State of Iowa

1974

FORTIETH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1974

RICHARD C. TURNER
Attorney General

Published by
THE STATE OF IOWA
Des Moines
H1228

ATTORNEYS GENERAL OF IOWA
1853 - 1972

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A.J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1957
Norman A. Erbe	Boone	1957-1961
Evan Hultman	Black Hawk	1961-1965
Lawrence F. Scalise	Warren	1965-1967
Richard C. Turner	Pottawattamie	1967-

PERSONNEL OF THE DEPARTMENT OF JUSTICE

RICHARD E. HAESEMEYER .....Solicitor General
Solicitor General and First Ass't. Attorney General. B. April 11, 1928, Tipton, Iowa; B.S., University of Illinois; L.L.B., Harvard Law School; married, three children; American Airlines, Inc., N.Y.C., 1956-1962; Monsanto Company, Textile Div. (formerly the Chemstrand Corp.) N.Y.C. 1962-1967; App't. Solicitor General and First Ass't. Attorney General February 20, 1967.

JOHN E. BEAMER ..... Special Assistant Attorney General
B. September 23, 1939, Abilene, Texas; B.A., Cornell College; J.D., S.U.I.; Agent F.B.I., 1964-1970; married, two children; App't. Ass't. Atty. Gen. 1970, App't. Special Ass't. Atty. General, 1972.

GEORGE W. MURRAY ..... Special Assistant Attorney General
B. June 1, 1920, Chicago, Illinois; Coe College 2 years; L.L.B., Drake University; married, one child' App't. Spec. Ass't. Atty. Gen. 1961-1965 and also 1967.

ASHER E. SCHROEDER ..... Special Assistant Attorney General
B. May 12, 1925, Maquoketa, Iowa; married, three children; B.A., J.D., S.U.I.; App't. Ass't. Atty. Gen. 1969, App't. Special Ass't. Atty. Gen. 1971.

LORNA L. WILLIAMS ..... Special Assistant Attorney General
B. February 9, 1915, Gaylord, Kansas; B.A., J.D., Drake University; two children, private practice 1941-1967; App't. Special Ass't. Atty. Gen. 1967.

JOHN I. ADAMS .....Assistant Attorney General
B. July 11, 1926, Des Moines, Iowa; B.A., L.L.B., S.U.I.; Agent F.B.I., 1953-1955; Legal Department, Continental Western Insurance Company, 1958-1968; App't. Ass't. Atty. Gen. 1969.

GARY A. AHRENS .....Assistant Attorney General
B. June 3, 1948, Boone, Iowa; B.A., University of Chicago; J.D., University of Virginia; married; App't. Ass't. Atty. Gen. 1973.

JOHN W. BATY .....Assistant Attorney General
B. October 5, 1942, Monticello, Iowa; B.S., Iowa State University; J.D., Drake University; Ass't. Marshall County Atty. 1968-1969; married; App't. Ass't. Atty. Gen. 1972.

JOSEPH S. BECK .....Assistant Attorney General
B. January 3, 1944, Spencer, Iowa; B.B.A., University of Iowa; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1973.

LARRY M. BLUMBERG .....Assistant Attorney General
B. September 8, 1946, Omaha, Nebraska; B.A., University of Minnesota; J.D., Drake University; married, one child; App't. Ass't. Atty. Gen. 1971.

THEODORE R. BOECKER .....Assistant Attorney General
B. November 20, 1947, Des Moines, Iowa; B.A., Creighton University; J.D., Drake University; married, two children; App't. Ass't. Atty. Gen. 1973.

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B. December 6, 1942, Des Moines, Iowa; B.A., J.D., Drake University; single; App't. Ass't. Atty. Gen. 1968.

C. JOSEPH COLEMAN, JR .....Assistant Attorney General
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ROXANNE BARTON CONLIN .....Assistant Attorney General
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DARBY MARIA CORIDEN .....Assistant Attorney General
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JAMES C. DAVIS .....Assistant Attorney General
B. February 23, 1937, Bloomington, Indiana; Oregon State College 2 years; Greenville College 1 year; B.A., J.D., S.U.I.; married, one child; private practice 1962-1970; Justice of the Peace 1967-1970; App't. Ass't. Atty. Gen. 1970.

JOHN R. DENT .....Assistant Attorney General
B. January 15, 1947, Denver, Colorado; B.A., Colorado College; J.D., Drake University; married, three children; App't. Ass't. Atty. Gen. 1973.

DAVID M. DRYER .....Assistant Attorney General
B. February 20, 1948, Cedar Rapids, Iowa; B.A., University of Iowa; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1974.

CAROL S. EGLY .....Assistant Attorney General
B. June 27, 1949, Creston, Iowa; B.A., St. Olaf College; J.D., Drake University; single; App't. Ass't. Atty. Gen. 1975.

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B. November 7, 1940, Des Moines, Iowa; B.A., Central College; J.D., S.U.I.; single; App't. Ass't. Atty. Gen. 1967.

ROBERT W. GOODWIN .....Assistant Attorney General
B. June 25, 1943, Indianola, Iowa; B.S., J.D., Drake University; Agent F.B.I. 1967-1971; married, two children; App't. Ass't. Atty. Gen. 1970.

HARRY M. GRIGER .....Assistant Attorney General
B. March 13, 1941, Des Moines, Iowa; B.A., J.D., S.U.I.; married; App't. Ass't. Atty. Gen. 1967.

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B. October 18, 1947, Des Moines, Iowa; B.B.A., J.D., Drake University; single; App't. Ass't. Atty. Gen. 1972.

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B. February 1, 1948, Des Moines, Iowa; B.A., J.D., University of Iowa; single, App't. Ass't. Atty. Gen. 1973.

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B. August 27, 1949, New York City, N.Y.; B.A., University of Iowa; J.D., Drake University; married, one child; App't. Ass't. Atty. Gen. 1974.

DOROTHY KELLEY .....Assistant Attorney General
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B. July 1, 1947, Chicago, Illinois; B.S.E., Northeast Missouri State University; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1973.

THOMAS D. MC GRANE .....Assistant Attorney General
B. November 2, 1940, Waverly, Iowa; B.A., U.N.I.; J.D., University of Iowa; married, three children; U.S.A.F. 1961-1964; App't. Ass't. Atty. Gen. 1971.

THOMAS MANN, JR .....Assistant Attorney General
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ELIZABETH A. NOLAN .....Assistant Attorney General
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CLIFFORD E. PETERSON .....Assistant Attorney General
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GARY M. PETERSON .....Assistant Attorney General
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EARL W. ROBERTS, JR .....Assistant Attorney General
B. June 26, 1944, Baltimore, Maryland; B.A., Oakwood College; J.D., University of Iowa; married, three children; App't. Ass't. Atty. Gen. 1974.

STEPHEN C. ROBINSON .....Assistant Attorney General
B. September 7, 1935, Des Moines, Iowa; A.A., Graceland Junior College; B.A., S.U.I.; L.L.B., Drake University; married, two children; private practice 1962-1967; App't. Ass't. Atty. Gen. January 3, 1967; Secretary Executive Council of Iowa May 1, 1967; Executive Secretary Republican Party of Iowa, November 1, 1969; App't. Ass't. Atty. Gen. August 15, 1973.

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B. December 1, 1947, Monticello, Iowa; B.A., Clarke College; J.D., University of Iowa; single; App't. Ass't. Atty. Gen. 1974.

IRA SKINNER .....Assistant Attorney General
B. October 4, 1928, Des Moines, Iowa; B.A., J.D., Drake University; married; App't. Ass't. Atty. Gen. 1970.

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B. January 21, 1946, Centralia, Washington; B.A., S.U.I., J.D., Drake University; married; App't. Ass't. Atty. Gen. 1974.

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GARY H. SWANSON .....Assistant Attorney General
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GARRY D. WOODWARD .....Assistant Attorney General
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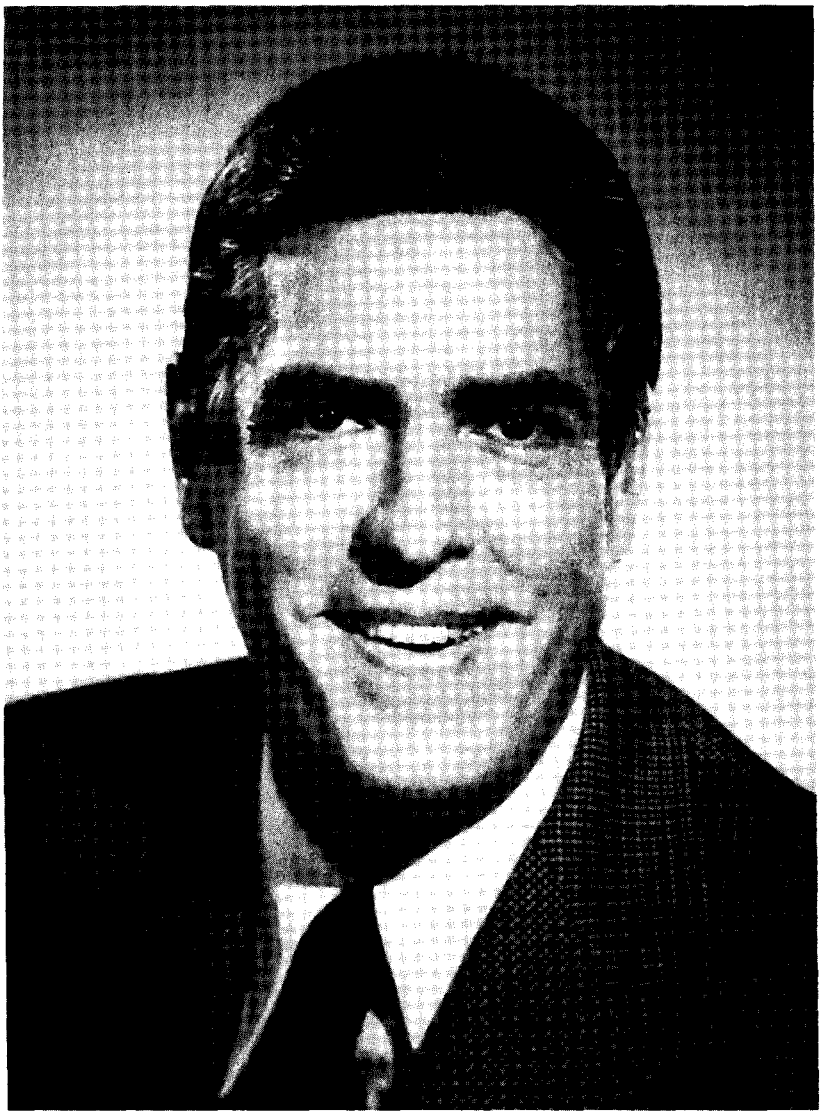
MYRON E. LIGHT ..... Administrator
B. May 25, 1921, Deep River, Iowa; BCS; married, three children; F.B.I., 1941-1972; App't Chief Investigator 1972; App't. Administrator 1975.

PHYLLIS J. WISE ..... Administrative Assistant
B. Sept. 13, 1932, Ottumwa, Iowa; married, two children; App't. Admin. Ass't. 1973.

MARJORIE J. BURGESS ..... Administrative Assistant
B. July 6, 1928, Des Moines, Iowa; three children; Bookkeeper, 1967-1974; App't. Admin. Ass't. 1975.



RICHARD C. TURNER ..... Attorney General

B. September 30, 1927, Avoca, Iowa; B.A., J.D., S.U.I.; married, three children; private practice 1953-1967; State Senator from Pottawattamie County 1960-1964; Ass't. Pottawattamie County Attorney 1954-1956; Avoca Town Clerk 1953-1960; Elected Attorney General 1966, 1968, 1970, 1972 and 1974.

REPORT OF THE ATTORNEY GENERAL

April 14, 1975

The Honorable Robert D. Ray
Governor of Iowa
State Capitol Building
LOCAL

Dear Governor Ray:

In accordance with the requirements of Sections 13.2(6) and 17.6, Code of Iowa, 1975, I am privileged to submit the following report of the condition of the office of the Attorney General, opinions rendered and business transacted of public interest.

OPINIONS

During 1973 and 1974, the Iowa Department of Justice prepared, pursuant to Section 13.2(4), 504 written legal opinions. This compares with 488 opinions prepared in 1971 and 1972, 443 opinions written during the 1969-1970 biennium and 607 opinions furnished in 1967 and 1968. Of the 504 opinions issued during the last two years, 176 were furnished in response to requests from members of the general assembly, 183 in response to questions from state officers and 145 in answer to inquiries from county attorneys.

The preparation and furnishing of these opinions constitutes one of the more important and time-consuming functions which the Department of Justice is required to perform. With annual sessions and the continuing growth in size and complexity of government, it is clear that an increasing portion of Department of Justice staff resources will have to be devoted to writing these attorney general's opinions.

CIVIL RIGHTS

The attorney assigned to the civil rights division is charged by law with the presentation of the complainant's case before the civil rights commission at public hearing, and thereafter through the appellate process. During this biennium, 8 cases were tried to the commission, and 9 additional cases were set for public hearing and assigned to this office, but were successfully settled before the hearing. Six cases have been heard by district courts and 6 by the Supreme Court, 3 of which are pending decision.

In an effort to provide the commission with technical legal information about pending cases, we examined and classified all open cases pending in the Iowa Civil Rights Commission as of July 1. This examination took three weeks to complete.

In addition, as cases are processed by the commission, legal questions and problems often arise and the assistant attorney general is called upon to research the issues and determine the technical and legal procedures for handling such cases.

Preparatory to public hearing, additional investigation is often required. In appellate matters, numerous briefs and oral arguments are presented before final determination. The office also answers written and oral requests from the public on matters pertaining to civil rights. Opinion requests in this area, as well as approval of proposed rules, are handled by the attorney general's office. The assistant assigned to this area is also requested periodically to participate in seminars and conferences concerning equal opportunity matters.

TREBLE DAMAGES—ANTI-TRUST CASES

During this biennium, 1.5 million dollars were paid by 5 drug manufacturers to the state and its political subdivisions as damages for the fixing of prices on the prescription drug tetracycline. As required by the court, more than $450,000 was allocated to the Department of Health for use in special projects such as measles immunization, public health, nursing and the detection of sickle cell anemia. The total settlement amount of $1,600,000 has now been distributed.

We are also involved in an anti-trust case brought against the major automobile manufacturers. This action is currently still in the discovery stage. Data has been collected from cities and counties, as well as state agencies on the number and type of automobiles purchased during the period of the lawsuit. No trial dates have been set.

We have successfully settled the cast iron pipe price fixing case. The matter was tried in April of 1973, after 10 weeks of evidence, the jury was unable to reach a verdict and the judge declared a mistrial. Post-trial negotiations produced a settlement to the State of Iowa and its political subdivisions in the total amount of $394,672.48. Distribution has not yet been made. We also intervened in the gypsum anti-trust case and were awarded $100,000, one-half of which has already been distributed.

The most complex case we are currently pursuing involves the drug ampicillin. It is alleged that three manufacturers of that drug committed a patent fraud and thereafter interfered with other companies' attempts to produce and distribute the same which caused an artificially high price. After four years of discovery proceedings, the case is likely to proceed to trial on the liability aspect sometime during 1975. Damages will be determined in a separate suit.

Recently, we filed an action against the 37 large corporate producers of chickens and the association to which they belong alleging illegal price fixing through the market manipulation.

REMOVAL OF PUBLIC OFFICIALS

The Attorney General is authorized under Chapter 66 of the Code to bring removal actions against public officials whom he believes to be guilty of willful or habitual neglect or refusal to perform their

duties; or willful misconduct or maladministration; corruption; extortion; intoxication; or upon the conviction of a felony.

Three members of the Worth County Board of Supervisors were charged with falsifying mileage claims against the county, accepting gratuities from contractors who did business with the county, illegally selling county property and mishandling the proceeds and numerous other violations. The district court removed one of the supervisors but allowed the other two to remain in office. However, on appeal, the Iowa Supreme Court reversed the lower court and removed the two remaining supervisors.

CONSUMER PROTECTION

The activities of the consumer protection division of the Iowa Attorney General's Office have continued to increase during 1973-1974 as compared to prior years. The following table shows how this activity has increased over the years.

	Received	Closed	Moneys Recovered	Lawsuits Filed
1967-1968	1,226	959	$ 48,494	21
1968-1969	2,968	2,452	451,633	37
1971-1972	7,590	5,798	1,140,374	31
1973-1974	10,717	9,099	2,511,559	58

The enactment in 1974 of the Iowa Consumer Credit Code has significantly added to the duties of our consumer protection staff since the consumer protection division was given responsibility for the enforcement of this new law. The ICCC, as it is known, is a comprehensive code attempting to cover the area of consumer credit. It deals with interest rates, debt collection practices, and several other areas touching on the giving of credit. This measure also provides a number of remedies which are available both to the consumer himself and to the Attorney General on behalf of consumers.

The consumer protection division has filed a large number of lawsuits during the past two years. These cases have involved a wide variety of illegal acts. The subject matter of these cases involved such things as: (1) pyramid sales; (2) trade schools; (3) falsely advertising as a non-profit group; (4) automobile odometer turnbacks; (5) health spas; (6) subdivided land sales; (7) distributor investment schemes; (8) magazine sales; (9) violations of the three day door-to-door sales law; (10) fraud in the sales of "antiques"; (11) beef baiting; (12) computer dating; (13) excess interest rates; (14) television repairs; (15) invention promoters; (16) collection agencies.

This division has continued its activities in informing the public of various fraudulent schemes. In addition, an effort has been made to inform the public as to the complex and sometimes ambiguous requirements of the credit code. This effort has involved both release to the media and appearances by personnel from the

division before many church, school, business, consumer and other organizations to explain the activities of the office.

Much needed consumer legislation was sponsored and supported by this division during the years 1973-1974. A subdivided land law, which is among the toughest in the nation, was drafted by the consumer protection division and passed by the general assembly along with a law giving consumers three business days in which to cancel transactions made with door-to-door salesmen. In addition, a long standing effort to change the holder in due course law was partially successful when the old law was modified somewhat by the Iowa Consumer Credit Code.

Unfinished business in the legislative area includes a bill that will be introduced again this year to change the mechanics lien law to require that suppliers of building contractors notify homeowners that they are furnishing supplies for which they have not been paid. The rationale behind this proposal is to insure that the homeowner has some notice that the materials are not being paid for so that he can protect himself against the possibility of paying for material and yet having a mechanics lien placed against his property by the supplier who has not been paid by the contractor.

Another bill will be introduced this year to require non-profit organizations soliciting donations to file a statement with the Secretary of State showing how the money they raised was spent during the preceding year.

It is expected that the work load of this division will continue to increase as it has in the past.

CRIMINAL APPEALS

In the years 1973-1974, the criminal appeals division of the Attorney General's Office has participated in 557 criminal appeals taken to the Iowa Supreme Court from the district and municipal courts of this state. The state prevailed in 489 of these appeals. Nineteen (19) convictions were reversed and 49 cases were remanded for further proceedings.

Before the Iowa Supreme Court, the state defended the denial by the Iowa district court of 24 habeas corpus and post-conviction petitions. The state was sustained by the supreme court in 20 of these cases. In the United States district courts, the state was upheld in 24 cases and one conviction was reversed. One of these rulings was appealed to the United States Court of Appeals for the Eighth Circuit resulting in a reversal. Of the 7 cases taken to the Supreme Court of the United States on writ of certiorari from various state and federal criminal and habeas corpus decisions, the state prevailed in 6 of the 7 cases.

