and harmonized if possible. Metier v. Cooper Transport Co. Inc., 378 N.W. 2d 907 (Iowa 1985). From the above quoted sections it is clear that the state will defend, indemnify and hold harmless employees for their acts or omissions while within the scope of their employment. However, if the action of the employee was a willful and wanton act or omission this duty to indemnify and hold harmless does not apply and the state may be entitled to restitution from the volunteer employee.

Whether any individual is an employee of the State and thus afforded the protection of § 25A.21 must be determined on the facts of each situation. Certainly not every act of an employee

is within the scope of their office or employment. Iowa Code § 135C.25 establishes County Care Review Committees and sets out their duties. The limits on State and Committee member liability set forth in §§ 135C.25(4) and 25A.14(12) evidence a legislative intent that such members be considered employees of the State.

The second part of your question asks whether County Coordinators are state employees. The Tort Claims Act defines employee.

> 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 but does not include a contractor doing business with the state.

Iowa Code § 25A.2(3) (1989). County Coordinators recruit members and conduct training sessions for Care Review Committees in their county. The County Coordinators are volunteers selected by the Department of Elder Affairs. The Department of Elder Affairs is also responsible for training County Coordinators, assisting in the training of care review committee members, providing ongoing technical assistance and providing adequate support and general supervision/monitoring of volunteers' work. We are of the opinion that the degree of supervision and control retained by the state makes the volunteers state employees for purposes of Iowa Code chapter 25A.

As state employees the County Coordinators would be defended and indemnified by the state as provided in Iowa Code § 25A.21 (1989) as discussed above. Furthermore, Iowa Code § 25A.24 provides:

> A person who performs services for the state government or any agency or subdivision of state government and who does not receive compensation is not personally liable for a claim based upon an act or omission of duties, except for acts or omissions which involve intentional misconduct or knowing violation of the law, or for a transaction from which the person derives an improper personal benefit. For purposes of this section, "compensation" does not include payments to reimburse a person for expenses.

In summary, it is our conclusion that Care Review Committee members and County Coordinators are considered state employees and would be defended and indemnified by the state under the Tort Claims Act, Iowa Code chapter 25A. Furthermore, the volunteers

would not normally be personally liable for their actions in performance of their statutory duties pursuant to sections 25A.23 and 25A.24. However, if the action of the volunteer is not carried out in good faith, if the conduct constituted acts or omissions which involve intentional misconduct or knowing violation of the law, or if the person derives an improper personal benefit from a transaction, the person may be personally liable for their actions. It should also be noted that this is a general statement and any of those individuals may not fall within Chapter 25A, dependent on the existing facts and exceptions to personal liability.

Sincerely,

Cynthia A. Forsythe

CYNTHIA A. FORSYTHE
Assistant Attorney General

/mr

INCOMPATIBILITY OF OFFICES: County assessor and secretary of school board. Iowa Code §§ 279.3, 291.2, 291.3, 291.6 - 291.11, 441.1, 441.17 (1989). The offices of county assessor and secretary of the school board are not incompatible. (Scase to Kliebenstein, 10-31-89) #89-10-3(L)

October 31, 1989

Mr. Don Kliebenstein
Grundy County Attorney
630 G Avenue
Grundy Center, Iowa 50638

Dear Mr. Kliebenstein:

You have requested an opinion of the attorney general addressing the following inquiry:

> Are the offices of County Assessor and Secretary of a School District lying within the Assessor's taxing jurisdiction incompatible?

As a preface, we note that your question concerns the doctrine of incompatibility of office, as opposed to the doctrine of conflict of interest. The incompatibility and conflict of interest doctrines, while often confused, are distinct concepts. As our prior opinions indicate, the "doctrine of incompatibility is concerned with the duties of an office apart from any particular office holder." 1988 Op.Att'yGen. 21 (# 87-1-15(L), copy attached), quoting 1982 Op.Att'yGen. 220, 221. Conflict of interest issues, on the other hand, require examination of "how a particular office holder is carrying out his or her official duties in a given fact situation." Id. This opinion will address only your question concerning incompatibility of office.

The initial determination to be made under the incompatibility doctrine is whether both positions in question are "offices" as defined by Iowa law. The incompatibility doctrine does not apply if a person holds one office but is merely employed by another body. See 1988 Op.Att'yGen. 21; 1968 Op.Att'yGen. 257.

The Iowa court has recognized that "although an office is an employment, it does not follow that every employee is an officer." State v. Taylor, 260 Iowa 634, 639, 144 N.W.2d 289, 292 (1966). While acknowledging difficulty in defining the term "public officer" as distinguished from an "employee," the court has devised the following list of the essential elements required to make a public employment a public office:

> (1) The position must be created by the Constitution or legislature or through authority conferred by the legislature. (2) A portion of the sovereign power of government must be delegated to that position. (3) The duties must be defined, directly or impliedly, by the legislature or through legislative authority. (4) The duties must be performed independently and without control of a superior power other than the law. (5) The position must have some permanency and continuity, and not be only temporary and occasional.

State v. Pinckney, 276 N.W.2d 433, 435 (Iowa 1979), quoting State v. Taylor, 260 Iowa at 639, 144 N.W.2d at 292.