During 1973-1974, the criminal appeals division disposed of 302 extradition cases.

In addition to its criminal appeal and extradition work, the criminal appeals division gives legal assistance to the Iowa Beer

and Liquor Control Department, the Iowa Board of Parole, the Iowa Department of Labor, the Iowa Board of Pharmacy Examiners, the Iowa Drug Abuse Authority, and the Iowa Industrial Commissioner. During 1973-1974, this division handled 61 hearings involving liquor license denials, suspensions and revocations before the Iowa Beer and Liquor Control Department hearing board.

The addition of more attorneys to the division has resulted in a decrease in the criminal appeals backlog in the Iowa Supreme Court. The backlog reached a high of about 400 cases in August, 1973. There are currently (January, 1975) about 250 criminal appeals on the docket.

ENVIRONMENTAL PROTECTION

As anticipated, the work load of the environmental protection division continues to increase. The division represents the Department of Environmental Quality, Natural Resources Council, State Conservation Commission, Department of Soil Conservation, Real Estate Commission, Commission on the Aging, and various other state boards and officials concerned with environmental quality.

During the biennium, abstracts of title to 87 tracts of land acquired by the State Conservation Commission were examined and a total of 83 title vesting certificates were reviewed and approved. In addition, 14 appeals in condemnation proceedings were tried in the district court and one in the Iowa Supreme Court, leaving 8 such cases pending in the district court. Twelve cases, principally quiet title actions, involving the State Conservation Commission, were disposed of during the period, leaving 26 such cases pending.

Boundary disputes along the Missouri River and other meandered streams and lakes continue to require a great deal of time. Work continued on the U.S. condemnation suit involving land along the Missouri River claimed by the Winnebago Tribe of Indians, the State of Iowa and others.

Agency orders relating to water quality were enforced in 11 district court actions and one appeal to the Supreme Court, leaving 10 district court cases pending. In addition, this division intervened in an action in the U.S. District Court in Washington, D.C., seeking the release of federal funds totaling more than $100,000,000 appropriated by the congress for sewage treatment works construction grants but impounded by the federal administration.

Agency orders relating to air quality were enforced in 16 district court actions, leaving 5 such cases pending. Six district court cases involving solid waste disposal were tried or settled during the period, leaving 3 such cases pending. One case involving the Chemical Technology Commission and its rules regulating the use of inorganic arsenic was disposed of during the period leaving one such case pending.

Five cases involving the Department of Soil Conservation were disposed of during the period, leaving one such case pending and two cases involving flood plan activities regulated by the Natural Resources Council were tried, leaving one such case pending.

In summary, litigation handled by this division this biennium included 81 new cases opened and 70 cases closed, leaving 55 cases pending. In addition to this litigation, and probably of even greater importance, a great deal of time continues to be spent in participation in the meetings and administrative hearings of the assigned agencies and in counseling and advising the agencies and their staff personnel with regard to existing statutes, proposed legislation, rules and regulations, implementation and enforcement of environmental protection laws, and general agency functions.

AREA PROSECUTORS

The area prosecutors division was established in 1971 to aid Iowa county attorneys. The staff of 5 experienced trial lawyers has provided immediate assistance to county attorneys, ranging from single court appearances to the conduct of extensive investigations and their resulting trials. Two research lawyers are on call to answer legal questions from county attorneys. Their responsibilities include immediate answers to phoned questions and, when needed, more extensive legal memoranda.

In the 1973-1974 biennium, area prosecutors handled 210 cases, including 133 felony cases of which 71 resulted in convictions, 2 cases resulted in acquittals, 4 were dismissed for lack of evidence, 4 cases were dismissed by the district court, 5 cases were dismissed by judgment of the Iowa Supreme Court, and 48 cases are pending disposition. Area prosecutors provided assistance in 52 investigations as follows: assault with intent to murder—2; campaign finance disclosure—2; deaths—2; forgery—1; gambling—20; narcotics and prostitution—2; perjury—1; police misconduct—2; prison incidents—14. Assistance was also provided in 26 indictable misdemeanor cases.

During the period, an additional 16 issues of the Iowa Criminal Law Bulletin were distributed to district court judges, magistrates, county attorneys and state and local law enforcement agencies. The monthly distribution of the Bulletin increased 300% to 700 copies due to increased requests from various agencies involved in the criminal justice system.

Two volumes of the Dictionary of Iowa Criminal Law were published (1973, 1974). These were yearly compilations of material developed through regular area prosecutors' research and material developed for the Criminal Law Bulletins. Over 700 copies of the 1974 Dictionary have been distributed and additional requests have made a second printing necessary.

The area prosecutors will continue to provide county attorneys with a total services program. The wide acceptance and spirit of cooperation between the staff of the area prosecutors and county attorneys has made a definite contribution to the quality of prosecution provided to the citizens of this state.

SPECIAL PROSECUTIONS

The special prosecutions section (SPS) was formed in 1972 with the assistance of a federal grant awarded through the Law En-

forcement Assistance Administration. The section is currently operating under a "block" grant, administered by the Iowa Crime Commission and performance is subject to constant review by the Courts Committee of the Commission. The Courts Committee, comprised of a supreme court justice, district court judges, state officials, businessmen and legislators, receives quarterly reports from the section, which are reviewed for performance and progress under the grant. The scope of the grant application, approved in 1972, was written to include investigations of anti-trust violations, tax evasion, public official misconduct and organized crime. In 1974, the need arose to render assistance to the Iowa Securities Commission and considerable investigative and prosecutive success in the field of securities has been achieved by this section. The section is currently operating with four attorneys, three investigators and one secretary.

Details of the work performed by SPS must remain confidential in some instances since many cases are currently in an investigative status. It is significant to note that 82 cases were received during the two year period 1973-1974, as compared with 30 cases received in 1972, the initial year of operation. The 82 cases were received from a variety of sources, including citizens, other state or municipal officials, confidential informants and those initiated by SPS.

In the field of anti-trust investigations during 1972, the initial year of operation, the section was responsible for 53 convictions and fines totaling $26,500. This was the result of an intensive investigation of International Harvester dealerships throughout the state when it was determined that numerous dealers had agreed among themselves to increase the manufacturer's suggested retail parts prices by 10 percent. Additionally, 8 convictions and fines totaling $4,000 were realized in the case during 1973.

During the two year period 1973-1974, the section conducted anti-trust investigations in various fields of business and industry including automobile body shops, newspapers, funeral services, insurance, real estate, bakery products, farm equipment, cattle feeders, credit cards, appliances and many others. During 1973-1974, investigations of automobile body shops, trash haulers, acquarium and pet supplies and automobile dealers in different Iowa localities determined that violations of the Iowa anti-trust statute were occurring. Since many of the violations did not appear sufficiently significant as to warrant prosecutive action, individual letters, in most cases, were directed to each firm advising them that a violation on their part was apparent. They were instructed to cease and desist.

Three convictions relative to anti-trust violations under Iowa statutes were secured during the period. One was in the instance of an acetylene/oxygen gas distributor which required its dealers to sign three-year exclusive purchase agreements and two dealt with fixing the retail sales price of bread. In addition, final judgment proceedings are pending in a case relating to fixing the prices of manufactured spray nozzles and accessories and trials of two in-

dividuals are pending in another case in which fixing the retail price of bread is involved.

In the field of public official misconduct, the attorney general's office of an adjoining state brought to our attention in 1973 the fact that several chemical companies were giving merchandise premiums to municipal employees in that state. These premiums were allegedly offered by salesmen in order to make sales of chemicals to municipal water and sewage plants in cities of less than 15,000 population. It was suggested that a similar practice might exist in the State of Iowa. A survey was promptly instituted among all county engineers and city clerks in Iowa towns of less than 15,000 population. Numerous interviews and extensive investigation was conducted. To date, 13 convictions have been realized as to chemical companies, 16 convictions relating to chemical company salesmen and 8 public employees have been convicted with a total of $11,125 collected in fines. Prosecutive action is in a pending status as to 15 indictments relating to chemical company salesmen and/or public employees.

The Iowa Securities Commission requested investigative and prosecutive assistance of the special prosecutions section in March of 1974 as to questionable operations and transactions by investment firms operating in the State of Iowa. As a result, investigations of ten such firms were initiated with remedial or prosecutive action taken or pending in all instances. Judgments have been rendered by the court against four defendant companies, two have been ordered into receivership by the court while the Commissioner of Insurance ordered a cease and desist order as to one other company. Criminal indictments were returned against two individuals connected with one of the firms placed into receivership. There are 6 cases in which litigation or additional litigation is currently pending.

A summarization of statistical accomplishments by the section since its inception in 1972, reflects 101 convictions obtained and a total of $41,625 in fines collected, with litigation still pending in several additional cases.

Investigative efforts by the SPS in the field of organized crime have been somewhat limited due to utilization of investigators' time on more urgent matters unrelated to organized crime. During the 1973-1974 period, investigators operated confidential sources, conducted interviews and utilized recognized investigative techniques to monitor activities of known or suspected individuals connected with organized criminal activities. Liaison is maintained with local, state and federal law enforcement agencies to the extent that criminal intelligence data is exchanged on a continuing basis. Since SPS investigators are not considered peace officers they lack authority to make arrests. Accordingly, our liaison program enables us to disseminate information on cases or individuals to other agencies for appropriate action.

Some examples of past information disseminated by SPS which enabled other law enforcement agencies to take effective action are:

A local police department recovered stolen merchandise valued at more than $1,000; another agency arrested a subject involved in a jewel theft; and two female escapees from the women's reformatory were arrested by local police. Investigation and information from sources developed by the section resulted in the location of a narcotic ring and identification of known interstate narcotic dealer. Based upon this information, local narcotic officers were ultimately able to arrest and convict this individual. The section also located and identified two large bookmaking operations which were turned over to an appropriate federal agency which conducts widespread investigations of gambling matters in and outside of Iowa.

In addition to the foregoing, voluminous information of a criminal intelligence nature relating to gambling, narcotics and prostitution is exchanged with other agencies on a continuing basis. Reliable sources have reported the possible interest of three unrelated gamblers from outside the State of Iowa in establishing gambling operations in Iowa. Developments are being closely followed.

Several problems exist with our present antiquated (1890) state anti-trust statute, including the fact that anti-competitive activities by individuals and corporations providing services are not covered by the statute, the same being limited to those buying or selling tangible commodities. Further, no civil sanctions are provided. In many cases, the unit would prefer to request injunctive relief in equity, but is precluded from doing so, and must utilize the criminal process. Inadequate discovery procedures exist under the present statute. The grand jury subpoena is now the only real means of discovery. A proposed revised "Iowa Competition Law" pending in the general assembly would provide for civil discovery without the necessity of proceeding through the grand jury. It would also cover services and provide civil, as well as criminal sanctions.

PUBLIC SAFETY

The Attorney General's Office has represented the Department of Public Safety in a considerable volume of litigation involving the department's various regulatory functions. The bulk of litigation involved drivers licenses. During the biennium, the Attorney General's Office handled 410 cases in the district court and 14 cases in the Supreme Court involving the suspension or revocation of drivers licenses. In addition, the Attorney General's Office has represented the Department of Public Safety in litigation in the areas of dealer licensing, motor vehicle registration, motor vehicle inspection, and private detective licensing. Legal advice and representation in civil cases is also provided to the Highway Patrol,

the Bureau of Criminal Investigation, the State Fire Marshall, Beer and Liquor Enforcement and Narcotic and Drug Enforcement.

The Attorney General also furnishes an assistant attorney general to work on a full time basis in the office of the Commissioner of Public Safety. The assistant provides input into administrative decision making, as well as general counsel to the department. His specific duties include monitoring civil claims and actions against the department and departmental personnel, assisting with the department's legislative program and departmental rules, and drafting and approving contracts and leases for the department.

HIGHWAY COMMISSION

Pursuant to §307.9 of the 1973 Code of Iowa, the Attorney General provides special counsel to the highway department and to the developing Department of Transportation.

The greater part of the work has involved the adjudication of condemnation awards. In defense of plaintiffs' prayers, savings of $638,727.78 were realized in 1973, and in 1974, $1,229,663.39. 137 cases were disposed of by trial, settlement and dismissal during the biennium. As of January 1, 1975, there were 96 cases pending.

In the most recent biennium, the staff handled a wide variety of miscellaneous litigation involving the Highway Commission. A total of 96 cases were disposed of in state and federal courts, with 96 cases remaining active as of January 1, 1975. While the commission usually appeared as a defendant, this office did institute actions for the recovery of damages suffered by the commission to property under its jurisdiction (such as bridges, light poles, etc.), which resulted in recoveries in excess of $160,000.

In addition to processing in excess of 500 condemnation matters, the staff also provides informal advice to commission departments, and aids in drafting a variety of legal documents involving local, state and federal agencies. It prepares rules and policies and reviews proposed legislation.

As counsel to the newly formed Department of Transportation and to the Energy Policy Council, this office has experienced new and unusual legal problems. It is anticipated that this will continue to be true as each agency develops within the broad statutory framework upon which each was founded.

REVENUE

The Iowa Department of Revenue has been represented by the Department of Justice in a considerable volume of litigation and in administrative hearings, involving the corporate and personal income taxes, franchise tax on financial institutions, sales and use taxes, property taxes, inheritance tax, cigarette and tobacco taxes, motor vehicle fuel taxes, and chain store tax.

In the past two years, there were 51 administrative hearings before the Iowa Director of Revenue and 25 appeals were taken to

the State Board of Tax Review from decisions of the Director of Revenue. Fifteen of these appeals were won, six were lost, and four are pending for hearing. A total of 73 civil tax cases were tried or settled at the Iowa district court level. Of the 38 cases tried, 24 were won, 7 were lost and 7 are pending decision. Thirty-five cases were settled. An additional 40 cases are pending for trial. Five cases arose and were settled in the federal bankruptcy courts. Three cases involving default judgments for condemnation of garnished funds for unpaid taxes were disposed of. In addition, the staff handled 158 cases involving mortgage and other lien foreclosures, partition actions, quiet title actions, and the like where the subject property was impressed with a tax lien. While most of these cases simply required the filing of an answer, 25 did require a substantial amount of work resulting, at times, in collection, in whole or in part, of amounts represented by the tax liens. Eight civil cases were submitted in the Iowa Supreme Court of which two were won, five were lost, and one is pending decision. An additional 5 cases are pending for submission.

Commencing in the spring of 1973, the Departments of Revenue and Justice began to prepare criminal income tax fraud cases. In 1973 and 1974, 24 convictions for willful failure to file Iowa income tax returns or pay Iowa income taxes were procured. Of these, 18 cases were handled by county attorneys with the assistance of my staff assigned to the revenue department and 6 cases were completely handled by the staff. Six criminal income tax and one criminal sales tax fraud cases are pending for trial.

Several Iowa Supreme Court cases deserve mention. In the case of *In Re Estate of English*, 1973, Iowa, 206 N.W.2d 305, the court confirmed our formula for inheritance taxation of inter vivos transfers whereby the transferor reserved, in whole or in part, a life interest in the property transferred. *In Estate of Dieleman v. Department of Revenue*, 1974, Iowa, 222 N.W.2d 459, the court held that the succession to damages for wrongful death was not subject to inheritance tax. The state had been collecting tax on such damages since 1919. In *Iowa National Industrial Loan Company v. Iowa State Department of Revenue*, December 18, 1974, 2-57008, the court construed §422.37(1), Code of Iowa, 1973, as granting to corporations as defined therein the right to file Iowa consolidated returns for Iowa corporation income tax purposes and voided the revenue department's rule 22.37-1 which had existed for over 25 years.

In addition to administrative hearings and litigation, a far greater amount of time was spent by the staff in advising the Director of Revenue and his staff on legal tax problems, drafting tax opinions of the Attorney General, and aiding with the drafting of tax legislation.

SOCIAL SERVICES

The Attorney General performs legal services for the Department of Social Services pursuant to §13.6, Code of Iowa, 1973, requiring a special assistant attorney general to serve in such capaci-

ty. In addition, there are presently three other assistant attorneys general assigned full time to the work of this department.

Among the services which these attorneys provide to the Department of Social Services are: (1) consultations on a daily basis with respect to statutes, judicial decisions, policy and state and federal regulations; (2) advising with regard to proposed regulations, legislation and manual materials; (3) defending suits brought against the Department of Social Services, commissioner or employees of the department in state and federal courts, including prisoner litigation; (4) inspecting and approving contracts and leases, and handling real estate matters involving the department; (5) referring to county attorneys various suspected welfare fraud matters in the welfare area, as well as matters connected with uniform reciprocal support actions and habeas corpus and juvenile delinquency, dependency and neglect cases commenced at the county level; (6) representing the State of Iowa, and Iowa Department of Social Services before the Supreme Court in matters which had been handled by the county attorneys at the district court levels; (7) researching and preparing drafts of proposed Attorney General opinions; (8) representing the claimant, Department of Social Services, in all estates of decedents and conservatorships in which claims have been filed seeking reimbursement of old age assistance and medical assistance in connection with winding up the trust division of the department; (9) representing the department in appeals to the district courts from administrative hearings; (10) representing the department in all matters involving the mental health and correctional State institutions.

Recoveries of assistance in the old age and medical programs are decreasing somewhat in view of the repeal of the Old Age Assistance Chapter 249, Code of Iowa, 1973, and the repeal of reimbursement claims in the medical assistance program, §6, Chapter 249A, Code of Iowa, 1973. Since the legislature did not specifically provide for a retroactive effective date, our office handles the litigation on the claims already filed.

There is pending litigation in regard to (1) prisoner rights; (2) challenges to Iowa's social welfare statutes and policies and (3) to the Fair Labor Standards Act as it relates to employees of the department, especially those serving in the mental health institutions. Appeals to the Iowa Supreme Court relating to juvenile litigation seems to be on the upswing this past year.

Following is the number of cases appearing on this office's docket over the last two years:

United States Supreme Court	6
Eighth Circuit Court of Appeals	6
United States District Court (Iowa)	147
Iowa District Courts	425
Iowa Supreme Court	46
Out of State	1

Monies recovered for the State of Iowa during the last biennium are:

Estates (OAA & Title XIX)	$1,188,943.71
Welfare Fraud	10,910.86
Skilled Nursing Homes' Overpayments	115,462.70
Total	$1,315,317.27

STATE DEPARTMENTS

In the past two years, this office has assisted the state departments on a continuing basis as requested. As indicated in the previous biennium report, the number of such requests is increasing rather than decreasing with the numerous changes in the state laws which these departments administer. At the present time, one assistant attorney general is handling the requested legal work of the following departments: Public Instruction, Insurance, Banking, Historical Department (new), as well as that of the Executive Council, the Board of Regents, Higher Education Commission, Educational Radio and Television Facilities Board, in addition to matters for which the Department of Justice now has preliminary responsibilities, i.e., the State Bar Examinations, assisting county attorneys on county government questions and the proper disposition of charitable trusts and escheats.