A county assessor is clearly a public officer. See Iowa Code §§ 441.1, 441.17 (1989) (creating the office and defining duties of the assessor); 1972 Op.Att'yGen. 450 (concluding that offices of county assessor and school board member were incompatible).

The crucial question here is whether the secretary of a local school district is a public officer. Prior opinions of this office have assumed that the secretary of a school board, appointed pursuant to Iowa Code § 279.3, is an officer of the school district. See 1976 Op.Att'yGen. 561; 1962 Op.Att'yGen. 329. For the purposes of this opinion, we will assume that conclusion is correct based on the definition of officer set forth above and in 1982 Op.Att'yGen. 220.[1]

---

[1] The position of secretary of the school board was created by the legislature. The secretary of a school board is appointed by the board for a one year term and is required to qualify for the position within ten days by taking an oath of office and filing a bond. Iowa Code §§ 279.3, 291.2 - 291.3 (1989). Compensation for the secretary is set by the board. Iowa Code § 279.32 (1989). The powers and duties of the secretary, are set forth in Iowa Code §§ 291.6 through 291.11 (1989). While these

(continued...)

No constitutional or statutory provision directly prohibits one person from serving concurrently as county assessor and secretary of the school board.[2] In the absence of such provision the propriety of such action must be resolved by application of the common law doctrine of incompatibility of office. This doctrine has been set forth by the Iowa Court as follows: "If a person, while occupying one office, accept[s] another incompatible with the first, he ipso facto vacates the first office, and his title thereto is thereby terminated without any other act or proceeding." State v. White, 257 Iowa 606, 609, 133 N.W.2d 903, 904 (1965), quoting State ex rel. Crawford v. Anderson, 155 Iowa 271, 272, 136 N.W. 128, 129 (1912).

The White court offered the following guidelines for determination of incompatibility issues:

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

---

[1](...continued)
duties are primarily record keeping, accounting and reporting functions, they are performed independently by the secretary without direct supervision from the board.

[2] It should be noted that Iowa Code § 441.17(1) (1989), provides that the assessor shall "[d]evote full time to the duties of the assessor's office and shall not engage in any occupation or business interfering or inconsistent with such duties." This office has interpreted § 441.17(1) as precluding the assessor from engaging in a non-conflicting appraisal service during "normal working hours of the assessor's office." 1982 Op.Att'yGen. 119; see also 1968 Op.Att'yGen. 370 (concluding that the offices of county assessor and county civil defense director were not, per se, incompatible, but that unless the assessor could perform the duties of civil defense director at night and on weekends, the "entire time" requirement of § 441.17(1) would be violated). We have not, in this opinion, attempted to determine whether service as the secretary of the school board might violate the full-time service requirement of § 442.17(1).

> patibility 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. 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.

State v. White, 257 Iowa at 609, 133 N.W.2d at 904-05 (citations omitted).

Application of these principles to the present case leads us to conclude that the office of county assessor is not incompatible with the office of secretary of the school board. Neither office is subordinate to the other. Nor do the duties of either office appear to be "inherently inconsistent." Furthermore, the duties of the school board secretary, as set forth in Iowa Code §§ 291.6 through 291.11 do not include decision-making functions. Rather, as noted above, the secretary's functions are confined to preserving and filing business records, accounting for school funds and claims, countersigning warrants and drafts, and reporting specific items as required by statue. Unlike directors of the school board, the secretary plays no active role in the representation of policy interests which might interfere with his or her role as county assessor. Therefore, we believe that our current opinion is consistent with the 1972 opinion in which this office concluded that the offices of county assessor and school board director were incompatible. 1972 Op.Att'yGen. 450.

In summary, it is our conclusion that the offices of county assessor and secretary of the school board are not incompatible.

Sincerely,

Christie J. Scase

Christie J. Scase
Assistant Attorney General

MUNICIPALITIES: City Utilities; Civil Penalties. Iowa Const., Art. III, § 38A. Iowa Code §§ 362.2 (18); 364.22; 364.22 (2); 364.22 (5 through 12); 364.22 (4); 384.84; 388.1; 388.2; 388.3; 388.4; 1989 Iowa Acts, House File 153, §§ 5, 6, 7, 8. A municipal utility board may not impose a civil penalty for a violation of a municipal infraction pursuant to Iowa Code § 364.22 (1989). Municipal infractions must be enacted by ordinance, and a municipal utility board lacks authority to pass an ordinance. (Walding to Osterberg, State Representative, 10-31-89) #89-10-2(L)

October 30, 1989

The Honorable David Osterberg
State Representative
318 Second Avenue N.
Mount Vernon, Iowa 52314

Dear Representative Osterberg:

We are in receipt of your request for an opinion of the Attorney General on behalf of the Iowa Association of Municipal Utilities regarding the legality of surcharges instituted by municipal utility boards. Specifically, the question presented to us is:

> [M]ay a board-governed water system adopt by resolution a water conservation plan which establishes penalties for violations in the form of surcharges which are similar to the civil penalties which may be imposed for the commission of a municipal infraction?

That issue has arisen in the development of a model water conservation plan for Iowa municipalities to provide for restricted water use during periods of shortage, presumably as a result of the recent drought. We have been told that, as an example, a violation in the first instance of the water conservation plan would result in a surcharge of $50.00 being added to the consumer's bill, a surcharge of $100.00 for a second violation and, for subsequent violations, a $200.00 surcharge.