Two years ago this office proposed a reorganization of the office of Attorney General whereby two additional staff members would be assigned to the work of advising the state departments. This proposal was made known to the 65th General Assembly. However, due to other apparent priorities, the request must necessarily be repeated to the current legislature. Lack of sufficient office space is an important factor. One possibility for the solution of this problem may be the assignment of a special assistant attorney general to space in one or more of the larger state departments which do not presently have such counsel. It would seem that such plan does not promote the best economy in state government because it tends to isolate and impair the flexibility and utilization of legal staff. Consequently, my office continues to seek a better solution. Employment of outside counsel has been recommended to the Executive Council in those instances involving specialized legal representation as is required before the FCC in Washington, D.C. and in connection with labor and management litigation and construction contract arbitration at Cedar Falls and Iowa City and in the recent liquidation under receivership of an insurance company.

In 1974, the state departments were successfully represented by this office in 14 cases in the district courts of Iowa throughout the state, but mostly in Polk County, and in three cases in the federal district court.

In the Supreme Court of Iowa, the case of *Erb v. State Board of Public Instruction*, 1974, 216 N.W.2d 339, determined that a teacher's certificate cannot be revoked on grounds of moral turpitude unless the activities forming the basis of the complaint

directly affects the student-teacher relationship. Appeals in two other state agency cases involving open meetings and title insurance are pending at this time.

Much time has been given to matters involving the Administrative Procedures Act enacted by the 65th General Assembly, 1974 Session. This law evolved from a model prepared by a special committee of the Iowa State Bar Association. It provides a current method of notice and publication of rules and regulations promulgated by state departments and better defined hearing procedures. It also provides a uniform method of appeal from decisions of the various state agencies. A need for this legislation was pointed out in our last report.

Another recent enactment directly affecting this department is the Professional and Occupational Licenses Act (Chapter 1086, Laws of the 65th G.A., 1974 Session) which provides for a restructuring of the State Board of Law Examiners and after July 1, 1975, the Attorney General will no longer be charged with the responsibility as ex officio chairman of such board for the administration of the state bar examinations. The average number of new lawyers admitted to practice in each bar examination has more than doubled in recent years, with approximately 600 new lawyers now being admitted to practice in the State of Iowa each year. Undoubtedly, many hours of additional work will be required in the transition period to assist the new board in the proper preparation and administration of the bar examinations.

TORT CLAIMS

In 1973 the tort claims division of the Department of Justice presented tort claims to the State Appeal Board totaling $3,522,198.07. In 1974, tort claims in the amount of $866,466.43 were presented to the board. Upon the recommendation of the special assistant attorney general assigned to the division, the Appeal Board in 1973 and 1974 paid out $12,145.09 and $52,711.58 on said claims.

The tort claims division instituted a number of lawsuits on behalf of the State of Iowa district courts during the past two years. Over $100,000 was recovered for the State on these causes of action. On a theory of public nuisance, a successful action was initiated in Polk County District Court enjoining a major truck company from violating Iowa's sixty-five foot truck length limitation law. The action of the state was affirmed by the Iowa Supreme Court.

During 1973, two judgments totaling $763,000 were entered against the State and in 1974 two judgments were entered in the aggregate amount of $1,250,000. These cases are on appeal to the Iowa Supreme Court. Currently, the division is handling 125 district court lawsuits involving a total demand of $26,209,276.

OTHER MATTERS

In addition to the measures previously described, my office has prepared and submitted to the legislature numerous legislative

proposals designed to strengthen law enforcement and improve the administration of justice. Included among these are proposed bills dealing with witness immunity, joint trials and a statewide grand jury. We have also been active in the discussion and debate on the proposed criminal code revision.

In addition to the foregoing, the Iowa Department of Justice has actively cooperated with other law enforcement agencies at all levels of government. We have conducted cooperative research, given speeches and participated in conferences.

During his four terms in office, the present Attorney General has served as chairman of the Midwest Conference of the National Association of Attorneys General, twice been made a member of the Executive Committee of the National Association and has served as chairman of the Consumer Protection Committee of that body and has served as chairman and a member of numerous other committees.

During the biennium, we successfully brought to a conclusion a suit against Younker Brothers in which the Supreme Court determined that the 19% per annum interest rates charged on revolving charge accounts were usurious.

CONCLUSION

The foregoing constitutes the record of some of the more important achievements and urgent needs of the Department of Justice in handling its ever-increasing work load. Both the natural growth in the number of matters requiring our attention and legislative enactments adding to our duties make it necessary that we have a substantially larger appropriation in the approaching biennium. It is especially important that we receive full state funding for the area prosecutors and special prosecutions units since it is unlikely the crime commission will be willing to continue federal funding of these projects beyond the three years they have already supported them. The loss of these valuable programs would be tragic and would contribute significantly to the reduction of criminal prosecution in the State of Iowa.

State of Iowa

1974

FORTIETH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1974

RICHARD C. TURNER
Attorney General

Published by
THE STATE OF IOWA
Des Moines
H1228

ATTORNEYS GENERAL OF IOWA
1853 - 1972

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A.J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1957
Norman A. Erbe	Boone	1957-1961
Evan Hultman	Black Hawk	1961-1965
Lawrence F. Scalise	Warren	1965-1967
Richard C. Turner	Pottawattamie	1967-

PERSONNEL OF THE DEPARTMENT OF JUSTICE

RICHARD E. HAESEMEYER .....Solicitor General
Solicitor General and First Ass't. Attorney General. B. April 11, 1928, Tipton, Iowa; B.S., University of Illinois; L.L.B., Harvard Law School; married, three children; American Airlines, Inc., N.Y.C., 1956-1962; Monsanto Company, Textile Div. (formerly the Chemstrand Corp.) N.Y.C. 1962-1967; App't. Solicitor General and First Ass't. Attorney General February 20, 1967.

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B. September 23, 1939, Abilene, Texas; B.A., Cornell College; J.D., S.U.I.; Agent F.B.I., 1964-1970; married, two children; App't. Ass't. Atty. Gen. 1970, App't. Special Ass't. Atty. General, 1972.

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B. June 1, 1920, Chicago, Illinois; Coe College 2 years; L.L.B., Drake University; married, one child' App't. Spec. Ass't. Atty. Gen. 1961-1965 and also 1967.

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JOHN I. ADAMS .....Assistant Attorney General
B. July 11, 1926, Des Moines, Iowa; B.A., L.L.B., S.U.I.; Agent F.B.I., 1953-1955; Legal Department, Continental Western Insurance Company, 1958-1968; App't. Ass't. Atty. Gen. 1969.

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B. June 3, 1948, Boone, Iowa; B.A., University of Chicago; J.D., University of Virginia; married; App't. Ass't. Atty. Gen. 1973.

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B. March 13, 1941, Des Moines, Iowa; B.A., J.D., S.U.I.; married; App't. Ass't. Atty. Gen. 1967.

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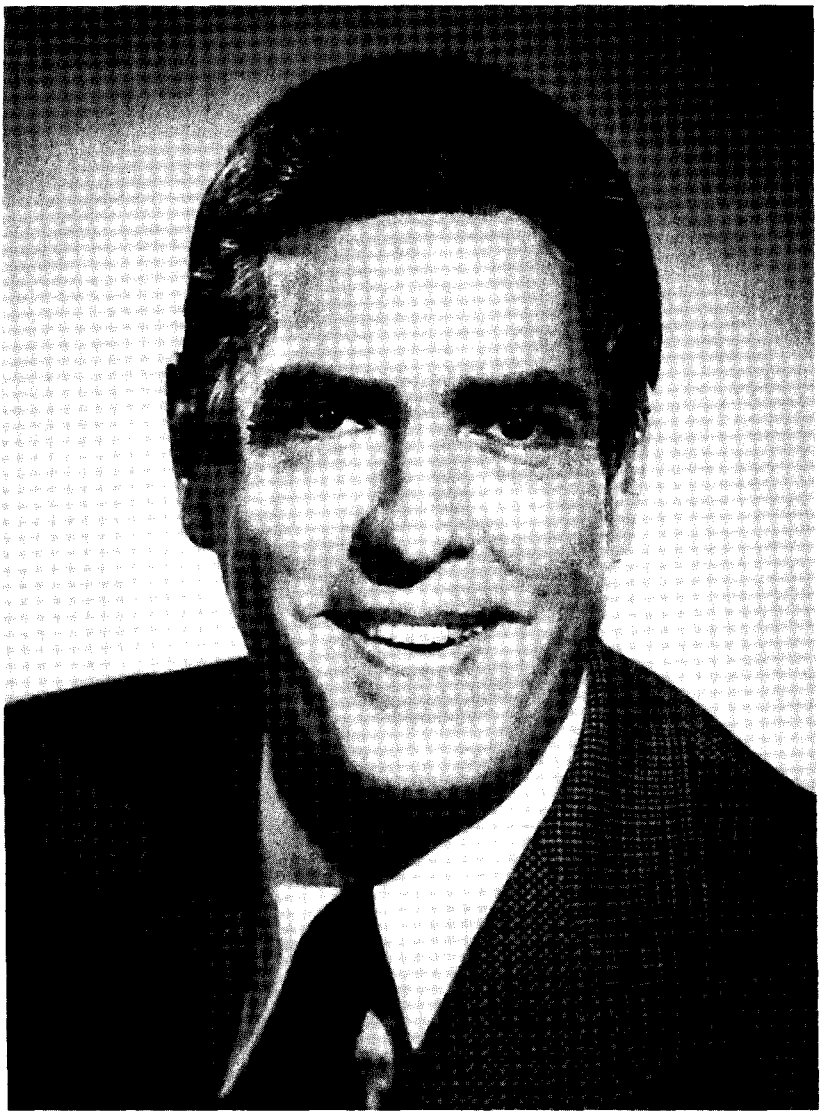

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THE
OFFICIAL OPINIONS
OF THE
ATTORNEY GENERAL
FOR
BIENNIAL PERIOD
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January 2, 1973

JUDICIAL MAGISTRATES: Appointing Commissioners. §§602.42 to 602.47, Code of Iowa, 1973. A county board of supervisors charged with the responsibility of appointing members of a county judicial magistrate appointing commission cannot appoint any one or more of themselves to such nominating commission. (Turner to County Attorneys, 1/2/73) #73-1-1

TO: ALL COUNTY ATTORNEYS: Recently a number of individuals have asked if a governing body may appoint its own members to other boards whose members are selected by the first body. The most common example is the appointment by the county board of supervisors of members to the county judicial magistrate appointing commision.

It has long been established in the common law such an appointing body cannot use its members in its appointments as is clearly set forth in 67 C.J.S. 130, Officers §20:

"Officers who have the appointing power, or who are members of the appointing board, are disqualified for appointment to the offices to which they may appoint.

"It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, so that, even in the absence of a statutory inhibition, all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint; and similarly a member of an appointing board is ineligible for appointment by the board, even though his vote is not essential to a majority in favor of his appointment, and although he was not present when the appointment was made, and notwithstanding his term in the appointing body was about to expire; nor can the result be accomplished indirectly by his resignation with the intention that his successor shall cast his vote for him. A statute declaratory of this rule of the common law will be construed liberally so as to give as broad a scope to the remedy provided by it as the language used will justify. Thus remaining in office by the sufferance of the appointing board will not cure such a disability."

See also 63 Am.Jur.2d 690, Public Officers and Employees, §96.

This rule is implicitly contained in and affirmed by the chapter establishing a Unified Trial Court, Ch. 1124, Laws of the 64th G.A., Second Session, S.F. 428, in §17:

"No person while a member of the county judicial magistrate appointing commission shall be appointed to the office of judicial magistrate. * * *"

Since appointing commission members cannot appoint themselves, it would appear equally just and implicitly required that the board of supervisors not appoint themselves to the appointing commission.

A great number of cases have so held: *People ex rel Ellis v. Lennon,* 1891, 86 Mich. 468, 49 N.W. 308; *Hornung v. State,* 116 Ind. 458, 19 N.E. 151; *Gaw v. Ashley,* 1907, 195 Mass. 173, 80 N.E. 790; *Meaglemery v. Weissinger,* 1910, 140 Ky. 353, 131 S.W. 40, 31 L.R.A.N.S. 575; *State ex rel Smith v. Bowman,* 1914, 184 Mo. App. 549, 170 S.W. 700; *Parrish v. Town of Adel,* 1915, 144 Ga. 242, 86 S.E. 1095; *Burtis v. Haines,* 1917, 91 N.J.Law 4, 102 A 355; *State v. Dean,* 1918, 103 Kan. 814, 176 P. 633; *Wood v. Town of Whitehall,* 1923, 120 Misc. 124, 197 N.Y.S. 789, affd. 206 App.Div.786, 201 N.Y.S. 959; *Ehlinger v. Clark,* 1928, 117 Tex. 547, 8 S.W.2d 666; *People v. Pearson,* 1923, 121 Misc. 26, 200

N.Y.S. 60; *Board of Commissioners v. Montgomery,* 1930, 170 Ga. 361, 153 S.E. 34; *State v. Thompson,* 1952, 193 Tenn. 395, 246 S.W.2d 59; *Commonwealth v. Major,* 1941, 343 Pa. 355, 22 A2d 686; *Bradley v. City Council of City of Greenville,* 1948, 212 S.C. 389, 46 S.E.2d 291; *Hetrich v. County Com'rs of Anne Arundel County,* 1960, 222 Md. 304, 159 A2d 642; *State v. McDaniel,* 1960, 2 Storey 304, 157 A2d 463.

As stated in *Meaglemery v. Weissinger,* supra, where the court refused to allow a fiscal court to appoint one of its members as a bridge commissioner: (131 S.W. 41)

"The fact that the power to fix and regulate the duties and compensation of the appointees is lodged in the body of which he is a member is one, but not the only, reason why it is against public policy to permit such a body charged with the performance of public duties to appoint one of its members to an office or place of trust and responsibility. It is of the highest importance that municipal and other bodies of public servants should be free from every kind of personal influence in making appointments that carry with them services to which the public are entitled and compensation that the public must pay. And this freedom cannot, in its full and fair sense be secured when the appointee is a member of the body and has the close opportunity his association and relations afford to place the other members under obligations that they may feel obliged to repay. Few persons are altogether exempt from the influence that intimate business relations enable associates to obtain, and few strong enough to put aside personal considerations in dispensing public favors. And it is out of regard for this human sentiment and weakness, and the fear that the public interest will not be so well protected if appointing bodies are not required to go outside their membership in the selection of public servants, that the rule announced has been adopted, and ought to be strictly applied."

In *State v. Dean,* supra, the court refused to uphold appointment of a secretary from among members of the Panama Pacific International Expositions saying: (176 P. 634)

"It is quite clear that a very unfortunate and perfectly innocent mistake has been made. The commission could no more pay one of its own members compensation to do work in furtherance of the object of the creation of the commission than it could let to itself the contracts for the erection of the exposition buildings. * * * The members of the commission were charged with the execution of an important public trust, as agent, at least, of the state, and the same public policy which underlies the statute forbids an agent of a private individual, even, or anyone acting in a fiduciary relation, to tempt his own loyalty by entering into any transaction which requires him to play a dual role. It makes no difference that the defendant did not participate in the forbidden acts, or that no fraud or wrong was intended, or resulted. The prohibition was laid on the commission as a body not to disburse the public funds to the advantage or profit of its own membership, in order to forestall enticement to subordinate the public to private interest."

As said in *Wood v. Town of Whitehall,* supra, when the court refused to uphold the town board's appointment of one of its members as police justice: (197 N.Y.S. 790)

"It seems clear to me that it would be contrary to public policy and tht general welfare to uphold such an appointment. When public officers, such as the members of a town board, are vested by the legislature with power of appointment to office, a genuine responsibility is imposed. It must be exercised impartially, with freedom from a suspicion of taint or bias which may be against the public interest. An appointing board cannot absolve itself from the

charge of ulterior motives when it appoints one of its own members to an office. It cannot make any difference whether or not his own vote was necessary to the appointment. The opportunity improperly to influence the other members of the board is there. No one can say in a given case that the opportunity is or is not exercised. What influenced the other members to vote as they did, no one knows except themselves. Were their motives proper, based solely on the fitness of the appointee? They may have been. Were they improper, based on the promise or expectation of reciprocal favors? They may have been. No one knows except the parties directly interested. That is the difficulty. This is the possibility, which the law should remove by determining such appointments to be illegal."

For these reasons, it is my opinion that it is against public policy, and unlawful, for an official or board statutorily charged with the responsibility of appointing members of a county judicial magistrate appointing commission, to appoint any one or more of themselves to such nominating commission.

January 3, 1973

DEPARTMENT OF SOCIAL SERVICES: State Hospitals; Support of Mentally Ill. §230.15, Code of Iowa, 1973, as amended by S.F. 185, §5, Acts of Second Session; refers to 120 consecutive days per admission at 100% of cost before reduced rate is effective. (Williams to Gillman, Commissioner Dept. of Social Services, 1/3/73) #73-1-2

Mr. James N. Gillman, Commissioner, Department of Social Services: You have requested us to furnish an attorney general's opinion interpreting Senate File 185, Section 5, of the Acts of the Second Session of the 64th General Assembly, amending §230.15, Code of Iowa, 1971 [§230.15, 1973 Code of Iowa], dealing with personal liability of mentally ill persons in state institutions.

You ask the following question:

Should the reduced liability rate provided in this amendment apply to any total accumulation of 120 days' residence in a mental health institute or is it necessary that a patient be in residence for 120 consecutive days before the reduced rate of liability would apply?

§5 of Chapter 1108 of the 64th General Assembly amending §230.15, Code of Iowa, reads as follows:

"SEC. 5. Section two hundred thirty point fifteen (230.15), Code 1971, is amended as follows:

230.15 Personal liability. Mentally ill persons and persons legally liable for their support shall remain liable for the support of such mentally ill. Persons legally liable for the support of a mentally ill person shall include the spouse, father, mother, and adult children of such *the* mentally ill person, and any person, firm, or corporation bound by contract hereafter made for support *of the mentally ill person, and, with respect to mentally ill persons under twenty-one years of age only, the father and mother of the mentally ill person.* The county auditor, subject to the direction of the board of supervisors, shall enforce the obligation herein created as to all sums advanced by the county. *The liability to the county incurred under this section on account of any mentally ill person shall be limited to one hundred percent of the cost of care and treatment of the mentally ill person at a state mental health institute for the first one hundred twenty days of hospitalization, and thereafter to an amount not in excess of*

the average minimum cost of the maintenance of a physically and mentally healthy individual residing in his own home, which standard shall be established and may from time to time be revised by the department of social services. No lien imposed by section two hundred thirty point twenty-five (230.25) of the Code shall exceed the amount of the liability which may be incurred under this section on account of any mentally ill person.

"Nothing in this section shall be construed to prevent a relative or other person from voluntarily paying the full actual cost of the care and treatment of any mentally ill person as established by the department of social services.

"Persons who as of July 1, 1972, are hospitalized in any state mental health institute, or who on that date or any later date have been so hospitalized for a total of one hundred twenty days or more, shall be considered to have incurred liability for one hundred percent of the cost of their care and treatment for one hundred twenty days, and shall thereafter be entitled to reduced liability as provided by this section. There shall be no forgiveness of any liability existing on July 1, 1972, for the cost of care and treatment of mentally ill persons, except as provided in section 230.17 and no person who has paid any such costs prior to that date shall be entitled to any refund by reason of this section."

The Supreme Court of Iowa has repeatedly stated that under the recognized rules of statutory construction it must consider all portions of a law together without giving undue importance to any single or isolated portion. [See *Webster Realty Company v. City of Fort Dodge* (Iowa, 1970) 174 N.W.2d 413 at page 418; *Cedar Mem. Park Com. Ass'n. v. Personnel Assoc., Inc.* (Iowa, 1970) 178 N.W.2d 343 at page 350; *Goergen v. State Tax Commission* (Iowa, 1969) 165 N.W.2d 782 at page 786; *Mallory v. Paradise* (Iowa, 1969) 173 N.W.2d 264 at page 266.]

Applying these rules of statutory construction to the amendment to Section 230.15, Code of Iowa, requires an examination of the chapter to glean legislative intent.

Section 230.1, 1973 Code of Iowa, reads in part:

"230.1 Liability of county and state. The necessary and legal costs . . . and support of a mentally ill person admitted or committed to a state hospital shall be paid:

1. By the county in which such person has a legal settlement . . .

". . . The legal settlement of any person found to be mentally ill who is a patient of any state institution shall be that existing at the time of admission."

Sections 230.2 through 230.14 relate to procedures for ascertaining the liability "at the time of admission of commitment". Throughout all these sections it is obvious that they are applicable to *each* admission or to single admission or commitment.

The above-quoted amendment to Section 230.15, then must likewise refer to each admission. This means that the first one hundred twenty (120) days of each admission is to be paid by the patient or those legally liable before the reduction provision applies.

This means that the "liability of the county incurred under this section on account of any mentally ill person shall be limited to one hundred percent of the cost of care and treatment of the mentally ill person at the state mental hospital for the first one hundred twenty (120) days of hospitalization" of each admission and "thereafter" reduced under the formula set forth in the statute.

In other words, the reduced liability rate provided in the amendment is not applicable until the patient has been hospitalized for one hundred twenty (120) consecutive days per admission rather than one hundred twenty (120) days accumulated through various admissions. See: *Morrison v. Vance* 42 A. 2d 195.

This also applies to "persons who as of July 1, 1972" or "any later date" are hospitalized for "a total of one hundred twenty days or more". That provision refers to a single admission and means that for the days beyond one hundred twenty (120) consecutive days shall be at the reduced rate.

January 3, 1973

SCHOOLS: Statutory Interpretation Printing Contracts; Chapter 15, Code of Iowa, 1973; 1970 OAG 54; 1942 OAG 56. The provisions of Chapter 15, Code of Iowa 1971 apply to contracts for the printing of documents prepared by the Social Research Center at the University of Northern Iowa. (Nolan to Hansen, State Representative, 1/3/73) #73-1-4

The Honorable Willard R. Hansen, State Representative: You have requested an opinion of the Attorney General interpreting Chapter 15 of the Iowa Code as it may apply to the Social Research Center at the University of Northern Iowa and contracts which may be entered into with private firms or agencies of the state or federal government, and the printing of research instruments, reports and related documents.

As you point out in your letter, the Social Research Center, the UNI business office and the state printing department spend considerable time and money processing documents relating to Social Research Center activities.

The Code sections pertinent to your inquiry are as follows:

"§15.6. The director of the department of general services shall:

"1. Let contracts, except as provided in section 15.28, for all printing for all state offices, departments, boards, and commissions when the cost of the printing is payable out of any taxes, fees, licenses, or funds collected for state purposes.

"2. Direct the manner, form, style, and quantity of all public printing when not otherwise expressly prescribed by law.

* * *

"§15.8 The power of the director to let contracts shall not embrace printing for any state institution when the institution is able and desires to do its own printing.

"§15.28. The director may authorize the managing board, or head, or chief executive officer of any institution or department of the state located outside the city of Des Moines to secure, under the specifications of the director, competitive bids for printing needed by the institution or department, and submit the bids to the director. If the director approves any of the bids, the authorized board, head, or officer may contract for the printing but the contract shall not be valid until a duplicate copy is filed with and approved by the director."

It appears to me that the provisions of Chapter 15, Code of Iowa, 1973, are applicable to contracts under which the Social Research Center and the University of Northern Iowa are required to prepare and furnish research materials and documents in printed form. If such printing is done by the university with university material and equipment, §15.8 would apply. 1970 OAG

54. If contracts for the printing must be let by the university and the printing to be done at some place other than the university printing plant, then §15.28 applies. In the latter case the university would still be free to let the contracts for such printing subject to the obtaining of competitive bids and the approval of any such bid by the director. 1942 OAG 56.

January 3, 1973

SCHOOLS: Student Teachers, §260.27, Code of Iowa, 1971.1) Student teachers generally work under close supervision but may be given increasing responsibility in the classroom. 2) A teacher is not liable for an injury to a pupil unless the teacher's negligence is the proximate cause of the injury. 3) A student teacher placed under a contract with a school (260.27) is entitled to the same liability protection as other employees of the school district. (Nolan to Hansen, State Representative, 1/3/73) #73-1-6

The Honorable Willard R. Hansen, State Representative: This is written in answer to your request for an opinion and clarification of §260.27, Code of Iowa, 1971, which provides as follows:

"Student teachers' certificates. Whenever the conditions prescribed by the board of educational examiners for issuance of any type of class of certificate provide that the applicant shall have completed work in student teaching it shall be lawful for any accredited college or university located within the state of Iowa and states conterminous with Iowa and offering a program or programs of teacher education approved by said board of education examiners of Iowa or states conterminous with Iowa to enter into a written contract with any approved school district or private school, under such terms and conditions as may be agreed upon by such contracting parties. Students actually engaged under the terms of such contract, shall be entitled to the same protection, under the provisions of section 613A.8, as is afforded by said section to officers and employees of the school district, during the time they are so assigned."

According to your letter this provision of the code has raised questions among educators. Such questions include:

1. What authority do student teachers have during the time they are fulfilling the student teaching requirement?

2. Are student teachers liable for injury to a pupil under their supervision in the absence of the public school classroom supervising teacher?

3. Student teachers are not paid while student teaching; therefore, would they be protected by liability insurance provided for the salaried employees in the school district to which they are assigned?

In answer to these questions we advise:

1. Ordinarily, student teachers are only given an opportunity to prepare and present classroom instruction in the presence of and under the direct supervision of a classroom teacher. The supervising teacher may give the student teacher increasing responsibilities in the classroom, but the supervising teacher at all times has a duty to exercise proper supervision over the pupils in his charge and use reasonable care to prevent injury to them.

2. The mere fact that an accident happens in which a pupil is injured does not render the teacher liable where the teacher was not negligent or his con-

duct was not the proximate cause of the injury. 78 C.J.S. Schools and School Districts, §238C.

Chapter 613A provides that every municipality is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment (§613A.2). Under §613A.8 the governing body is required to defend "any of its officers and employees . . . except in cases of malfeasance office or willful or wanton neglect of duty".

3. A student teacher is, except as provided by statute (§260.27) still a student. However, by contract as provided in the code a student teacher becomes an agent of the school district while fulfilling this practice-teaching requirement. Under §613A.7 the governing body of the school district may purchase a policy of liability insurance "insuring against all or any part of liability which might be incurred by such minicipality or its officers, employees and *agents* under the provisions of section 613A.2 and may similarly purchase insurance covering torts specified in section 613A.4". (Emphasized) Accordingly, the fact that student teachers are not paid employees of the district would not necessarily determine the liability of the district. Student teachers, as agents, are eligible for the protection afforded by liability coverage unless the provisions of the insurance contract contain an exclusion applicable to them.

January 3, 1973

ELECTIONS: Registration, Costs of; §32, Chapter 1025, 64th G.A., Second Session (1972). The full expense of voter registration must be borne by the counties. (Haesemeyer to Johnson, Assistant Fayette County Attorney, 1/3/73) #73-1-3

Mr. J. G. Johnson, Assistant Fayette County Attorney: This opinion is in response to your letter dated August 15, 1972, regarding expenses incurred from voter registration. You asked specifically:

"Is the county financially responsible for the costs of registration (including clerks, computers, etc.) for cities that have voluntarily adopted permanent registration?"

It is the opinion of this office that the counties must be financially responsible for the costs of registration. Section 48.22 that you refer to in your letter was substituted by the 64th G.A. in Chapter 98 §48.22, entitled "Permissive Adoption". This substitution entailed a change in the population requirement however, another important part of the section went unchanged. That part states:

". . . When the city council of any such city or the board of supervisors of any such county adopts an ordinance or resolution establishing such plan, *all the provisions of this chapter shall apply to* such city or county." (Emphasis Added)

Prior to the 64th G.A., whenever a city adopted the registration plan the county and city split the costs in half, see Code of Iowa, 1971, §48.18. However, the 64th G.A. repealed §48.18, see Laws 64th G.A., 2nd Session, Chapter 1025, §35 line 4. This seemingly leaves no provisions as to who is to pay what and when! But, in the same chapter of the Session Laws, 1025, the legislature enacted a new provision entitled "Election Expense Fund", see 64th G.A., Chapter 1025, §32. This section creates the election expense fund and states:

". . . Annually, the board of supervisors (of the county) shall levy an amount sufficient to pay the costs of elections and voter registration, *pursuant to chapter 48* of the Code, incurred by the county . . ." (Emphasis Added)

This section is now embodied in Chapter 444 of the Code relating to tax levies.

Therefore under the new provisions of the Code, the county is to incur the full expense of voter registration pursuant to §48.22, as substituted, and Chapter 444 (Chapter 1025, §32 of Sessions Laws, 64th G.A., Second Session.)

January 3, 1973

COUNTIES AND COUNTY OFFICERS: Board of Supervisors; §§465.1, 465.2, 465.7, 465.23, Code of Iowa, 1971. The board of supervisors has power to determine whether a proposed drainage project is beneficial for sanitary agriculture or mining purposes so as to determine whether county is responsible for projecting such drain across secondary road right of way at location different from the present drain. (Nolan to Milroy, Benton County Attorney, 1/3/73) #73-1-5

Mr. Boyd J. Milroy, Benton County Attorney: You have requested an opinion interpreting §465.23, Code of Iowa, 1971, as applied to the following facts as set out in your letter:

"Landowners of Benton County together with the Soil Conservation Service plan to open a ditch for purpose of better field tile drainage.

"The ditch will be located in the natural drainage area from the point of origin to the distination.

"The ditch will be 3 to 5 feet below what has been accepted as the normal flow line gradient.

"This ditch when constructed will involve two Benton County secondary road structures. Both structures are reinforced concrete boxed culverts and both structures will become obsolete upon completing the open ditch project.

"The landowners claim that the second paragraph of Section 465.23 of the Code requires Benton County to pay the expense of both material and labor used in the installation of the drainage ditch across the highway.

"Benton County contends that there is adequate road structures existing. The ditch being constructed is below the normal elevation and therefore any alteration of present structures should be an expense of those constructing the ditch and not Benton County."

In two opinions issued by this office in 1960, the Attorney General advised that where private landowners construct an artificial drainage ditch, the county is not required to construct a new drain across the secondary road at the point of the ditch where the present drain accommodating a natural waterway is a suitable outlet in the natural course of drainage. 1960 OAG 99. (Knutson to Newell, Louisa County Attorney, 7/25/60) However, where the owners of land desire to construct a tile line and as a result of an application filed pursuant to §465.1, et. seq., a determination is made that the tile line must be projected across the right-of-way to a suitable outlet, then the Board of Supervisors as to secondary roads is responsible for materials and labor as provided in the second paragraph of Code §465.23. 1960 OAG 100. (Lyman to Garrettson, Henry County Attorney, 9/4/59)

The Board of Supervisors is required to hold a hearing on the application for such a drainage project (§465.2) and has authority to determine whether the drainage petitioned for will be "beneficial for sanitary, agriculture or mining purposes". The supervisors further have the authority to make a finding concerning the course, size, depth and manner of construction of such drain. (§465.7) Accordingly, the Board of Supervisors has the power to determine whether or not the existing culverts are adequate or obsolete. In the event they are found to be adequate, the county would not be responsible for the cost of projecting a tile line across the right-of-way at a different location or depth. On the other hand, the supervisors may determine that the culverts are obsolete and in this event the cost of projecting the tile line across the right-of-way could properly be borne by the county.

January 5, 1973

PUBLIC RECORDS: Crime Commission — Chapter 68A, §§68A.7, 80C.1, 80C.4, Code of Iowa, 1971; Chapter 106, Acts 62nd G.A. (1967), Federal Freedom of Information Act. Reports to the Iowa Crime Commission from law enforcement agencies participating in Project Arrow, which contain information regarding investigations conducted by those agencies under the direction of the Crime Commission, are within the exception to Chapter 68A, providing for confidentiality of peace officers' investigatory reports. (Skinner to George Orr, Executive Director, Iowa Crime Commission, 1/5/73) #73-1-7

Mr. George W. Orr, Executive Director, Iowa Crime Commission: You have requested an opinion of this office regarding the release to the public of certain information connected with a project funded by the Iowa Crime Commission. Specifically, you have asked if Chapter 68A, Code of Iowa, 1971, requires the release of the following kinds of material gathered by the Crime Commission in connection with a program known as Project Arrow:

1. Documents listing the name or assumed name of an intelligence agent.
2. Documents detailing the method of selection of intelligence agents who could then be identified by tracing their selection.
3. Time sheets indicating the time consumed on intelligence activity on specific dates.
4. Receipts for confidential funds, including those spent for narcotics and information.
5. Receipts for purchase, insurance or repair of intelligence vehicles including the physical description of such vehicles.
6. Invoices indicating the type of communication equipment being used by intelligence agents.
7. Expense claims indicating the nature of investigation involved.
8. Receipts indicating the location of the purchasing intelligence agent, thus revealing the location of an investigation.
9. Telephone expense rosters indicating the numbers called during an investigation.
10. Receipts for postal service indicating a method of intelligence operation.

11. Air charter receipts indicating the route traveled during an investigation.

The stated purpose of Project Arrow, paraphrased here, is to provide an intelligence gathering force which can be used to coordinate efforts to make a greater impact on planned criminal activities. The plan is to provide a more sophisticated anti-crime weapon to counteract the increasingly sophisticated criminal efforts within this state.

It appears that the entire project is a large scale investigation into the criminal element in the state, as opposed to an investigation into one particular criminal occurrence. If this is true the reports of the project can fall under the provision of Section 68A.7(5), Code of Iowa, 1971, which provides:

"Confidential records. The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information:

* * *

"5. Peace officers investigative reports, except where disclosure is authorized elsewhere in this Code."

Before further analysis it would be wise to dispense with some preliminaries.

The Crime Commission is a statutory agency. Chapter 80C, Code of Iowa, 1971. It is required to file periodic reports on its progress with the governor and to report to each annual session of the general assembly. Section 80C.4, Code of Iowa, 1971. It requires reports on the projects under its direction from the agencies charged with carrying out such projects. These reports are then public records. *Liner v. Eckard,* 152 N.W.2d 833 (Iowa 1967). Hence the documents concerned here would fall under the Public Records Act, Chapter 68A, if not included in an exception.

To determine if the documents fall within the exception for "peace officers investigative reports" it is necessary to determine the nature of the documents and the meaning of the exception.

The Crime Commission is not a law enforcement agency. It is a statutory body set up to act as the state law enforcement planning agency for purposes established by state or federal agencies.

"The commission shall conduct inquiries, investigations, analysis and studies into the incidence and causes of crime in Iowa, in co-operation with state, area, city and county agencies; and develop a state-wide program of interagency co-operation, in association with federal agencies and officials, and those of other states concerned with the problems of crime. The commission in co-operation with town, city, county and area agencies, and in conformity with such guidelines as may be promulgated by federal agencies, shall direct research, planning and action programs in furtherance of the policy and purpose of this chapter." Section 80C.3, Code of Iowa, 1971.

It is empowered to direct action programs in furtherance of the policy of the statute creating it. The policy and purpose of the statute is stated in Section 80C.1.

"The general assembly finds that the increasing incidence of crime threatens the peace, security and general welfare of the state and its citizens. To prevent crime, to insure the maintenance of peace and good order, and to assure the

greater safety of the people, law enforcement, judicial administration, and corrections must be better coordinated, intensified and made more effective at all levels of government."

Project Arrow is one of these action programs. It is set up to direct and coordinate actions by police officers of various cities in the state to provide a more sophisticated weapon to combat crime. It is an action program and not a research study or a planning program. It is carried out by police officers under the immediate supervision of the police chiefs of the cities involved. The reports of these various agents are peace officers reports. They are no less so because they are in the hands of the Crime Commission. Whether the Crime Commission is it self a law enforcement agency is immaterial, the reports involved here are from agencies, police departments, which are. The persons making these reports are policemen and peace officers.

January 8, 1973

SCHOOLS: Teacher Retirement — Chapter 1032, Acts 64th G.A., Second Session; §§105A.15, 97B.45 Code of Iowa, 1971. A school teacher covered by IPERS cannot be required to retire until he reaches the age of 70. (Nolan to Davis, State Senator, 1/8/73) #73-1-9

The Honorable Wilson L. Davis, State Senator: This is written in reply to your request for an opinion interpreting Senate File 274 (Chapter 1032) Acts of the 64th General Assembly, Second Session, which became effective July 1, 1972. This Act amends Chapter 105A, Code of Iowa, 1971, to include "age" along with race, creed, color, sex, national origin or religion as prohibited categories with respect to discriminatory practices.

According to your letter there is a specific case where a teacher feels that he, under this new law, would not have to retire at age 65. Your question is whether this law permits mandatory retirement at 65 under provisions of an existing legitimate company retirement plan or under IPERS.

Section 3 of Chapter 1032 amends §105A.15 to read as follows:

"The provisions of this chapter relating to discrimination because of sex or age shall not be construed to apply to any retirement plan or benefit system of any employer unless such plan or system is a mere subterfuge adopted for the purpose of evading the provisions of this chapter."

Where terminations have been made pursuant to a retirement system which is not a subterfuge to evade the prohibition against discharge because of age, it has been held in other jurisdictions that such terminations do not violate the statute even though employees are systematically retired upon reaching a certain age. *Walker Manufacturing Company v. Industrial Commission,* 1965, 27 Wisc. 2nd 669, 135 N.W.2d 307, 29 A.L.R. 3rd 1413.

The inclusion of "age" in a statute defining unfair and discriminatory employment practices is a proper exercise of police power. It is well settled that such power may be exercised for the protection of minors and also for the protection of persons of an upper age group against the possibility of being thrown out of employment at an age when other employers are unlikely to employ them with the resulting deprivations to their families. Recent Federal legislation (Title 29 U.S.C., §§621-634) and legislation in many other states apply unfair practices on account of age only until 65 years is reached. There is

almost universal acceptance of age 65 as the normal retirement age. The institution of a policy of involuntary retirement at such age may be a cause of discrimination on account of the establishment of some maximum hiring age for the purpose of providing contributions to the retirement fund. However, even states which have established teacher tenure acts have not limited school boards and other employers in the exercise of discretion to follow a policy of mandatory retirement at age 65 nor to require amendment of provisions of teacher tenure acts to make them apply to any teacher after the age of 65 has been reached. *Fountain v. Board of Trustees of Snelling-Merced Falls School District,* 1968, 68 Cal. Rptr. 842. *Campbell v. Aldridge,* 1938, 1959 Ore. 208, 79 P.2d 257, 127 A.L.R. 1328. *State v. Holbrook,* 1938, Fla., 179 So. Rptr. 691.