Violations for which surcharges would be assessed would relate to particular usages of the city utility. For instance, according to Mr. Jack Kegel, Director of Legal and Regulatory Affairs for the Utilities Association, the water conservation plan may ban the watering of lawns during certain daylight hours, a violation of which would constitute a municipal infraction subject to the above-described surcharges. The authority of a utility board to establish a progressive rate structure designed to discourage over-consumption (i.e., a variable utility rate that increases as a customer's volume of usage increases) is not in question. Accordingly, our review is limited to surcharges that are not based on regulatory rate structures.

In addition, we have been informed that several Iowa cities have already adopted, by ordinance, water conservation plans which provide that a violation constitutes a municipal infraction with statutory civil penalties pursuant to Iowa Code § 364.22 (1989). In those cities, according to Mr. Kegel, the governing body of the municipal utility was the city council. The Iowa Association of Municipal Utilities, in conjunction with the Department of Natural Resources, is attempting to provide in the model plan a parallel remedy for board-governed water systems. Thus, the focus of our examination is a review of the authority of a utility board, and not the authority of a council-governed municipal utility.

Finally, the scope of our examination is further defined by a review of the application of the municipal home rule amendment, Iowa Const., Art. III, § 38A, to a municipal utility board. In a prior opinion, 1986 Op. Att'yGen 125, we considered whether a municipal utility board had home rule authority to expend surplus funds on economic development programs. In that opinion, we concluded that the municipal home rule amendment could not be cited by utility boards to extend their authority to non-utility matters. In reaching that conclusion, the following discussion of the home rule amendment occurred:

> The municipal home rule amendment has two paragraphs. The first grants municipal corporations 'home rule power and authority . . . to determine their local affairs and government . . . ' The second abolishes the Dillon rule, which held that a municipal corporation has only those powers expressly granted by statute. While the second paragraph may affect municipal agencies, it is our view that the first paragraph does not

> confer home rule authority on municipal agencies. (Footnote omitted).

The 1986 opinion also noted that the Attorney General, in earlier opinions, had concluded that county home rule does not apply to county public hospitals, see 1980 Op. Att'yGen 388, and that while counties and cities have been granted home rule authority, that authority does not extend to townships. See 1986 Op. Att'yGen 54.

In our prior opinion, 1986 Op. Att'yGen 125, while noting that a municipal utility board is given "independent and broad authority within its statutory field of authority," this office nevertheless concluded that a board's authority is limited to the subject matter of city utilities. In our view, the authority to establish municipal infractions and civil penalties for violations of the infractions is not a matter within a utility board's statutory field of authority. Rather, the authority to establish municipal infractions and related penalties is set forth in § 364.22.

That section 364.22 was intended as the sole procedure for establishment of municipal infractions and related penalties is supported by the fact that the section was added in 1986, see 1986 Iowa Acts, ch. 1202, § 2, and subsequently amended, see 1989 Iowa Acts, House File 596, §§ 5, 6, 7 and 8; 1987 Iowa Acts, ch. 99, §§ 5 and 6, after this office had concluded that the state had preempted the entire area of criminal law. 1986 Op. Att'yGen 105. Further, the legislature, in authorizing municipal infractions, was cautious to provide adequate due process safeguards. See §§ 364.22 (5 through 12), as amended by 1989 Iowa Acts, House File 596, §§ 5, 6, 7 and 8. Section 364.22 provides the authority for municipal infractions and the necessary due process procedure.

Thus, the narrow issue we address is whether a municipal utility board may, by resolution, impose a civil penalty, including a surcharge for prohibited usages, for a violation of a municipal infraction pursuant to § 364.22.

It is our judgement that a municipal utility board may not impose a civil penalty for a violation of a municipal infraction pursuant to § 364.22. Municipal infractions must be enacted by ordinance, and a municipal utility board lacks authority to pass an ordinance.

Section 364.22(1) provides:

> A municipal infraction is a civil offense punishable by a civil penalty of not more than one hundred dollars for each violation or if the infraction is a repeat offense, a civil penalty not to exceed two hundred dollars for each repeat offense.

In addition, a violation of a municipal infraction is not punishable, by imprisonment. § 364.3(6). Thus, a violation of a municipal infraction is a civil offense, as opposed to a violation of § 364.3(2).[1]

The procedure for enactment of a municipal infraction is found in § 364.22(2). That subsection provides: "A city by ordinance may provide that a violation of an ordinance is a municipal infraction." (Emphasis Added). An "ordinance" is defined in § 362.2(18), as "a city law of a general or permanent nature."

In the administration of a city utility, city utilities or combined utility system, a municipal utility board[2] may exercise all of the powers of a city except those specifically excepted. § 388.4. Relevant to our consideration, however, is the exception found in § 388.4(1): "A [utility] board may not . . .

---

[1] A parallel provision to § 364.3(2) for counties is found in § 331.302(2). In 1982 Op. Att'yGen 27, issued on February 6, 1981, we held that counties could not levy fines or other penalties for violation of a county ordinance absent express legislative authority. Section 331.302(2), which became effective on July 1, 1988, provided the necessary express legislative authority for counties to impose a fine or imprisonment. See 1981 Iowa Acts, ch. 117, § 301. Enactment of § 331.302 (2) effectively overruled our 1981 opinion, except that the state has preempted the entire area of criminal law. See 1986 Op. Att'yGen 105, 106. That exception would apply equally to cities as well as counties, thereby foreclosing a city from legislating in the area of criminal law as well.