In Iowa the normal retirement age for a member of Iowa Public Employees Retirement System (IPERS) is 65 and mandatory retirement is provided for at age 70. §97B.45. Retirement allowances commence on the effective date of retirement as do corresponding provisions appear under Federal Social Security law. Most teachers in the State of Iowa have Social Security and IPERS benefits available to them at age 65. However, as members of IPERS they are entitled to the benefit of mandatory retirement at age 70 rather than at age 65. 1968 OAG 676, 678.

It appears, therefore, that Ch. 1032, Acts of the 64th G.A., 2nd Sess., will permit mandatory retirement under a legitimate company retirement plan at age 65, but where the employee as a member of IPERS is subject also to the provisions of §97B.45, supra, he cannot be required to retire until he reaches the age of 70.

January 8, 1973

ELECTIONS: Party affiliation, change of at time of voting: §§43.42 and 43.44, Code of Iowa, 1973. A change of party affiliation recorded by a voter at the primary election on August 1, 1972, becomes permanent or until again changed and the Commissioner Elections should enter a record of such change in the permanent files maintained by him. (Haesemeyer to Jesse, State Representative, 1/8/73) #73-1-19

The Honorable Norman Jesse, State Representative: Reference is made to your letter of January 3, 1973, in which you state:

"During the recent election, it came to my attention that in some cases, the Commissioners of Elections in cities requiring permanent registration under Chapter 48, did not change the party affiliation of individuals who voted in the primary election on August 1, 1972.

"Chapter 43, Sections 42 and 44, permit individuals to change their party affiliation at the time of voting in a primary election. When they vote they sign an affirmation that they are a member of the blank party.

"My question is when a qualified elector changes his party affiliation at the time of the primary election, does that change of party affiliation become permanent and is the Commissioner of Elections required to enter a record of such change in the permanent files required by Chapter 48?"

Sections 43.42 and 43.44, Code of Iowa, 1973, to which you make reference provide respectively:

§43.42 "Any elector whose party affiliation has not, for any reason, been registered, or any elector who has changed his residence to another precinct, or a first voter or citizen of this state casting his first vote in this state, shall be

entitled to vote at any primary election by declaring his party affiliation at the time of voting."

§43.44 "Any elector whose party affiliation has been recorded as provided by this chapter, and who desires to change his party affiliation on the primary election day, shall be subject to challenge. If the person challenged insists that he is entitled to vote the ticket of the political party to which he has transferred his political affiliation and the challenge is withdrawn, such person shall sign an affidavit which shall be in substantially the following form:

CHANGE OF PARTY AFFILIATION

"I do solemnly swear or affirm that I have in good faith changed my party affiliation to and desire to be a member of the ..... party.

.....
Signature of Voter

.....
Address

Approved:

.....
Judge or Clerk of Election

"If such person signs the affidavit, he shall be given a ballot of such political party and the clerks of the primary election shall change his enrollment of party affiliation accordingly."

The language of these sections is clear and free from ambiguity and in our opinion requires that a change of party affiliation recorded by a voter at the primary election on August 1, 1972, in accordance therewith becomes upermanent or until again changed and the Commissioner of Elections should enter a record of such change in the permanent files maintained by him in accordance with Chapter 48.

January 8, 1973

COUNTIES AND COUNTY OFFICERS: Clerk of the District Court — §633.31(2)(K), Code of Iowa, 1971. The fees of the Clerk of the District Court in probate matters should include in the computations that fix said fees the value of all probate assets or property of the decedent's estate subject to the jurisdiction of the Iowa Court. (Kuehn to Bentz, Madison County Attorney, 1/8/73) #73-1-8

Mr. C. R. Bentz, Madison County Attorney: This will acknowledge receipt of your letter in which you requested an opinion of the Attorney General regarding §633.31(2)(k), Code of Iowa, 1971. Section 633.31(2)(k) reads as follows:

"633.31 Calendar-fees in probate.

2. The clerk shall charge and collect the following fees, *in connection with probate matters,* all of which shall be paid into the county treasury for the use of the county:

"k. *For other services performed in the settlement of the estate of any decedent,* minor, insane person, or other persons laboring under legal disability, except where actions are brought by the administrator, guardian, trustee, or

person acting in a representative capacity or against him, or as may be otherwise provided herein, *where the value of the personal property and real estate of such a person falls* within the following indicated amounts, the fee opposite such amount shall be charged.

Up to $3,000.00	$5.00
3,000.00 to 5,000.00	10.00
5,000.00 to 7,000.00	15.00
7,000.00 to 10,000.00	20.00
10,000.00 to 15,000.00	25.00
15,000.00 to 25,000.00	30.00
For each additional $25,000.00 or major fraction thereof	20.00"

(Emphasis Added)

As you state in your letter, this section fixes the fees to be assessed by the Clerk of Court in the settlement of estates and you want to know what property is to be included in the computations that fix said fees regarding the statutory language . . . "where the value of the personal property and real estate of such a person . . ."

More specifically your question was:

"What property listed in the Preliminary Inheritance Tax Report and Probate Inventory is meant by the language 'personal property and real estate of such a person'"?

In 1911, the case of *In Re Estate of Pitt,* 1911, 153 Iowa 269, 133 N.W. 660, interpreted the statute as it read at that time as follows:

"He (the clerk of the district court) *was 'entitled to charge and collect . . . for all services performed in the settlement of the estate of any decedent,* except where actions are brought by the administrator or against him, or as otherwise may be provided herein, where the value of the estate does not exceed three thousand dollars, three dollars; where such value is between three and five thousand dollars, five dollars; where such value is between five and seven thousand dollars, eight dollars; where the value exceeds seven thousand dollars, ten dollars.'"
(Emphasis Added)

The issue in the case was whether or not the value of the homestead in Iowa and land in the State of Idaho should be included in the computations which fixed the fees to be paid to the Iowa Clerk of Court. The Court interpreted the statute in the following manner:

"Enough has been said to make it clear that ordinarily no services are rendered by the clerk in connection with real property in the administration of an estate of a deceased person, and that none were or might reasonably be expected to be rendered in connection with the homestead or land in Idaho left by Pitt. This statute and all others relating to the payment of fees proceed on the theory that such payment is exacted for something actually done by the officer for the benefit of the litigant, and we are of opinion that the word "estate" as employed in the paragraph of the statute quoted, means the estate administered in court.

The services for which compensation is allowed are those rendered "in the settlement of the estate," and "the value of the estate" by which the amount of the clerk's fee is to be determined is of that being settled in court. Primarily, the administration is of personal property only. An inventory of chattels only is required (sections 3300, 3311, Code), and whether it shall be involved in the

administration is contingent on whether there shall be enough personalty to satisfy the debts. Out conclusion is that the word 'estate' is employed in the paragraph quoted in a restricted sense of the estate to be administrered, and not broadly as referring to that not involved therein regardless of location."

Chapter 247, §1, Acts 55th G.A., 1953, amended §606.15(29), Code of Iowa, 1950, to read:

"For all services performed in the settlement of the estate of any decedent, minor, insane person, or other persons laboring under any legal disability, except where actions are brought, by the administrator, guardian, trustee, or person acting in a representative capacity or against him, or as may be otherwise provided herein, *where the value of the personal property of the estate including real estate sold for the payment of debts of the deceased . . . .*" (Emphasis Added)

This remained the law until July 1965.

Chapter 425, §1, Acts 61st G.A., 1965, amended §606.15(29) to read:

"For all services performed in the settlement of the estate of any decedent, minor, insane person, or other persons laboring under any legal disability, except where actions are brought by the administrator, guardian, trustee, or person acting in a representative capacity or against him, or as may be otherwise provided herein, where *the value of the personal property and real estate of such a person* falls within the following indicated amounts, ..." (Emphasis Added)

So, as of July 1965, the value of real property as well as personal property is to be used by the clerk in determining probate fees. The quoted portion of §606.15(29) of the 1966 Code is identical with the language now found in §633.31(2)(k), Code of Iowa, 1971.

The amendment to include all real estate was challenged in the case of *In the Matter of the Estate of Brauch v. Beeck,* 1970, Iowa, 181 N.W.2d 132. The facts and issues in that case were that based on the appraised value of the personal and real property the clerk's settlement fee was taxed at $190. The administrators filed a motion to re-tax said fees alleging they should be based only on the appraised value of the personal property. They alleged the real estate descends to the heirs instantly upon the death of the deceased, subject only to the rights of the administrator to sell for payment of debts and that the personal property is more than sufficient to pay the debts and cost of administration.

The trial court overruled the motion and the administrators appealed. The Iowa Supreme Court upheld the trial courts determination on the following grounds:

"Administrators, as they did in the trial court, rely here on the holding of In re Estate of Pitt, 153 Iowa 269, 133 N.W. 660 (1911). There the court observed that under the then existing statutes and law the real estate passed to the heirs eo instante upon the death of an ancestor. Also the land or its rents could be resorted to for the satisfaction of debts if the personal property was inadequate and then, on suit brought by the administrator to which the heirs had to be made parties. The court further observed an estate inventory of chattels only was required. The court construed the statutory use of 'estate' as meaning personal property only in the absence of a necessity to sell real estate to pay debts. The court held the clerk's settlement fee was to be based on value of the personal property.

The Pitt holding is of little value here due to statutory changes of our probate laws, some of which we point out infra.

Subsection 9 of Code section 633.361 requires the personal representative in an estate, within 60 days after his appointment, to file with the district court clerk an inventory including an 'Inventory of all real estate of the decedent in the State of Iowa, giving values and accurate descriptions of each tract.'

Under Code section 633.363 failure of the personal representative to promptly file an inventory the clerk of court is required to report forthwith such failure to the court for an order as may be necessary to enforce making and filing of the inventory.

Code section 633.386 provides: 'Sale, mortgage, pledge, lease or exchange of property-purposes.

1. Any real or personal property belonging to the decedent, except exempt personal property and the homestead, may be sold, mortgaged, pledged, leased or exchanged by the personal representative for any of the following purposes:

a. The payment of debts and charges against the estate;

b. The distribution of the estate or any part thereof;

c. Any other purpose in the best interests of the estate.'"

The Court went on to say:

"Counsel for administrators concedes the language of section 606.15(29) is clear and unambiguous. He argues the legislature went too far in including real estate as well as personal property as the basis of charging the clerk's settlement fee. Administrators would have us apply the reasoning and holding of the Pitt case. Faced with clear statutory language we find their position untenable.

We have long recognized the rule that where the language of a statute is plain and unambiguous and its meaning is clear and unmistakable there is no room for construction, and we are not permitted to search for its meaning beyond the statute itself. Kruck v. Needles, 259 Iowa 470, 476, 144 N.W.2d 296, 300; Herman v. Muhs, 256 Iowa 38, 40, 41, 126 N.W.2d 400, 401, 7 A.L.R.3d 1199.

No constitutional question is raised by administrators. The legislature may enact any law desired provided it is not clearly prohibited by some provision of the Federal or State Constitution. It is not the province of courts to pass upon the policy, wisdom or advisability of a statute; they are questions for the legislature. Strong v. Town of Lansing, Iowa, 179 N.W.2d 365, 367; Kruck v. Needles, supra; Rath v. Rath Packing Co. 257 Iowa 1277, 1285, 136 N.W.2d 410, 414."

Section 633.31(2) expressly states that the fees charged are to be "in connection with probate matters . . .". Subsection k of §633.31(2) further states that the fees listed in that subsection are to be for the "services performed in the settlement of the estate of the decedent . . . .".

Thus, since the fees in §633.31(2)(k) are only those for services rendered in the settlement of the estate of the decedent involving probate matters it necessarily follows that those fees should only be based on that part of the property of the decedent that is subject to the probate jurisdiction of the Iowa Courts. This conclusion would follow the probate jurisdictional concepts of

the law as established by *In Re Estate of Pitt,* supra. This is important to consider because *In Re Estate of Brauch v. Beeck,* supra, did not totally overrule *In Re Estate of Pitt.*

After arriving at the determination that the value of all personal and real property of the estate that is subject to the probate jurisdiction of the Iowa court should be included in the computations that fix the clerk's probate fees, there is still the problem of specifically answering your question which is:

"What property listed in the Preliminary Inheritance Tax report and Probate Inventory is meant by the language 'personal property and real estate of such a person.'?"

Section 633.361, Code of Iowa, 1971, reads as follows:

"633.361 Inventory and report. Within sixty days after his qualification, unless a longer time shall be granted by the court, the personal representative shall file with the clerk, in duplicate, a verified, full and detailed report and inventory of the property of the deceased, so far as the same has come to his knowledge, as follows:

1. Name, age and last residence of decedent.
2. Date of death.
3. Whether decedent died testate or intestate.
4. Name and post-office address off personal representative.
5. Name, age and post-office address of surviving spouse, if any.
6. If testate, name, age, relationship and post-office address of each beneficiary under will.
7. If testate, the name, age and address of each child, if any, born to or adopted by decedent after execution of the will.
8. If intestate, name, age, relationship and post-office address of each heir.
9. Inventory of all the real estate of the decedent in the state of Iowa, giving value and accurate description of each tract.
10. Any real property located outside of the state of Iowa not otherwise reported.
11. Personal property regarded as exempt from execution.
12. All other personal property.
13. All property whether subject to probate or not, not otherwise listed which is subject to the Iowa inheritance tax as provided in chapter 450.
14. A statement as to whether or not there is any property not therein inventoried which must be reported for federal estate tax purposes. The clerk shall send a copy of the report and inventory, and a copy of any supplementary inventory, to the department of revenue."

Obviously, all the property listed in this section cannot be included in determining the probate fees. Real property located outside of the State of Iowa would not be included because it would not be subject to the jurisdiction of the Iowa Probate Court. Insurance proceeds payable directly to the estate would be included in determining the probate fees and as some authority for this is §633.333, Code of Iowa, 1971. Insurance proceeds payable to named

beneficiaries would not be subject to the probate jurisdiction of the Iowa court nor would property transferred in contemplation of death and joint tenancy property.

Property, real or personal, held in joint tenancy has been ruled not to be included in determining the probate settlement fees of the Clerk of Court in 1966 O.A.G. 106. Although this opinion was written before *In the Matter of the Estate of Brauch v. Beeck,* supra, was decided, it still adheres to the probate jurisdictional concepts of *In Re Estate of Pitt,* supra, which was not overruled by the later case. The opinion cites to *Wood, Admr. v. Logue,* 1914, 167 Iowa 436, 148 N.W.1035, for the rule that a joint tenant in real estate does not die seized of any inheritable interest in the property because as state in said case:

"'. . . neither of the successive survivors takes or receives anything from or through the deceased tenant for the title is derived directly from the grantor through the deed which created the tenancy.'"

The opinion goes on to state that:

"The authority of the clerk to tax fees upon personal property held in joint tenancy is controlled by the reasoning of the cited cases. While there may exist a joint tenancy in personal property as well as real estate, Hyland v. Stantiford, 253 Iowa 294, 300, 111 N.W.2d 260, such property with full right of survivorship not becoming part of the deceased's estate is likewise not the basis for the taxation of clerk's fees."

Your letter seems to indicate that you do not think that property exempt from execution would be included in determining the probate fees. However, considering the probate jurisdictional concepts already discussed together with what the court said in *In the Matter of the Estate of Brauch v. Beeck,* supra, I believe that property exempt from execution should be included. In our opinion, the property to be used as a basis for taxation of the clerk's fees consists of probate assets or property of the decedent's estate subject to the jurisdiction of the Iowa Court.

January 8, 1973

COUNTIES AND COUNTY OFFICERS: Hospitals — Chapter 347, Code of Iowa, 1973. County may use depreciation reserves for expansion purposes. Hospital trustees have no authority to lease hospital space for a private clinic. (Nolan to Waltz, Union County Attorney, 1/8/73) #72-1-10

Mr. James F. Waltz, Union County Attorney: This is in answer to your request for an opinion on two questions pertaining to the county hospital as follows:

"On December 27, 1938, Union County, Iowa, was deeded Greater Community Hospital, free of debt or encumbrance, having been previously owned by the Greater Community Hospital Association. The voters of the County had registered their acceptance of the Hospital at election time the preceding November. The Hospital was organized under Chapter 347 of the Iowa Code.

"A Hospital Bond issue was approved by the voters of Union County in November of 1962 resulting in the issuance and subsequent sale of $600,000.00 of Hospital Bonds on February 1, 1963. The proceeds of the Bond sale, popular subscription of funds, Hill Burton Grant in Aid, and operating reserves permitted the construction of a new 83 bed General Hospital with a total investment of $1,761,000.00.

"The new structure was occupied on March 1, 1967. The need for additional service area is now evident, and long range plans are being formulated.

"Two major questions have been posed, they are as follows:

"1. Can our County Hospital use its depreciation reserves to build an addition for purposes of expansion?

"2. If the answer to the first question is yes, can a portion of said additional space be leased to a Doctor's Association to allow the Association to maintain a Clinic close to the Hospital?

"The Trustees feel that many benefits would be afforded the Public who use either facility by having them in a close proximity.

"An opinion from the Attorney General is very important to the Long Range Plans of the Hospital."

It is our view that the county hospital can use its depreciation reserves to build an addition for purposes of expansion. In 1962 OAG 110 this matter was considered and the following appears:

"I am of the opinion that §347.14(11) makes creation of the Depreciation Fund discretionary with the board of trustees, and also grants the board of trustees discretion as to how the fund is to be used. In that aspect, it may be transferred to the hospital fund, and such moneys in the fund can be, at the discretion of the hospital trustees, used for hospital purposes. This fund should be regarded, for the purposes set out in your letter, as an unappropriated fund within the terms of §347.7, and is available without submission to the electors."

With respect to your second question, there is no authority in the county hospital trustees to lease as lessor any space in the county hospital to private parties. 1962 OAG 103.

January 8, 1973

STATE OFFICERS AND DEPARTMENTS: Department of Public Safety, Division of Beer and Liquor Law Enforcement — §80.15, Code of Iowa, 1973. The Executive Council lacks jurisdiction to hear termination of employment appeals by two agents of the Division of Beer and Liquor Law Enforcement of the Department of Public Safety who were originally employed by the Enforcement Division of the old Iowa Liquor Control Commission in 1965 and 1970 respectively and who were transferred to the Division of Beer and Liquor Law Enforcement of the Department of Public Safety less than a year before their employment was terminated by such latter division. (Haesemeyer to Wellman, Secretary Executive Council of Iowa, 1/11/73) #73-1-15

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to your letter of December 19, 1972, in which you requested an opinion of the Attorney General on the question of whether or not the Executive Council has jurisdiction to hear termination of employment appeals by two agents of the Division of Beer and Liquor Law Enforcement of the Department of Public Safety who were originally employed by the Enforcement Division of the old Iowa Liquor Control Commission in 1965 and 1970 respectively and who were transferred to the Division of Beer and Liquor Law Enforcement of the Department of Public Safety less than a year before their employment was terminated by such latter division.

In 1971, the 64th General Assembly enacted Chapter 131, Sections 147 and 149 of which provide:

§147 "The commissioner of public safety shall establish a division of beer and liquor law enforcement and appoint a chief enforcement officer to head the division, who shall be an attorney licensed to practice in the state, and the other agents needed in the division as are necessary to enforce the provisions of Title VI of the Code. All enforcement officers, assistants, and agents of the division, excluding clerical workers, shall be subject to the provisions of section eighty point fifteen (80.15) of the Code."