[2] A "utility board" is defined in § 388.1(2), as "a board of trustees established to operate a city utility, city utilities, or a combined utility system." A utility board is established by referendum, § 388.2, subject to a favorable majority vote of those voting on the proposal to establish a board, Id., and appointed by the mayor with council approval. § 388.3.

pass ordinances." Thus, a utility board specifically may not pass ordinances. Rather, a utility board establishes rates for a city utility, city utilities or combined utility system by resolution of the trustees. § 384.84(1) Other powers of a utility board described in § 384.84(2) are exercised by resolution of the trustees.

Accordingly, a municipal utility board, because it does not have the authority to pass ordinances, is unable to establish municipal infractions under § 364.22.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

TOWNSHIPS: Township Trustees; disposition of real property. Iowa Code §§ 297.15, 360.9 (1989). The provisions of Iowa Code § 360.9 (1989) control disposition of real property owned by a township. The township trustees are not authorized to avoid reversion of real estate by giving or selling the property to a private entity. (Scase to Stromer, 10-17-89) #89-10-1(L)

October 17, 1989

Delwyn Stromer
R. R. # 2, Box 108
Garner, Iowa 50438

Dear Mr. Stromer:

As a state representative, you requested an opinion of the Attorney General regarding disposition of a rural schoolhouse site currently being held by a township but no longer needed for township purposes. The following factual background is outlined in your request. Ownership of a schoolhouse site, which was no longer needed for school use, was transferred to the township. The site has been used as a township hall. The township trustees are no longer going to use the facility as a township hall and a private entity is interested in obtaining and preserving the building and land as a schoolhouse for historical purposes. You note that the proposed use will not be funded with public money.

Given these facts, you inquire:

1. Do the trustees have the authority to give or sell the land and building to another entity for the above private use?

2. If not, does the land now revert to the owner of the tract of land from which it was originally taken as provided by Iowa Code § 297.15 (1989)?

We believe that resolution of both of these questions is controlled by a prior opinion of this office which addressed two highly analogous inquiries. In 1982 Op.Att'yGen. # 82-5-4(L), a copy of which is attached, dealt with the following questions: (1) "If township trustees accept a gift of a former schoolhouse site, do the township trustees have power to convey that property by gift to a private non-profit corporation?" (2) If not, "what

are the proper procedures for the township to follow in disposing of the property?" In that opinion we concluded that the township could not give the schoolhouse site to a private non-profit corporation and that Iowa Code § 360.9 (1981) set forth the only procedures that could be followed by township trustees in disposing of property no longer needed for township purposes.

As we reasoned in this prior opinion, "a township is a unit of government that exercises very limited powers." 1982 Op.Att'yGen. at p. 1. "Unlike counties and cities, see Iowa Const. Amendments 25 and 37, townships do not have home rule. . . . Townships, like school districts, operate under Dillon's Rule, i.e., the only powers exercised are those expressly granted or necessarily implied in governing statutes. 1982 Op.Att'yGen. at p. 2.

Disposition of township property is governed by Iowa Code § 360.9 (1989)[1], which provides, in relevant part, as follows:

> Any real estate, including improvements thereon, situated wholly outside of a city, owned by a township and heretofore used for township purposes and which is no longer necessary for township purposes, shall revert to the present owner of the tract from which the same was taken, provided that said owner of the tract last aforesaid shall, within the time hereinafter prescribed, pay the value thereof to the township clerk. . . .
>
> * * * * *
>
> If the present owner of the tract from which said site was taken fails to pay the amount of such appraisement to such township within twenty days after the filing of same with the township clerk, the township trustees may sell said site, including any improvements thereon, to any person at the appraised value, or may sell the same at public auction for the best bid.
>
> * * * * *

This statute neither expressly or impliedly authorizes the township trustees to make a gift of township property to a

---

[1] Iowa Code § 297.15 (1989), cited in your request, controls disposition of schoolhouse sites owned by a school district. If ownership of the site has been transferred to a township, section 360.9 controls.

private entity. Sale of township property to a private entity is authorized only if the owner of the tract of land from which the property was originally taken waives his or her right to reversion.[2]

In summary, the provisions of Iowa Code § 360.9 (1989) control disposition of real estate owned by a township. The township trustees are not authorized to avoid reversion of real estate by giving or selling the property to a private entity.

Sincerely,

Christie J. Scase

Christie J. Scase
Assistant Attorney General

Enclosures

---

[2] We are not asked, nor do we address, whether preservation of a building for historical purposes could be a valid township purpose for use of a building. Cf. 1980 Op.Att'yGen. 701 (#80-5-7(L)) (regarding county aid to nonprofit historical societies), copy attached. The only issue asked and addressed is whether the township trustees may convey the site in question outright to a private entity.

COUNTIES AND COUNTY OFFICERS; LAW ENFORCEMENT; PRISONER'S MEDICAL EXPENSES: Iowa Code § 356.5(2) (1989). Iowa Code section 356.5(2) does not preclude the county from seeking reimbursement of the medical costs it pays for a nonindigent prisoner's medical treatment while incarcerated in the county jail. (Zbieroski to Thole, Osceola County Attorney, 11-29-89) #89-11-4(L)

November 29, 1989

Mr. Michael E. Thole
Osceola County Attorney
Sibley, Iowa 51249

Dear Mr. Thole:

In a request for an Opinion from the Attorney General, you first pose the following question:

> Can a county recover, or seek to recover, the medical costs it paid for a prisoner who was incarcerated in the county jail?

You call to our attention that Iowa Code section 356.5(2) (1989) provides:

> The keeper of each jail shall:
>
> * * *
>
> a. Furnish each prisoner with necessary bedding, clothing, towels, fuel, and medical aid.

(Emphasis added). You further call to our attention Smith v. Linn County, wherein the court held that Iowa statutes do not require a county to "reimburse prisoners for medical expenses they have paid or incurred but only that the medical services in fact be made available to the prisoner." Smith v. Linn County, 342 N.W.2d 861, 863 (Iowa 1984).

The Smith case holds that an inmate is primarily liable for the costs of medical and hospital care rendered for their benefit. Consistent with Smith, this office has opined that the responsible government "agency is a payer of last resort, when all other options fail including insurance, indigent assistance programs, and the detainee's own resources." Op.Att'yGen. 88-8-1(L). Accordingly, we opine that section 356.5(2) does not preclude the county from seeking reimbursement of the medical costs it pays for a nonindigent prisoner's medical treatment who was incarcerated in the county jail. We hasten to add, however, that because prisoners have a constitutional right to receive the necessary medical treatment, the county should in no manner withhold treatment because the inmate is unable to pay. City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 245, 103 S.Ct. 2979, 2983, 77 L.Ed.2d 605, 611 (1983); Smith v. Linn County, 342 N.W.2d at 863.[1]

The essence of your next question is whether the county would have a cause of action to seek reimbursement, if after payment the County learned that the prisoner had funds, or after incarceration the prisoner obtained adequate funds, to pay the medical expenses, and, if so, what would be the applicable statute of limitation. This office does not render official opinions describing theories of liability or recovery in litigation. The function of an Attorney General's opinion is to resolve issues of law to govern public officials without need to resort to litigation. It is not the province of the Attorney General to tell courts how to conduct or resolve lawsuits. The underlying legal question, who is primarily liable for payment of medical costs, has been resolved by Smith. Where a county pays these medical costs although the prisoner has available funds, we opine above that we are aware of no prohibition which would bar the county from recovering the costs paid. We are aware of no

---

[1]On a related matter we opined that:

> The County Home Rule Law [Iowa Code tit. XIV, ch. 331] does not confer upon the county the power to charge inmates for their room and board in the county jail except as provided in Iowa Code § 356.30 (1983). Such an ordinance would be inconsistent with the general legislative scheme that except under certain circumstances, it is the county which must pay board and care costs for inmates in county jails.

1984 Op.Att'yGen. 101. However, we believe the opinion is not on point as it was limited to the question of who primarily was liable for room and board, not medical treatment.

statutory cause of action, and therefore the county should look to common law causes of action, such as quantum meruit, which fit the particular circumstances of the case.

In summary, the county is not precluded from seeking reimbursement of the medical costs it paid for a nonindigent prisoner's medical treatment while incarcerated in the county jail.

Sincerely,

Mark Joel Zbieroski

MARK JOEL ZBIEROSKI
Assistant Attorney General

PUBLIC OFFICERS AND EMPLOYEES: Gifts of travel expenses. Iowa Code §§ 68B.2(a), 68B.2(5)(b)(2), 68B.2(5)(b)(7), 68B.5, 565.3, 565.5 (1989). The payment of a governmental employee's travel expenses by an entity meeting the definition of a "donor" is almost always prohibited. The argument that payment of travel expenses and other intangible services which benefit public employees is a gift to the State or other governmental body has been rejected. If equal consideration is given in return for the reimbursement of travel expenses, the travel would not be a gift. Adequacy of consideration would be a question of fact. Although the legislature has generally excepted educational or seminar benefits from the definition of gift in § 68B.2(5)(b)(2), this exception does not include travel or lodging expenses. (Osenbaugh to Halvorson, State Representative, 11-21-89) #89-11-3(L)

November 21, 1989

The Honorable Rod Halvorson
State Representative
1030 North 7th Street
Fort Dodge, IA 50501

Dear Representative Halvorson:

We have received your request for an opinion concerning application of the gift law under Iowa Code §§ 68B.2 - 68B.5. In particular, you ask whether a private entity's payment of a city official's transportation to an economic development recruiting meeting can be excepted from the gift law on the ground that the city's participation constituted legal consideration of equal or greater value than the transportation. You also ask whether payment of a city employee's educational expenses can be excepted from the gift law on the ground that the education benefited the city and the education was re-donated to the city.

We note that attached to your opinion request were a city attorney's opinions describing specific fact situations and determining whether those actions violated the gift law. As we earlier advised you, this office does not determine whether an individual has committed a crime or violated a penal statute. "It is not within the province of the Attorney General to issue opinions finding individuals guilty of violations of criminal statutes and would be improper for him to do so. Guilt is a matter for courts and juries to decide." 1972 Op.Att'yGen. 564, 564-565. The county attorney, and not this office, would decide whether to prosecute an alleged violation of the gift law. We do not have a mechanism to resolve issues of fact or to consider arguments of the persons involved.