§149 "All agents of the enforcement division of the liquor control commission and the appropriation to sustain them are, on the effective date of this Act, transferred to the department of public safety as agents of the division of beer and liquor law enforcement, whether or not they qualify as such under chapter eighty (80) of the Code, notwithstanding the provisions of section one hundred forty-seven (147) of this Act; however, those agents who do not qualify as such under chapter eighty (80) of the Code shall remain members of the Iowa public employees retirement system. This section shall only be printed in the session laws and not made permanent part of the Code."

The Act became effective January 1, 1972. Section 153, Chapter 131, 64th General Assembly, First Session (1971). Thus, it is evident that the two individuals in question were transferred to the Department of Public Safety as agents of its new Division of Beer and Liquor Law Enforcement as of January 1, 1972. Section 80.15, Code of Iowa, 1973, provides:

"No applicant for membership in the department of public safety, except clerical workers and special agents appointed under section 80.7, shall be appointed as a member until he has passed a satisfactory physical and mental examination. In addition, such applicant must be a citizen of the United States, of good moral character, and be not less than twenty-two years of age. The mental examination shall be conducted under the direction or supervision of the commissioner of public safety and may be oral or written or both. Each applicant shall take an oath on becoming a member of the force, to uphold the laws and Constitution of the United States and of the state of Iowa. During the period of twelve months after appointment, any member of the department of public safety, except members of the present Iowa highway safety patrol who have served more than six months, shall be subject to dismissal at the will of the commissioner. After the twelve months' service, no member of the department, who shall have been appointed after having passed the beforementioned examinations, shall be subject to dismissal unless charges have been filed with the secretary of the executive council and a hearing held before the executive council, if requested by said member of the department, at which he shall have an opportunity to present his defense to such charges. The decision of the executive council by majority vote shall be final, subject to the right of appeal by the employee to the district court of Polk county, or to the district court of the county in Iowa in which the employee resides, within thirty days after he shall have received notice of the decision of the executive council. All rules and regulations regarding the enlistment, appointment, and employment affecting the personnel of the department shall be established by the commissioner with the approval of the governor."

In authorizing dismissal during the period of twelve months after appointment, the statute makes no distinction between appointsments made by operation of law and appointments made by the commissioner of Public Safety or the director of the division. Accordingly, it is our opinion that the two individuals in question, having served only eleven months in the department of Public Safety, may be dismissed and have no right of appeal to the Executive

Council. It should also be noted that the provision of Section 80.15 which grants a right of appeal to the Executive Council applies only to persons who have not only served twelve months but have also been appointed after having passed certain physical and mental examinations. In this connection, it is true of course that Section 149 of Chapter 131 arguably waives such qualifications contained in Section 80.15 as age, citizenship and the satisfactory passage of physical and mental examinations. However, it is to be observed that Section 149 by its terms is a transitory provision which is not included in the Code. Moreover, in view of the language of Section 97A.1(2) which effectively would exclude from participation in the Public Safety Peace Officers' Retirement, Accident and Disability system any agent of the Division of Beer and Liquor Law Enforcement who had not passed a satisfactory physical and mental examination, it is our view that the waiver language contained in Section 149, of Chapter 131 was intended to enable agents transferred from the enforcement division of the Liquor Control Commission to qualify for Chapter 97A benefits only, and it is not effective to give a right of appeal to the Executive Council to the two individuals you have described.

January 9, 1973

CITIES AND TOWNS: City Councilmen — Change of Compensation — §§363.9 and 368A.21, Code of Iowa, 1973. City councilmen are included within the purview of section 368A.21. The word "term," as used in that section, means the time between actually taking and leaving office. (Blumberg to Kelly, State Representative, 1/9/73) #73-1-11

Honorable E. Kevin Kelly, State Representative: We are in receipt of your opinion request of December 18, 1972, regarding section 368A.21, 1973 Code of Iowa. You specifically asked whether that section applies to city councilmen, and what the word "term" means as used in that section.

Section 368A.21 provides in part: "[N] or shall the emoluments of any city or town officer be changed during the term for which he has been elected." There can be no doubt but that city councilmen are city officers. Reference to this is made several times in the Code. See, for example, section 363.9. To further exemplify this, see *City of Council Bluffs v. Waterman,* 1892, 86 Iowa 688, 53 N.W.289. There, the defendant was an elected alderman. In the second year of his term the salaries of aldermen were raised by the Legislature upon adoption of an ordinance by the cities. The Supreme Court held that the salary of the defendant alderman could not be raised during his current term because of a statute similar to the one now in question.

In answer to your second question, the word "term" as used in section 368A.21 refers to the time the officer takes office until the time he leaves office, as opposed to when he is elected. See, *Schanke v. Hendon,* 1958, 250 Iowa 303, 93 N.W.2d 749. You also made reference to the fact that staggered terms of councilmen would mean unequal pay for council members for a period of time after a salary change. This has no bearing upon the problem. Section 368A.21 is quite clear in its intent.

Accordingly, we are of the opinion that city councilmen are encompassed within section 368A.21, and that the term of office referred to in that section means the time between actually taking and leaving office, as opposed to the time of being elected.

January 10, 1973

MILITARY AND NAVAL FORCES: U. S. Marines: U. S. Coast Guard, Chapter 250, Code of Iowa, 1973. The United States Marine Corps and the United States Coast Guard are military or naval forces of the United States within the meaning and intent of Chapter 250, and their members or former members are eligible for the benefits provided thereby. (Turner to Smith, State Auditor, 1/10/73) #73-1-12

The Honorable Lloyd R. Smith, Auditor of State: You have posed a question for an opinion of the attorney general as to whether members or former members of the United States Marine Corps and the United States Coast Guard are eligible for certain benefits provided to veterans through the commission of veteran affairs, by Chapter 250, Code of Iowa, 1973, which does not seem to designate specifically any military or naval branches, corps or forces, but applies generally to "military or naval forces of the United States".

It is universally accepted as a matter of common knowledge, from the Halls of Montezuma to the Shores of Tripoli, that the United States Marine Corps and the United States Coast Guard are military and naval forces, or armed forces, of the United States. See, for example, *Petition of Delgado,* D.C. California, 57 Supp. 460.

Both of these services have fought our country's battles on the land and on the sea and the mere fact that the United States Coast Guard is presently attached to the Department of Transportation, or that the United States States Marine Corps is controlled by the Commandant of Marines, independent of army or navy control, is of little consequence in determining what the legislature intended at the time the statute was enacted. These branches were a part of the armed forces, and the military and naval forces, of the United States and remain so as far as this law is concerned. Thus such members and former members are eligible for benefits under Chapter 250. We might add we have looked for but found no law to the contrary from other states.

January 10, 1973

STATE OFFICERS AND DEPARTMENTS: Auditor of State, issuance of industrial loan licenses; earlier opinion clarified: Chapter 534 and 536A, Code of Iowa, 1973. Opinion of June 21, 1972, Haesemeyer to Yenter, merely states that service corporations may not engage in the industrial loan business and should not be construed as preventing such service corporations from engaging in any other type of business. (Haesemeyer to Alt, State Representative, 1/11/73) #73-1-16

The Honorable Don D. Alt, State Representative: You have asked clarification of our opinion of June 21, 1972, to Deputy Auditor of State Ray Yenter in which we stated that it was our opinion that a service corporation jointly owned by two savings and loan associations could not engage in the industrial loan business.

Our primary reason for reaching the conclusion we did was that since authorization for the service corporation is found in §534.19(15), Code of Iowa, 1973, it is a business organized or operated or permitted under the authority of a law of this state relating to savings and loan associations and under §§536A.2 and 536A.5 it could not be issued a permit to make industrial loans. However, the opinion also contains some language in unnecessarily sweeping terms to the effect that a service corporation cannot do anything which its parent corporation could not do.

This is to advise that the June 21, 1972, opinion should not be construed as prohibiting service corporations from engaging in any business other than industrial loans.

Service corporations were first authorized by federal regulations pertaining to federally chartered savings and loan associations and there are numerous rules and regulations controlling them under the Federal Home Loan Bank System which also supervised practically all of the savings and loan associations which are state chartered. It is evident from the attached front page and explanatory Code page from a "directory" comprised of the service corporation committee of the United States Savings and Loan League, which is comprised of both federally and state chartered associations that such associations engage in numerous corporate activities outside of those allowed by the laws under which the savings and loan associations themselves operate. We are not prepared to say that these activities are prohibited to service corporations under Iowa law. What we have said is that it is our opinion that service corporations may not be issued a permit to engage in the industrial loan business.

January 11, 1973

COUNTIES AND COUNTY OFFICERS: Mileage: §331.22, Code of Iowa, 1971, (H.F. 1129, 64th G.A., Second Session). Statute imposing a $1,000 limitation on mileage allowance for Supervisors should, in most instances, cover the expense of travel both inside and outside the county on county business. (Nolan to Atwell, Supervisor of County Audits, 1/11/73) #73-1-13

Mr. Herman E. Atwell, Supervisor of County Audits, Auditor of State: This letter is written in answer to your request for an opinion as to whether or not travel expenses as authorized for members of County Boards of Supervisors for travel outside their county of residence (as authorized in Attorney General's Opinion dated July 13, 1955) must be applied against mileage as provided for in §331.22 of the 1971 Code, provided claims are made for actual cost instead of ten cents per mile travelled.

The provisions of §331.22 as amended by H. F. 1129, 64th G.A., 2nd Sess., impose a limitation of $1,000 for each supervisor for mileage at the rate of ten cents for every mile "travelled in going to and from sessions and in going to and from the place of performance of committee service". It should be anticipated that substantially all of a supervisor's travel expense will be incurred in the county where he resides and holds office. There has been a long-standing practice of permitting supervisors to perform some of their road inspection work while going to and from their home to the county seat, and consequently, the distance travelled to and from sessions has varied. There are, no doubt, some occasions requiring the county supervisors to travel outside their own county on county business. Inasmuch as the statutory provisions permit approximately 10,000 miles of reimbursable travel expense, such provision should in most instances cover the expense of travel both within and without the county on county business.

It is our opinion, therefore, that your question should be answered affirmatively. If in the light of present-day travel requirements such mileage allowance is not adequate, the remedy should be attained through appropriate legislation.

January 11, 1973

COURTS: Judicial Magistrates — Ch. 250, Code of Iowa, 1973; Ch. 602, Code of Iowa, 1973; Art. III, Constitution of Iowa. Offices of Judicial Magistrate and Director of Soldier's Relief are incompatible. (Nolan to Briles, State Senator, 1/11/73) #73-1-14

The Honorable James Briles, State Senator: This is written in reply to your request for an opinion of the Attorney General on the question of whether or not the positions of Director of Soldier's Relief in the county and judicial magistrate are incompatible. Chapter 250, Code of Iowa, 1973, providing for the relief of soldiers, sailors and marines now provides for a commission of veteran affairs consisting of three persons. The commission is not under the supervision or jurisdiction of any county or state board although the members are appointed by the County Boards of Supervisors. 1938 OAG 44. The members of the commission are county officers whose functions are administrative rather than judicial. Offices with which the commission may be combined are set out in §332.17, Code.

On the other hand, the judicial magistrates under the unified trial court law (Ch. 602 of the Code) are the successors to the justices of the peace. Under the new law judicial magistrates are appointed by a judicial magistrate appointing commission. The judicial magistrate is a judicial officer.

It is well settled that the constitutional division of power between the legislative, the judicial and the executive branches of government (Article III, Constitution of Iowa) prohibits the exercise of judicial powers by an administrative officer and vice versa except where statute expressly directs or permits such exercise of power. Accordingly, we must conclude that the offices of judicial magistrate and Director of Soldier's Relief are incompatible offices because the duties prescribed for each are constitutionally inconsistent with the other.

January 12, 1973

STATE OFFICERS & DEPARTMENTS: Beer and Liquor Control Department; Delivery of beer to private residence. Chapter 131, §124, Acts of the 64th G.A., First Session. The delivery and sale of beer from the premises of a liquor licensee or beer permittee to a private residence is not contrary to the Iowa Beer and Liquor Control Act. (Jacobson to Gallagher, Director Iowa Beer & Liquor Control Dept., 1/12/73) #73-1-17

Mr. Rolland A. Gallagher, Director, Iowa Beer & Liquor Control Department: This is to acknowledge receipt of your letter of September 19, 1972, in which you requested an opinion from this office as follows:

"Chapter 131 of the Acts of the 64th General Assembly First Session, Division 2, Section 124, line 7 states 'A Class "B" permit shall allow the holder to sell beer at retail for consumption on or off the premises.'

"Recently we have been having several requests, particularly from pizza houses, requesting information as to whether or not when an individual places an order, for instance for pizza to be delivered, can the licensee also deliver beer with that order?

"Quite frankly, we cannot see anything wrong with the actual delivering of beer in its original container with an order of pizza, but we feel this could get out of hand and more or less lead to bootlegging as the law now reads.

"Your opinion is requested as to where deliveries of beer in its original containers is legal as the question also arises as to when the sale actually is consumated; for instance, is the sale made when the telephone call is placed and received on the premises, although no money exchanges hands at that time, or is the sale made when the money changes hands at the residence of the person who places the order?"

Two prior opinions, 34 OAG 479 and 36 OAG 15, deal with the identical subject of your inquiry and held that such a delivery service is permissible.

In 36 OAG 15 it is stated:

"The sale of beer for consumption off the premises may be made in a number of methods, the grocery store having a class 'C' permit may accept an order for a case of beer over the telephone the same as any other order for groceries. The same is true of a class 'B' permit holder who would, by way of illustration, be a druggist. We fail to see a distinction of soliciting by radio, letter or personal solicitation."

And, in 34 OAG 479 it is stated:

'('The fact that the order was telephoned, that collection of the same was not made until delivery or that the price to be paid was charged to the account of the purchases would not be a violation of the law."

In light of the above prior opinions, it is our opinion that the delivery and sale of beer from the premises of a liquor licensee or beer permittee to a private residence, irrespective of where and when payment is made, is not contrary to the provisions of the Iowa Beer & Liquor Control Act, Chapter 131, Acts of the 64th General Assembly, First Regular Session.

January 15, 1973

STATE OFFICERS AND DEPARTMENTS: Board of Nursing — §152.4, Code of Iowa, 1973. The Board of Nursing has authority to approve and accredidate all schools of nursing and programs. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 1/15/73) #73-1-18

Lynne M. Illes, R.N., Executive Director, Iowa Board of Nursing: We are in receipt of your opinion request of December 15, 1972. You specifically asked:

"1. Does the Iowa Board of Nursing have legal jurisdiction over colleges and/or universities in the State of Iowa offering a Baccalaureate Degree in Nursing and/or Master Degree in Nursing to individuals who are Registered Nurses?

2. If the response to number one is negative, which State agency would have the legal authority to set the minimum standards for regulation of these programs to ensure that nursing educational criteria are being met."

The Board of Nursing already approves many nursing programs, pursuant to section 152.4, 1973 Code of Iowa. A few of these programs offer Baccalaureate or Masters Degrees, such as the University of Iowa. The remainder do not offer such degrees. Your problem concerns the situation where a nurse, who has already received training and has been licensed, wishes to enter a program for a Baccalaureate or Masters Degree at an institution which does not have a program leading to the initial licensure. In other words, we are talking about a program that only offers additional courses and training than was received to become licensed. Programs such as the one at the University of Iowa would not be included in this category since it includes initial training for

licensure. Your question is whether the Board of Nursing has authority to approve programs that only offer additional training and degrees to nurses. Your problem is further compounded by the fact that H.E.W. has officially recognized the Board of Nursing as the state agency for approval of nurse education under 42 U.S.C. 298(b). Approval of nurse programs is necessary here for the granting of federal funds and loans to nurses entering these programs. Thus, your question.

Section 152.4 provides in part:

"No school of nursing for registered nurses shall be approved by the board of nursing as a school of recognized standing unless said school is affiliated with a hospital and requires for graduation or any degree the completion of at least a two years course of study in subject described by the board."

The same is provided for licensed practical nurses. There is nothing in this section which distinguishes between initial training programs and programs offering a Baccalaureate or Masters Degree. It appears from the language of the section that all schools of nursing with programs for registered or licensed practical nursing come under the jurisdiction of the Board of Nursing for the purpose of approval of programs.

Accordingly, we are of the opinion that the Board of Nursing has the authority to approve and accredidate all schools of nursing and programs.

January 18, 1973

STATE OFFICERS AND DEPARTMENTS: Extended Sick Leave: §79.1, Code of Iowa, 1973. An officer of the Department of Social Services, stabbed while transporting a prisoner, may not be granted sick leave with pay in excess of that provided by law. (Haesemeyer to Wellman, Secretary, Executive Council of Iowa, 1/18/73) #73-1-20

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: You have requested an opinion of the Attorney General with respect to a situation involving an officer who was stabbed while transporting inmates from the State Penitentiary at Fort Madison to University Hospitals in Iowa City for medical treatment. The officer in question was first employed by the Department of Social Services on June 1, 1972, was stabbed on November 13, 1972, and is currently recuperating at home from his wound and subsequent surgery. The wounded officer's sick leave was fully utilized as of November 30, 1972. In your letter, you ask whether there is any way this officer's sick leave can be extended until he is certified by a physician as able to return to duty or until February 1, 1973, whichever is the earliest, with the understanding that if he continues to use sick leave until February 1, 1973, his situation will be reviewed regarding further action. In your letter you state:

"The Executive Council directed this office to request an opinion as to whether there is any legal way they can grant the request for extended sick leave because Council members feel a moral obligation, because of the facts occasioning the request, to grant the extension requested.

"They express an interest in knowing whether the Governor, as Chief Executive, could issue an Executive Order granting the extension."

The applicable statutory provision is §79.1, Code of Iowa, 1973, which provides in relevant part:

" * * *

Leave of absence of two and one-half working days each month with pay may be granted in the discretion of the head of any department, agency or

commission to employees of such department, agency or commission when necessary by reason of sickness or injury; unused portions of such leave for any one year may be accumulative to a total of ninety working days. Provided, however, that notwithstanding the foregoing limitations, state highway commission maintenance employees, uniformed members of the division of highway safety and uniformed force and members of the division of criminal investigation and bureau of identification and the division of drug law enforcement, except clerical workers, of the department of public safety may upon the recommendation of the commissioner with the approval of the executive council, be granted additional leave of absence with pay, for injuries sustained in line of duty.

* * *"

The statutory language is clear, plain and free from ambiguity. As an employee of the Department of Social Services, the officer in question does not fall within any of the exceptions provided for extended sick leave. Certainly the omission of people such as the officer you describe is unfortunate but the remedy, if there is to be one, must come from the Legislature.

Insofar as your second question is concerned, it is our opinion that the Governor may not by Executive Order extend the officer's sick leave. Under our system of government, it is universally agreed that it is the function of the Executive department to administer and enforce the laws as written and it is interpreted by the courts. See *U.S. v. Jefferson County Board of Education,* 372 F2d 836, decree corrected, 380 F2d 385, Cert. Den., 389 US 840 (1967); *Quinn v. U.S.,* 349 US 155 (1955); *Verry v. Trenbeath,* 148 N.W.2d 567 (N.D.); *State ex. rel. Wisconsin Development Authority v. Dammann,* 228 Wis. 147, 277 N.W. 278, vacated on other grounds, 228 Wis. 147, 280 N.W. 698 (Wis. 1938). In performing these functions Executive officers may exercise some discretion, including the determination of when and in what locality there is need for the exercise of their powers for the enforcement of the laws but, they may not select the laws which they will enforce or the persons whom they will protect. *Beauboef v. Delgado College,* 303 F.Supp. 861, Aff'd., 428 F2d 470 (1970); *U.S. v. Gordon Kiyoshi Hirabayashi,* 46 F.Supp. 657 (1942); *Loftus v. Department of Agriculture of Iowa,* 211 Iowa 566, 232 N.W. 412, appeal dismissed, 283 U.S. 809 (1930). If an attempt were made by Executive Order to extend the officer's sick leave, both §79.1 and the principle of separation of powers would be violated.