This opinion addresses common underlying questions of law raised by your request. It may well be that other exceptions to the gift law might apply to the situations you describe. This opinion is not intended in any way to resolve whether past actions are contrary to the gift law. Instead, the purpose of an Attorney General's opinion is to interpret the law so as to guide future actions of state and local officials.

The statutory definition of a "gift" excludes the rendering of services "in return for which legal consideration of equal or greater value is . . . given and received . . .". § 68B.2(5)(a). This office has frequently stated that the payment of travel expenses of public employees by outside interests is usually prohibited. 1970 Op.Att'yGen. 319; 1972 Op.Att'yGen. 276; 1974 Op.Att'yGen. 437. Subsequent revisions of the statute do not change this result. While § 68B.5 now refers generally to gifts and does not specifically mention travel, providing of travel would generally constitute something of value and therefore fit within the general definition of "gift" in § 68B.2(5)(a). The specific exceptions to the definition of "gift" twice mention travel. Sections 68B.2(5)(b)(2) (seminar expenses other than travel and lodging), 68B.2(5)(b)(7) (travel permitted for speaking engagements).

The argument that payment of a state employee's expenses for official travel could be regarded as a gift to the State rather than to the employee has been expressly rejected in the prior opinions. It was noted that "this suggestion would not in most instances amount to anything more than a transparent scheme to circumvent the manifest purpose and intent of [chapter 68B]." 1970 Op.Att'yGen. 319, 320. The opinion also noted that the recipient's supervisors would be more likely to approve a "free" trip, and the employee would recognize this fact and arguably be more favorably disposed toward the donor. This theory could exclude all payment for official travel as a gift to the State. This would create a huge exception to the application of the gift law. It is clear that the legislature did not intend that reimbursement of travel expenses for State-related travel be excluded generally from the law.

While there are statutory provisions for the State or local governments to accept gifts, this office has previously opined that those statutes do not contemplate the receipt of intangible gifts such as travel. Iowa Code §§ 565.3, 565.5; 1970 Op.Att'yGen. 319. Donation of items of personal or real property which are properly accepted by the governing body would most often raise no gift law issue because these would not generally benefit a particular employee in the same way that travel is seen as a personal benefit. However, even such donations could violate § 68B.5 if the individual official or employee actually

received the benefit from the gift. (For example, acceptance of new furniture for an employee's office could be perceived as a benefit to the employee rather than a gift to the State.)

You also ask whether a private entity's payment of a city official's transportation to an economic development recruiting meeting can be excepted from the gift law on the ground that the city's participation in that venture constituted legal consideration of equal or greater value.

Arguments that payment of an official's travel is in return for equal consideration must be carefully scrutinized. In 1974 Op.Att'yGen. 437, 439, this Office concluded that a proposed agreement between the State Fair Board and travel agencies to promote the State Fair would violate § 68B.5 if the travel agencies paid the travel and lodging expenses of Fair Board employees acting as tour escorts. The opinion concluded that the provision of some services by the State employees as tour escorts could be seen as a "'transparent ruse' to circumvent the intent and manifest purposes of Chapter 68B..." The value of the state employee's participation is often intangible and difficult to assess. Further, the government may have been less willing to participate in the venture if it were to pay the employee's expenses. Most significantly, the gift law question will only arise when the entity providing the free travel meets the statutory definition of a "donor" -- i.e., if that entity does business with the donee's agency, is regulated by that agency, has interests which may be substantially affected by that agency, or is a lobbyist. Payment of travel expenses by such a donor must be inherently suspect.

Nonetheless, the fact remains that a violation of the gift law cannot be found if "legal consideration of equal or greater value" is given in return for the free travel. The adequacy of consideration will be a factual determination. This office cannot resolve issues of fact in an opinion.

You ask whether a city official could travel on a private company plane to participate in an economic development recruiting trip. The city attorney has advised his client that the city's participation in the venture constituted equal or greater consideration than the cost of the travel. This is a question of fact, and we would not review the determination of the city attorney on this question. The city attorney is privy to the facts of the case and may appropriately advise his client on these matters.

Factors which a court might consider in determining whether such an arrangement is a gift would include: the nature of the cooperative arrangement, the governmental interest in the

venture, what each party provided to the venture, whether there are legitimate reasons for government to participate, whether non-governmental parties to such an arrangement would receive the same benefits, the extent to which the travel could be seen as a benefit to the individual employee, and the extent to which the particular employee's governmental authority could affect the donor. A free trip to Hawaii in return for poorly defined "consultation" would more likely be found to be a gift than would the acceptance of a ride in a van from one Iowa county seat town to another, along with six other business people, each of whom has a definite role in recruiting for local economic development.

There are few instances where an employee has definite assurance that receiving reimbursement of travel expenses from a private donor is permissible. One such instance is where the travel is paid in return for participation in a panel or a speaking engagement at a meeting. § 68B.2(5)(7). Another is where there is a contractual obligation for the "donor" to provide travel. 1978 Op.Att'yGen. 199; 1970 Op.Att'yGen. 319.