Possible solutions which suggest themselves are for the Legislature to retroactively amend §79.1 so as to cover the situation you describe, pass a special bill compensating the officer in question for the time lost due to his injury and for the Department of Social Services to give the officer some light duty which he could perform at home while recuperating.

January 18, 1973

CONSTITUTIONAL LAW: Supreme Court, Appointment of Bar Examiners: Art. III, §1, Art. V, §1, Constitution of Iowa; Chapter 610, Code of Iowa, 1973. A proposal to give the Governor the authority to appoint the members of the Board of Bar Examiners instead of the Supreme Court and to add lay members to such board would be unconstitutional as a violation of the doctrine of separation of powers and the inherent power of the court to regulate the practice before it. (Haesemeyer to Willard Hansen, State Senator, 1/18/73) #73-1-22

The Honorable Willard Hansen, State Senator: Reference is made to your letter of December 21, 1972, in which you request an opinion of the Attorney General with respect to the following question:

"If the power to admit persons to practice as attorneys remains vested in the Supreme Court, but the Governor, with the approval of two-thirds of the members of the Senate, is granted the authority to appoint members of the Board of Law Examiners, is this change in conflict with the provisions of Article III, Section 1 of the Constitution of the State of Iowa?"

Article III, §1, Constitution of Iowa, provides:

"The powers of the government of Iowa shall be divided into three separate departments — the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted."

This provision, or one like it, is found in the constitutions of every state and of the United States and in the cornerstone of our form of tripartite government. The premise of this concept is that by distributing the powers of government among the three branches, a system of checks and balances is created which will ensure the continued liberty of the people. Thus, it is well settled in this state that the Executive branch of government may not encroach on the Judicial branch. *Dallas Fuel Co. v. Horne,* 1941, 230 Iowa 1148, 300 N.W. 303. Similarly, the Legislature may not constitutionally exercise Judicial powers. *Wilcox v. Miner,* 1925, 201 Iowa 476, 205 N.W. 847.

In the constitution of this state, a separate article is devoted to each department of government. Article III relates to the Legislative, Article IV is concerned with the Governor and Executive branch, and Article V is devoted to the Judicial branch. Section 1 of Article V provides:

"The Judicial power shall be vested in a Supreme Court, District Courts, and such other Courts, inferior to the Supreme Court, as the General Assembly may, from time to time, establish."

Consistent with this, the Legislature has up until now carefully abstained from intruding into the Judicial domain and in §610.1, Code of Iowa, 1973, has provided that the Supreme Court has sole jurisdiction to admit persons to practice before the courts of the state:

"The power to admit persons to practice as attorneys and counselors in the courts of this state, or any of them, is vested exclusively in the supreme court."

Chapter 610 also contains a number of other provisions regulating the admission of persons to practice law but these all may be reasonably said to "aid" the court in the exercise of its constitutional power and are not calculated to frustrate or hamper the courts, usurp the Judicial power or dictate the qualifications of applicants for admission to the bar.

In the present scheme of things, the court is given broad discretion with respect to examinations and other qualifications. §610.3. In §610.4, provision is made for a board of law examiners:

"The attorney general shall, by virtue of his office, be a member of, and the chairman of, the commission provided for by this chapter, and the court shall appoint from the members of the bar of this state at least four other persons who, with the attorney general, shall constitute said commission, which shall be known as the board of law examiners."

It should be noted that, like the courts, constitutional authority for the office of Attorney General is found in Article V, the Judicial article of the constitution, specifically §12. The other four members are appointed by the court and as attorneys are officers of the court and subject to its control.

Regrettably, the courts of this state have not had occasion to consider the fundamental question you raise, viz: the extent to which the Legislature may by statute intrude the Executive department into the admission process. However, in *Bump v. District Court of Polk County*, 1941, 232 Iowa 623, 5 N.W.2d 914, the Iowa Supreme Court make it very clear that it had *inherent* power to regulate and punish the unauthorized practice of law. In light of this, it does not require much of an extension of logic to conclude that the court assumed that it also had the inherent power to regulate admissions.

While there is something of a paucity of case law on the subject in Iowa, decisions from other jurisdictions support the view that the courts have inherent power to regulate practice before them and that attempts by legislatures to usurp Judicial prerogatives in this area will be held to have run afoul of the doctrine of separation of power.

In 144 A.L.R. 150, 155 it is stated that:

"The act of admitting attorneys to practice and the determination of the qualifications of particular applicants are in most states regarded as peculiarly judicial in character.

"The view supported by the decisions generally is that a legislature may not so regulate matters of procedure and method as to frustrate or destroy the essential power of the courts over admissions to the bar."

The exclusive jurisdiction of the courts over the admission of persons to practice may be traced back to 13th century England. As stated in 150 A.L.R. 150, 155:

". . . In 1292, Edward I made an order by which he appointed the Lord Chief Justice of the Court of Common Pleas and the rest of his fellow justices of that court, that they, according to their discretion, should provide and ordain from every county certain attorneys and apprentices of the best and most apt for their learning and skill, who might do service to his court and people, and those so chosen only, and no other, should follow his court and transact the affairs thereof, the said King and his Council then deeming the number of seven score to be sufficient for that employment, but it was left to the discretion of the said justices to add to that number or diminish, as they should see fit. I Pollock & Maitland's History of English Laws, 194; Dugdale's Origines Juridiciales 141. The profession of attorney was placed under the control of the judges, and the discretion to examine applicants as to their learning and qualifications, and to admit to practice, was exercised from that day by the judicial department of the English Government, and no legislation sought to deprive the court of the power in that respect, or to invest it in any other branch of the government. Parliament legislated upon the subject, but the legislation was of a character to exclude persons unfit to practice, who threatened the public welfare through ignorance or untrustworthiness. The statutes always recognized that the admission of attorneys was a matter essentially belonging to the courts and a matter of judicial discretion, and only sought to protect the public against improper persons . . ."

As further noted in 144 A.L.R. 150, 165:

"The effect of most of the cases touching the point is to imply, state, or hold that, since the legislature has no power to obstruct or interfere with the perfor-

mance of judicial functions, and the efficiency of the court bears a direct relation to the learning, character, and ability of members of the bar, no statute prescribing prerequisites for admission to the bar, or dispensing therewith, can constitutionally effect the admittance of persons whom the courts consider unqualified."

Thus, in *State ex. rel. Ralston v. Turner,* 1942, 141 Neb. 556, 4 N.W.2d 302, 144 A.L.R. 138, the Nebraska Supreme Court declared unconstitutional an attempt by that state's legislature to require by statute that graduates of any resident law school be allowed to take the bar examination and upon passing be admitted in the face of a court rule that law schools had to be approved by the standardization agency of the American Bar Association.

Legislative attempt to prescribe qualifications are considered only as minimum:

"When and so far as statutes specify qualifications and accomplishments, they will be regarded as fixing the minimum and not as setting bounds beyond which the judicial department cannot go. Such specifications will be regarded as limitations, not upon the judicial department, but upon individuals seeking admission to the bar." Opinion of Justices (1932) 279 Mass 607, 180 N.E. 725, 81 A.L.R. 1059. See also *In Re Bailey,* 1926, 30 Ariz. 407, 248 P. 29.

In a situation regarding the use of assistants for the Board of Examiners of Massachusetts, the Supreme Court of that state held that such matters are:

". . . solely within the exercise of the judicial function, namely, discovery of the fact whether the applicant is sufficiently learned in the law to be admitted to practice as an attorney at law," *Re Opinion of Justices,* 1932, 279 Mass. 607, 180 N.E. 725.

The court further stated that:

". . . if subjects similar to these were held to be within legislative cognizance, it would be vain to say that final power over admission to the bar is within the control of the judicial department of government . . ." *Re Opinion of Justices, supra.*

The Board of Examiners plays a vital role in the admission of an applicant to the bar of Iowa. In light of the authorities previously cited, it seems apparent that to change the procedure in the selection of the examiners violates the principle of separation of powers. The act of admitting attorneys to practice and the determination of the qualifications of particular applicants are in most states regarded as peculiarly judicial in character — this is the rule in Iowa. The proposed change would *in effect* take the decision of admission away from the court and reduce the latter to a mere rubber stamp for examiners it did not appoint and over whom it has no control. (See also *Re Keenan,* 1941, 310 Mass. 166, 37 N.E.2d 516, 137 A.L.R. 766).

As I understand the proposal, the Governor, not the court, would appoint the bar examiners two of whom would not even be lawyers. While your question states that the power to admit would remain vested in the Supreme Court, it seems inescapable that the power would be a hollow one indeed, an empty formalism whereby the court would be placed in the position of being obliged to admit persons examined and found qualified by a board of bar examiners not appointed by the court and in whom the court might not even repose much confidence. By way of a parenthetical observation, one cannot help wondering precisely what function the lay members of the board would perform. The

function of the examiners is, after all, to examine, i.e. to formulate questions and evaluate the answers. The suitability of non-lawyers performing this work certainly would seem to be open to serious question.

In any event, and for the reasons stated, it is our opinion that the proposal contemplated would violate the doctrine of separation of powers and would be in conflict with Article III, §1 of the Iowa Constitution. *Re Florida State Bar Assoc.*, 1938, 134 Fla. 851, 186 So. 280; *Re Day, 1899, 181 Ill. 73, 54 N.E. 646; Opinion of Justices,* 1932, 279 Mass. 607, 180 N.E. 725; *Re Keenan,* 1941, 310 Mass. 166, 37 N.E.2d 516; *Re Richards,* 1933, 333 Mo. 907, 63 S.W.2d 672; *Feldman v. State Board of Law Examiners,* 438 F.2d 699 (8th Cir. 1971); *Application of Park,* Alas. 1971, 484 P.2d 690; *Sams v. Olah,* Ga. 1969, 169 S.E.2d 790; *In Re Chi-Dooh Li,* Wash. 1971, 488 P.2d 259; See also 81 A.L.R. 1059 and 137 A.L.R. 766.

January 19, 1973

STATE OFFICERS AND DEPARTMENTS: National Guard, Discrimination in Employment: §§29A.28 and 29A.43, Code of Iowa, 1973. The state and its subdivisions are not prohibited from requiring employees to provide them a schedule of training meetings where they are scheduled in advance and their compensation is not diminished. (Wietzke to Erhardt, Wapello County Attorney, 1/19/73) #73-1-23

Mr. Samuel O. Erhardt, Wapello County Attorney: In your request for an Attorney General's opinion, you have asked:

"Certain employees of the City of Ottumwa, Iowa, are members of the National Guard. These employees, being members of the said military organization, are required to attend, each month, a weekend drill. The City of Ottumwa proposes to require that the employees who must attend these weekend drills submit to the city a schedule showing the dates of said drills. The city would then schedule the work periods of said employees so that the said employees would be attending the drills on their days off. There would be no diminishment in pay since the employees are now paid for their days off, and would continue to be paid, even though they are attending the drills. It is requested that your office give an opinion whether Section 29A.28 and/or Section 29A.43 of the 1966 Code of Iowa, prohibit the city from following this proposed course of action."

Section 29A.28, Code of Iowa, 1971, provides:

"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 force 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."

Section 29A.43, Code, provides:

"No person, firm, or corporation, shall discriminate against any officer or enlisted man of the national guard or organized reserves of the armed forces of the United States because of his membership therein. No employer, or agent

of any employer, shall discharge any person from employment because of being an officer or enlisted man of the military forces of the state, or hinder or prevent him from performing any military service he may be called upon to perform by proper authority. Any member of the national guard or organized reserves of the armed forces of the United States ordered to temporary active duty for the purpose of military training or ordered on active state service, shall be entitled to a leave of absence during the period of such duty or service from his private employment other than employment of a temporary nature, and upon completion of such duty or service the employer shall restore such person to the position held prior to such leave of absence, or employ such person in a similar position, provided, however, that such person shall give evidence to the employer of satisfactory completion of such training or duty, and further provided that such person is still qualified to perform the duties of such position. Such period of absence shall be construed as an absence with leave, and shall in no way affect the employee's rights to vacation, sick leave, bonus, or other employment benefits relating to his particular employment. Any person violating any of the provisions of this section shall be punished by a fine of not to exceed one hundred dollars, or by imprisonment in the county jail for a period of not to exceed thirty days."

In a May 21, 1968, Attorney General's opinion we have said:

"It should be noted, however, that the fact that §29A.43 contains a leave of absence provision affecting only private employers does not mean that the prohibition against discharging an employee on account of guard membership or hindering or preventing him from performing guard service is similarly limited. On the contrary, we must conclude that the legislature when it used the expression 'no employer' in the second sentence of §29A.43 meant precisely that. If the members of the general assembly meant to include only private employers they could have done so by saying 'no private employer' instead of 'no employer'. From the fact that the expression 'private employment' is found in the third sentence of §29A.43, we must conclude that the omission of the word 'private' in the second sentence of such section was intentional and was calculated to give the prohibition against discharge and hinderance broader application than the provision for leave of absence and restoration of employment."

1936 OAG 619 provides that military members on government payroll should not be required to take their vacation during field training, and leave of absence may be granted to attend field training. 1940 OAG 245.

It is not necessary that persons inducted into military service ask for or obtain a leave of absence. 1942 OAG 41. Further, public employees are entitled to such leave without loss of pay during the first thirty days. 1936 OAG 619; 1942 OAG 130, 136; 1942 OAG 41; 1956 OAG, Aug. 22, June 8; 1944 OAG 134.

From all the above citations it does not appear the specific question you raise has been dealt with by this office. Since the employees are paid the same, guard training meetings are scheduled on weekends when most personnel will not be working, and such training is of a repetitive nature which is easily scheduled in advance, there does not appear to be any discrimination or hinderance in requiring employees to furnish employers such schedules. An employer may ask employees to do any number of things as part of their contractual agreement so long as it is not illegal. In my opinion the furnishing of an easily obtained schedule where their pay is not affected is not illegal under the above sections.

January 23, 1973

STATE OFFICERS AND DEPARTMENTS — Agriculture Department: §170.16, Code of Iowa, 1973. Restaurants are required to provide rest rooms but public use of such facilities is within the owner's discretion as has been established custom and administrative policy (Wietzke to Geddes, Admin. Asst., Dept. of Agriculture, 1/23/73) #73-1-24

Mr. Mark Geddes, Administrative Assistant, Department of Agriculture: In reply to your request for an Attorney General's opinion, you asked if §170.16, Code of Iowa, 1973, makes it mandatory for a restaurant to provide rest rooms for public use.

Section 170.16, Code of Iowa, 1973, provides:

"Toilet Rooms. Hotels, motor inns, taverns, cocktail lounges, restaurants, cafeterias, and food establishments shall provide toilet rooms. All toilet rooms shall be completely enclosed, have tight fitting, self-closing doors, and shall be vented to the outside of the building. Toilet fixtures shall be of a sanitary design, readily cleanable, and shall be kept in a clean condition and in good repair. The floors of such rooms shall be of suitable, nonabsorbent, impermeable material and the walls and ceilings shall be of material that can be easily cleaned and kept in a sanitary condition. All places serving beer, cocktails, or alcoholic beverages shall provide separate toilet rooms for men and women."

It does not appear any Attorney General opinions concerning this subject have been written in Iowa or that any states have a similar statute. Beyond the clear requirement that toilets exist in the listed establishments, there is little indication of the legislature's intent to require or not require such facilities be available to the public.

It is our understanding that the general policy of the Iowa Department of Agriculture since 1913 has been to require adequate public facilities in hotels, motels and motor inns; to leave provision of public facilities to the discretion of restaurants and to feel that it is unreasonable to require public facilities at food establishments which the public does not frequent as packing houses or places which the public visits for only short periods of time as meat markets or grocery stores. Such application has become a practice which the legislature has not specifically changed even though this section has been amended a great number of times in the sixty years from 1913 to 1973. This administrative practice may be modified by the Iowa Supreme Court dicta in restaurant, rest room negligence cases as stated in *Holmes v. Gross,* 1958, 250 Iowa 238, 93 N.W.2d 714, at 249:

"In view of the present day custom which now amounts to *almost a requirement,* that modern and up-to-date cafes maintain rest rooms, he would be an invitee while going to or coming from and while in a rest room." (Emphasis Added)

Section 4.4, Code of Iowa, 1973, provides a number of presumptions used to construe statutes including that "a just and reasonable result is intended" and "a result feasible of execution is intended". In §4.6 of the Code indicates the courts should consider the consequences of a particular administrative construction and interpretation. The above administrative construction does appear to provide a just and reasonable result or consequence.

The common law has long provided similar rules, including that "common usage and practice are of great value in determining a statute's meaning", (82 C.J.S. 759, Statutes §358) and "contemporaneous construction placed on an ambiguous statute by the officers or departments charged with its enforcement and administration is to be considered and given weight in construing the statute, especially if such construction has been uniform and consistent and has been observed and acted on and acquiesced in for a long time." 82 C.J.S. 761, Statutes §359. Such common law is followed in Iowa. Administrative clarification of ambiguous statutes are considered by Iowa courts in determining legislative intent. Long use of such rules demonstrates their equitable merit, requires they be given great weight, and should not be disregarded or overturned unless cogent reasons are given. In addition, numerous amendments to the act after establishment of the administrative rule tend to indicate legislative acquiescence and adoption of the rule. *John Hancock Mutual Life Ins. Co. v. Lookingbill,* 1934, 218 Iowa 373, 253 N.W. 604; *State v. Standard Oil Co. of Indiana,* 1937, 222 Iowa 1209, 271 N.W. 185; *State v. Independent Order of Foresters,* 1939, 226 Iowa 1339, 286 N.W. 425; *Prudential Ins. Co. of America v. Green,* 1942, 231 Iowa 1371, 2 N.W.2d 765; *State v. Robbins,* 1944, 235 Iowa 602, 15 N.W.2d 877; *State v. All-Iowa Agricultural Ass'n,* 1951, 242 Iowa 860, 48 N.W.2d 281; *Yarn v. City of Des Moines,* 1952, 243 Iowa 920, 54 N.W.2d 439; *Northwestern States Portland C. Co. v. Board of Revenue,* 1953, 244 Iowa 720, 58 N.W.2d 15; *Patterson v. Iowa Bonus Board,* 1955, 246 Iowa 1087, 71 N.W.2d 1; *School District of Soldier Township v. Moeller,* 1955, 247 Iowa 239, 73 N.W.2d 43; *Everding v. Board of Education,* 1956, 247 Iowa 743, 76 N.W.2d 205; *Lever Brothers Co. v. Erbe,* 1958, 249 Iowa 454, 87 N.W.2d 469; *Mason City v. Zerble,* 1958, 250 Iowa 102, 93 N.W.2d 94; *Clarion Ready Mixed Con. Co. v. Iowa State Tax Commission,* 1961, 252 Iowa 500, 107 N.W.2d 553; *Central Township School District v. Oakland Ind. School District,* 1962, 253 Iowa 391, 112 N.W.2d 665.