Turning to your second question, reimbursement of a government employee's travel expenses to educational functions is governed by a specific exception, § 68B.2(5)(b)(2). In that subsection, the legislature, while authorizing private payment of certain educational expenses, specifically excluded travel and lodging. § 68B.2(5)(b)(2). That sub-section, in our view, comprehensively defines what expenses for participation in educational seminars can be paid by a donor. If the payment of travel expenses to a seminar would otherwise constitute a gift and is not within a specific statutory exception, then we believe that § 68B.2(5)(b)(2) occupies the field and that payment for expenses beyond those permitted by the section cannot be permitted on the theory that these are gifts to the State or that the employee has re-donated the information received to the State. The exclusion of travel and lodging from § 68B.2(5)(b)(2) reflects a legislative judgment that an employee can receive personal benefits from travel and lodging and that reimbursement of these expenses by a donor creates the same risk of favorable treatment as do other more tangible gifts.

In conclusion, the payment of a governmental employee's travel expenses by an entity meeting the definition of a "donor" is almost always prohibited. The argument that payment of travel expenses and other intangible services which benefit public employees is a gift to the State or other governmental body has been consistently rejected. If equal consideration is given in return for the reimbursement of travel expenses, the travel would not be a gift. Adequacy of consideration would be a question of fact. Governmental employees who accept travel payments on this ground must be aware that a court would likely closely scrutinize

the alleged consideration given in return for payment of travel costs. The payment of travel costs to a state employee by one who meets the statutory definition of a "donor" is inherently suspect. Although the legislature has generally excepted educational or seminar benefits from the definition of gift in § 68B.2(5)(b)(2), this exception does not include travel or lodging expenses.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

TAXATION; CONSERVATION: State-owned open space lands. Iowa Code §§ 111E.2, 111E.3, 111E.4 (1989); 1989 Iowa Acts, ch. 236 (H.F. 769). "Open space property" that is taxable pursuant to Iowa Code § 111E.4 after state acquisition includes only the real estate acquired by the Department of Natural Resources since January 1, 1987, pursuant to statutes which appropriate funds expressly for "open space" land acquisition. (Smith to Wilson, Director, Department of Natural Resources, 11-9-89) #89-11-2(L)

November 9, 1989

Mr. Larry J. Wilson, Director
Department of Natural Resources
Wallace Bldg.
LOCAL

Dear Mr. Wilson:

You have requested an opinion of the Attorney General concerning the scope of "open space property" that remains taxable pursuant to Iowa Code § 111E.4 despite state ownership if acquired by the Department of Natural Resources (DNR) since January 1, 1987. Your opinion request explained that the term "open space property" appears to be susceptible to two interpretations: that term includes either all real estate acquired by the DNR since January 1, 1987; or only real estate acquired after that date pursuant to other statutes which appropriate funds expressly for "open space" land acquisition. It is our opinion that the General Assembly intended the narrower meaning of "open space property."

Iowa Code Chapter 111E was created by 1987 Iowa Acts, Chapter 174. Chapter 111E, titled "Open Space Lands," does not contain a definition of "open space lands" or "open space property." However, subsection 111E.1(3) contrasts lack of funding for "open space acquisition" with "generally available" state and federal funding for acquisition and protection of fish and wildlife areas and land acquisition for boating access to public waters. This contrast impliedly limits the scope of "open space property" by excluding real estate acquired under the marine fuel tax fund established by Iowa Code § 324.79, the fish and game protection fund established by Iowa Code § 107.17, and federal programs for cost-sharing such acquisitions.

Similarly, funding sources for acquisition of open space lands listed in § 111E.3 do not include the marine fuel tax or the fish and game protection fund. Rather, acquisition of open spaces is distinguished from other DNR acquisition programs, as

in subparagraph 111E.2(1)(c)(2), which requires the DNR to obtain "the maximum efficiency of funds appropriated for this program...." Emphasis added.

Although it may be unnecessary to look beyond chapter 111E in order to conclude the General Assembly intended that "open space property" includes only a limited class of DNR real estate acquisitions, related statutes provide further support for that conclusion. Statutes relating to the same subject matter must be construed together in light of their common purposes and intent. Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co., 165 N.W.2d 771, 774 (Iowa 1969). Related statutes include a series of appropriations acts enacted between 1973 and 1985 and the newly enacted Resources Enhancement and Protection Act. Also relevant is the item veto in 1975 of a bill section that would have established an unlimited standing appropriation to the State Conservation Commission for payment of school taxes on all real estate acquired by the Commission after July 1, 1975.

The earliest legislative reference to the Iowa Conservation Commission's open space land acquisition program was titled an act "to appropriate from the general fund of the state to the state conservation commission for the open space land acquisition program." 1973 Iowa Acts, ch. 74. That act appropriated two million dollars for specified open spaces purposes. Subsequent appropriations for open space land acquisition were included in 1974 Iowa Acts, ch. 1026, § 2; 1977 Iowa Acts, ch. 33, § 2; 1979 Iowa Acts, ch. 14, § 6(2)(b); and 1982 Iowa Acts, ch. 1264. Each of these appropriations expressly referred to the "open spaces land acquisition program" or "open spaces land acquisition." This history of appropriations for an open space acquisition program is consistent with the language in chapter 111E indicating that open space land acquisition is only one of several land acquisition programs of the DNR.

The legislative mandate and appropriations for payment of school taxes on open space lands acquired by the Conservation Commission first appeared in 1975 Iowa Acts, chapter 62 (H.F. 898). Section 7 of H.F. 898 would have created a new section in Iowa Code chapter 107 establishing an unlimited standing appropriation to the State Conservation Commission for payment of school taxes on lands acquired under the 1973 open spaces land acquisition appropriation "and under the authority of any other Act of the general assembly which authorizes the acquisition of land which would otherwise be subject to the levy of school taxes." However, Section 7 was vetoed by Governor Ray, whose veto message included public policy arguments opposing creation of an exception to the general rule that state-owned land is exempt from local property taxes.

Subsection 1(5) of the same 1975 Act appropriated $3.7 million to the State Conservation Commission for purposes including land acquisition. Subsection 1(5) also included the following mandate and appropriation for payment of school district taxes:

> Prior to the expenditure of funds appropriated by this paragraph, an amount sufficient to pay school taxes on land acquired under the provisions of the Acts of the Sixty-fifth General Assembly, chapter seventy-four (74), 1973 Session, and land acquired pursuant to this Act, shall be deducted from the funds appropriated by this paragraph and shall be paid to the school districts in which such lands are located.

Governor Ray's veto message also criticized the "one-year" reimbursement of school district taxes mandated by Subsection 1(5). The veto message commented that the one-year reimbursement was reluctantly approved because a veto would have necessitated vetoing the $3.7 million capital appropriation to the Conservation Commission as well.

Subsequently, a series of appropriations acts mandated funds for payment of school district taxes on lands "acquired under the open spaces acquisition program, commenced in Acts of the Sixty-fifth General Assembly, 1973 Session, chapter 74, which would otherwise be subject to the levy of school taxes." See, e.g., 1979 Iowa Acts, ch. 12, § 7; 1985 Iowa Acts, ch. 260, § 6. Thus, in contrast with the vetoed standing unlimited appropriation and the one-year payment mandated by the 1975 act, these subsequent mandates for payment of school district taxes were expressly limited to lands that had been acquired under the 1973 open spaces acquisition appropriation act and subsequent open spaces acquisition appropriation acts.

The 1987 Open Space Lands Act did not provide for continuing payment of school district taxes on open space lands acquired under previous appropriations for purchase of open space lands. Rather, as codified in Iowa Code § 111E.4, it requires the DNR Director to include in the Department's budget proposal for each fiscal year a budget request for payment of taxes on open space property acquired by the DNR since January 1, 1987. This change eliminates the need for a continuing series of annual or biennial appropriation acts for local tax reimbursement on open space property acquired since January 1, 1987. Additionally, it expands the mandate for payment of taxes to include "property taxes" rather than school district taxes. It does not expand the meaning of "open space property."

Two years after enactment of the Open Space Lands Act, the General Assembly enacted Iowa Resources Enhancement and Protection Act (REAP). 1989 Iowa Acts, ch. 236 (H.F. 769). The REAP Act established a state resources enhancement and protection fund. Section 6 of the Act created a new Iowa Code § 455A.18 allocating revenues deposited in the fund. This new code section provides for a specified portion of revenues deposited in the REAP fund to be credited to an "open spaces account" to be used by the Department of Natural Resources "to implement the statewide open space acquisition, protection, and development programs." This section further states: "Political subdivisions of the state shall be reimbursed for property tax dollars lost to open space acquisitions based on the reimbursement formula provided for in § 111E.4." These provisions of the REAP Act are consistent with previous enactments distinguishing open space property from lands acquired under programs with other funding sources.

In contrast, open spaces are not mentioned in Iowa Code §§ 99E.31(3) and 99E.32(3) (1989) which appropriated Iowa Lottery receipts to the DNR for the acquisition and development of "parks, recreation areas, forest, fish and wildlife areas, and natural areas...." Thus, lands purchased by the DNR with Iowa Lottery receipts become tax-exempt unless the lottery receipts are first allocated to the REAP open spaces account.

The use of the terms "open space property" and "open space lands" with reference to lands purchased with particular funding sources is also consistent with other enabling statutes of the Department of Natural Resources which mandate payment of property taxes on State-owned land acquired with specific funding sources. These other mandates are in §§ 107.16 and 110.3, which provide that land acquired with Chickadee Checkoff revenue and wildlife habitat stamp revenue, respectively, remain taxable despite the exemption for State-owned property in § 427.1. And § 108A.12 contains general language requiring the State to reimburse from the General Fund local tax revenues lost due to lower assessments and acquisition of public lands "stemming from designation of a protected water area."

When all of these enactments are viewed together, it appears that since the 1975 veto of the broad unlimited standing appropriation for payment of school taxes on State lands, the General Assembly has enacted a patchwork of property tax exemption exceptions and reimbursement provisions which apply to some of the DNR's land acquisition funding sources but not others.

In conclusion, it is our opinion that "open space property" that is taxable pursuant to Iowa Code § 111E.4 after state

acquisition includes only the real estate acquired by the DNR since January 1, 1987 pursuant to statutes which appropriate funds expressly for "open space" land acquisition.

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General
Environmental Law Division

MHS:rcp