Under the above rules of statutory construction the Agriculture Department's administrative construction as may be modified should be followed absent cogent contrary reasons.

As to facilities where spirituous beverages are served, regulations of rest rooms are also provided for under Liquor Department regulations 6.5(6) 'toilets' which are intended to implement §123.27, Code of Iowa, 1971, and provide:

"6.5(6) *Toilets.*

a. All licensed establishments dispensing alcoholic beverages shall provide properly designated flush toilets for each sex. Such toilets shall be so constructed as to assure complete privacy as to segregation of sexes. Toilets shall be easily accessible with no entrance through a kitchen or living quarters. Each toilet shall have outside ventilation, or be vented thereto (vents to be six inches in diameter).

"b. The minimum floor space of each toilet shall comply with the specifications of local issuing authorities. The floor of each toilet shall be made of nonabsorbent material which shall extend four inches or more on the walls above the floor level.

"c. Toilets for men shall have the following equipment: One wash bowl with running water, one intermittent or flush type wall urinal, one flush stool complete with cover (same to be segregated from urinal by a partition) for

each one hundred patrons based on seating capacity of establishment, individual sanitary towels, plenty of soap, sanitary toilet paper and a metal receptacle for accumulated waste.

"d. Toilts for women shall have the same equipment as for men except urinal, the amount of equipment to be determined the same as for men.

"e. All toilets and wash rooms, including walls, floors, ceilings and fixtures shall be kept in a clean and sanitary condition; walls and ceilings shall be painted with a waterproof oil paint or enamel.

"f. The foregoing regulations shall in no way be construed as to prevent any county, city or town from setting up an ordinance, more restrictive regulations governing such establishments within their jurisdiction.

"This rule is intended to implement section 123.27 of the Code."

This regulation would appear to require public entrances for facilities in places serving such spirits, and thus by implication require they be available to the public.

Thus, public rest rooms are required in hotels, motels, motor inns, and places serving spirituous refreshments. Restaurants and cafes would also have to provide public facilities if they serve spirits and probably if they are of recent construction or modernization. Finally, food establishments which the public does not frequent such as packing houses or places which the public visits for only short periods of time as meat markets or grocery stores provide such public facilities at their own discretion, although they are required to provide such facilities at least for their employees.

January 23, 1973

TAXATION: Collectibility of semiannual tax on mobile homes; Chapter 135D, Code of Iowa, 1973; Chapter 445, Code of Iowa, 1973. The semiannual tax on mobile homes is collectible by the County Treasurer through issuance of distress warrant and sale of personalty pursuant to procedures set out in Chapter 445, Code of Iowa, 1973. (Kuehn to TeKippe, Chickasaw County Attorney, 1/23/73) #73-1-25

Mr. Richard P. TeKippe, Chickasaw County Attorney: You have requested an opinion of the Attorney General with reference to the collectibility of the semiannual tax imposed on the owners of mobile homes by Chapter 135D, Code of Iowa, 1973.

The substance of your inquiry is as follows:

"Nevertheless, I believe that we still have a situation where the mobile home tax as presently enacted provides no means of collection other than the criminal charges which can be filed under that section.

Basically, my question to your office is whether or not you agree that there is no means of collecting the mobile home tax if the owner simply refuses to pay. Even if the criminal charges are filed, and prosecuted to a conviction, the payment of any fines involved would seem to be the last step which can be taken against the mobile home owner. So long as they do not attempt to convey the mobile home, and simply use it for residential purposes, and continue to the non-payment of taxes, I do not see how the Chapter 135D, or the other provisions of the Iowa Law insofar as the collection of taxes provide any means of collecting these delinquent taxes.

If you in fact agree with this situation, it would appear that legislation should be suggested which would remedy this situation. I would appreciate your early response herein."

The question you have raised here is one which has not yet been met head-on either by the courts of this State or by earlier related opinions of the Attorney General. The problem quite obviously arises out of the absence in Chapter 135D, Code of Iowa, 1973, of expressed enforcement provisions. You suspect that because of this omission, no collective measures exist to enforce the semiannual tax on mobile homes. It has been the position of the Iowa Department of Revenue ever since the enactment of Chapter 135D, that the general enforcement provisions of Chapter 445, Code of Iowa, relating to the collection of personal property taxes govern the procedure available to enforce the semiannual tax. Chapter 445, relates to the procedures available for the collection of delinquent real and personal property taxes. Section 135D.24, provides that:

"The tax and registration fee shall be a lien on the vehicle senior to any other lien there may be upon it."

The lien mentioned in this section has been treated in the same manner as a lien arising from liability for personal property taxes and has thus been treated under the provisions of Chapter 445. This means that the lien set out therein becomes the responsibility of the county treasurer and he is responsible for the lien record and the collection of unpaid taxes. The treasurer has the duty to enter the figures of non-payment of this tax on the delinquent personal property tax list each year and once the lien has been filed he can force collection by distress warrant as set out in §445.8, Code of Iowa, 1973.

The basic Department of Revenue interpretation and policy regarding the enforcement of the semiannual tax can be found in memorandum #139 dated September 27, 1963. This document consists of a series of questions and answers as to how various questions under Chapter 135D are to be handled. The policy stated therein and followed thereafter has been to treat the semiannual tax as a personal property tax on the owner of the mobile home. The responsibility of the county treasurer to list non-payment of the tax each year on the delinquent personal property tax list under Chapter 445, of the Code was set out in that memorandum and has been the basis for administration of the tax since that time.

It makes sense to apply the Chapter 445 provisions to enforce the semiannual tax on mobile homes. The tax, though measured by the size of the property rather than by its value, is nonetheless a personal property tax. A tax need not be ad valorem to be a property tax. A tax which imposes a specific liability computed by some standard of weight or measurement and which requires no assessment beyond a listing and classification of the subject to be taxed, may also be a property tax. 1 Cooley, *Taxation,* 1924 §§39, 52. The semiannual tax is this kind of property tax. That the tax is a personal property tax is further suggested by §135D.26 which permits the conversion of the vehicle to real property. Once the conversion is affected, the mobile home is subject to taxation as real property under that section. The implication is that in the absence of conversion to realty, the mobile home is personal property and the tax imposed on the vehicle is a personal property tax.

Just why specific enforcement provisions were not incorporated into Chapter 135D is not really known. However, since the semiannual tax on

mobile homes is a personal property tax, the legislature presumably intended it to be enforced in the same manner as other personal property taxes. It is an old and well settled rule of construction in this State that statutes which are not inconsistent with one another and which relate to the same subject matter are in pari materia. As such, they should be construed together and effect should be given to them all, although they contain no reference to one another and were passed at different times. *Fitzgerald v. State,* 1935, 220 Iowa 547, 260 N.W. 681; *Dotson v. City of Ames,* 1960, 251 Iowa 467, 101 N.W.2d 711; *Northwestern Bell Telephone Co. v. Hawkeye State Telephone Co., Iowa,* 1969, 165 N.W.2d 771; *Goergen v. State Tax Commission, Iowa,* 1969, 165 N.W.2d 782. Additionally, in *Daily Record Co. v. Armel,* 1952, 243 Iowa 913, 54 N.W.2d 503, the Court held that where legislation dealing with a particular subject consists of a settled policy, new enactments of a fragmentary nature on that subject shall be read as intended to fit into the existing system and to be carried into effect conformably with it. The statutes should be so construed as to harmonize the general scheme of the system and make it consistent in all its parts and uniform in its operation, unless a different purpose is clearly shown.

Consequently, since the semiannual tax imposed by Section 135D.22 is a personal property tax, the foregoing authorities demand that it be construed together with that chapter which sets out the means of enforcing collection of personal property taxes, namely, Chapter 445. Thus, the tax liability becomes a lien on the taxpayers property under Section 135D.24, Code of Iowa, 1973. Delinquent semiannual taxes are entered by the county treasurer on the delinquent personal property tax list under Section 445.8, Code of Iowa, 1973, and if the tax remains unpaid the county treasurer is empowered to enforce by means of a distress warrant and subsequent sale of the personal property of the taxpayer.

It should also be noted that §135D.24, Code of Iowa, 1973, states that the county sheriff shall be the agent for enforcement of the tax provisions imposed by Chapter 135D. This, presumably, would include the serving of a distress warrant upon the taxpayer for purposes of enforcing his tax liability. Section 445.8(4), Code of Iowa, 1973, sets out the sheriff's powers with respect to serving the distress warrant and collecting the delinquent tax.

Therefore it is the opinion of the Attorney General that Chapter 135D, Code of Iowa, 1973, creates a tax enforceable by means of distress warrant and tax sale against the property of the taxpayer, even though Chapter 135D contains no express provisions setting out the enforcement procedure to be used. While specific legislation would indeed be helpful to clarify the administrative steps available to collect the tax, the current practice of enforcing the tax pursuant to Chapter 445 clearly is proper and conforms to established rules of statutory construction.

January 30, 1973

STATE OFFICERS & DEPARTMENTS: Water Quality Commission — Water Pollution Emergencies — §§455B.43 and 455B.30(4), Code of Iowa, 1973. Iowa has statutory provisions at least as efficacious as Section 504 of the Federal Water Pollution Control Act Amendments of 1972 in meeting water pollution emergencies. (Davis to Obr, Director, Water Quality Division, Department of Environmental Quality, 1/30/73) #73-1-26

Mr. Joseph E. Obr, Director, Water Quality Division, Department of Environmental Quality: You have requested an opinion of this office as to whether the State of Iowa has statutory provisions for emergency water pollution abatement comparable to Section 504 of the Federal Water Pollution Control Act Amendments of 1972 which reads as follows:

"Sec. 504. Notwithstanding any other provision of this Act, the Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons, such as inability to market shell fish, may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other actions as may be necessary."

The statutory provisions in the 1973 Code of Iowa which apply to this question are Section 455B.43 and Section 455B.30(4) which read as follows:

"455B.43. Injunction. Any person, firm, corporation, municipality, or any officer or agent thereof causing water pollution as defined in section 455B.30 of any waters of the state or placing or causing to be placed any sewage, industrial waste, or other wastes in a location where they will probably cause pollution of any waters of the state may be enjoined from continuing such action.

The attorney general shall, upon the request of the department, bring an action for an injunction against any person, firm, corporation, municipality, or agent thereof violating the provisions of this section. In any such action, any previous findings of the department after due notice and hearing shall be prima-facie evidence of the fact or facts found therein."

"455B.30(4) "Water pollution" means the contamination of any water of the state so as to create a nuisance or render such water unclean, noxious or impure so as to be actually harmful, detrimental or injurious to public health, safety or welfare, to domestic, commercial, industrial, agricultural or recreational use or to livestock, wild animals, birds, fish or other aquatic life."

The provisions of the Iowa Code quoted above are, if anything, broader than Section 504 of the Federal Water Pollution Control Act Amendments of 1972 in that such pollution need only be probable for action to be taken.

We are, therefore, of the opinion that authority for the exercise of emergency powers comparable to or broader than said Section 504 exists under the statutes of the State of Iowa and that, while enforcement proceedings in court can only be brought by the Attorney General, it is mandatory that he bring such action upon the request of the Iowa Department of Environmental Quality.

February 5, 1973

STATE OFFICERS AND DEPARTMENTS — Incompatibility and conflict of interest — Chapter 68B, §§301.28 and 24.30, Code of Iowa, 1971. There is neither incompatibility of office or prohibited conflict of interest where a budget supervisor in Comptroller's office is also a member of a local school board. (Nolan to Mayer, Deputy Citizen's Aide, 2/5/73) #73-2-1

Mr. Thomas R. Mayer, Deputy Citizens Aide: This is in response to your request for an opinion on the question of whether there is a conflict of interest prohibited by law in the following situation, which we quote from your letter:

"An individual who works in the Department of Public Instruction wished to run for the school board in Bondurant, Iowa. He was informed that to do so would be a conflict of interest and thus he did not run for the position.

"The question arises however, in that another individual who is on the school board in Bondurant is also presently employed by the Comptroller's Office as Budget Supervisor of Education. The question is whether hiring on the school board and employed as Budget Supervisor of Education in the Comptroller's Office involves a conflict of interest."

Chapter 68B, Code of Iowa, 1971, contains the provisions of Iowa law pertaining to conflicts of interest of state officers and employees. In general, the provisions of this chapter apply to the receipt of gifts or compensation for service against the interests of the state. Similarly, §301.28, Code, prohibits any school director from contracting with the board to provide supplies or text books during the term of his employment. This section has been construed in 1930 OAG 335 as follows:

"The purpose of this statute is to render the act of a member of the board of directors of a school corporation that of an entirely disinterested party in a contract which he is making for the corporation, and to leave his judgment entirely free to act without any personal interest whatsoever."

In *State v. White*, 257 Iowa 606, 133 N.W.2d 903, the Iowa Supreme Court held two public offices incompatible where one was subject to the review of the other. In 1966 OAG 304 the offices of State Senator and board director of an area vocational school were deemed incompatible on the ground that a school corporation is a legislative creation having no rights or capacity except such as are conferred upon by the legislature which may dissolve such corporation at any time.

The powers of a Budget Supervisor in the Comptroller's Office are also statutory powers and in no way contemplate the review and supervision of all local affairs conducted by the school board. The State Appeal Board has the power of review of proposed budget expenditures, tax levies and tax assessments under §24.30, Code. However, the Budget Supervisor in the Comptroller's Office is not a member of the Appeal Board and unless it can be clearly shown he has effective power to change the outcome of a proceeding before the State Appeal Board, there would appear to be no incompatibility between the office of budget supervisor and school district director.

I am of the opinion that the interest of the school district in complying with the requirements of the state budget law and that of the Budget Supervisor in this instance are identical and accordingly a conflict of interest does not occur.

February 6, 1973

ELECTIONS: Reporting campaign expenses — §47.1 and Chapter 56, Code of Iowa, 1973. The enactment of §47.1, Code of Iowa, 1973, designating the Secretary of State as the State Commissioner of Elections does not place any additional responsibilities upon him with respect to the enforcement of Chapter 56 and the conclusion reached in our opinion of July 19, 1954, that his duties with respect thereto are only ministerial and custodial, is reaffirmed. *Every candidate* is required to file a statement and no exception is made for candidates who did not receive or disburse any money. The statement of expenses filed pursuant to Public Law 92-225, 92nd Congress, where candidates for federal offices are concerned could constitute compliance with the filing of a report required by Chapter 56 of the Iowa Code,

if the reports were filed within the deadline required by State rather than federal law. (Haesemeyer to Synhorst, Secretary of State, 2/6/73) #73-2-2

The Honorable Melvin D. Synhorst, Secretary of State: Reference is made to your letter of December 27, 1972, in which you state:

"An Attorney General's ruling dated July 19, 1954, addressed to the Secretary of State states as follows:

" 'In so far as the duty imposed upon you by section 56.8 is concerned it is to be said such duty is ministerial, and the duty imposed upon you by section 56.6 is custodial. While section 56.9 provides "the violation of any provision of this chapter shall constitute a misdemeanor" this duty is imposed upon the law enforcing officials of the place where the crime is committed.'

"Section 47.1, Code of Iowa 1973, enacted by the Sixty-fourth General Assembly provides that the Secretary of State is designated as Commissioner of Elections. Does the creation of this new title and position for the Secretary of State impose any additional duties on him relative to Chapter 56 of the Code of Iowa over and above those already described in the July 19, 1954, opinion?

"We have prepared a list of candidates for Federal and State offices, whose names appeared on the November 7, 1972, general election ballot, who have not filed statements of receipts and expenditures described in Chapter 56, Code of Iowa, which will be transmitted to you upon request. (It should be noted that several candidates filed these statements later than thirty (30) days following the November 7, 1972, general election, and these names do not appear on the list.)

"Is a candidate who receives no money or things of value and who pays and disburses no money required to file such a report?

"Under new Federal law, candidates for federal offices are required to file comprehensive campaign reports with Secretaries of State showing campaign receipts and expenditures. Would the filing of such a Federal report with the Secretary of State of Iowa constitute compliance with the filing of the report required by Chapter 56 of the Code of Iowa?

"This office has made a diligent effort to obtain expense reports from candidates following the November 7, 1972, general election. As we have done on numerous past occasions, we are recommending to the appropriate legislative committee that Chapter 56 of the Code be revised and strengthened."

In our opinion the enactment of what is now §47.1, Code of Iowa, 1973, designating you as the State Commissioner of Elections does not place any additional responsibilities upon you with respect to the enforcement of Chapter 56 and the conclusion reached in our opinion of July 19, 1954, that your duties with respect thereto are only ministerial and custodial, is reaffirmed. Section 47.1 provides:

"State commissioner of elections. The secretary of state is designated as the state commissioner of elections and shall supervise the activities of the county commissioners of elections. There is established within the office of the secretary of state a division of elections which shall be under the direction of the state commissioner of elections. The state commissioner of elections may appoint a person to be in charge of the division of elections who shall perform such duties as may be assigned to him by the state commissioner of elections. The state commissioner of elections shall prescribe uniform election practices and procedures and shall prescribe the necessary forms required for voter registration and the conduct of elections. The state commissioner of elections

may adopt rules and regulations, pursuant to chapter 17A, to carry out the provisions of this section."

It is evident from mere reading of §47.1 that the provision contemplates that the State Commissioner of Elections' duties thereunder relate to the conduct of the election, the supervision of county commissioners of elections and prescribing forms and practices and procedures. There is no reference to Chapter 56 or to reports by candidates.

In our opinion even though a candidate may not have received any contributions or may not have paid or disbursed any money he is nevertheless required to file a statement of expenses under Chapter 56. Section 56.1 provides:

"Statement. Every candidate for any office voted for at any primary, municipal, special or general election shall, within thirty days after the holding of such election, file a true, detailed, and sworn statement showing all sums of money or other things of value disbursed, expended, or promised, directly or indirectly, by him, and to the best of his knowledge and belief by any other person or persons in his behalf, for the purpose of aiding or securing his nomination or election. This section shall have no application to a judge standing for retention at a judicial election."

It is to be observed that *every candidate* is required to file a statement and no exception is made for candidates who did not receive or disburse any money.

Insofar as your last question is concerned it is our opinion that the statement of expenses filed pursuant to Public Law 92-225, 92nd Congress, where candidates for federal offices are concerned could constitute compliance with the filing of a report required by Chapter 56 of the Iowa Code. The statements filed in your office in compliance with Sections 302, 303 and 304 of such federal act require much more detailed reporting than does Chapter 56 and would certainly satisfy the requirements of the latter chapter. However, there is a difference in the deadlines for filing the reports under the state and federal laws and for a federal report to be in compliance with Chapter 56 it would have to be filed with the Iowa Secretary of State within the state deadline. The federal report would also have to be executed by the candidate himself, rather than merely by his campaign manager. It is to be observed that under §56.1 the required financial statement is to be filed within thirty days after the election while under the federal act the final accounting need not be filed until the 31st day of January following the election.

It should be noted that the federal statute does not supersede or nullify the Iowa provision by reason of §403(a) of the federal act which provides:

"Nothing in this act shall be deemed to invalidate or make inapplicable any provision of any state law except where compliance with such provision of law would result in the violation of a provision of this act."

February 6, 1973

STATE OFFICERS AND DEPARTMENTS: General Assembly Open Meetings Law not applicable — Article III, §9, Constitution of Iowa, §28A.1, Code of Iowa, 1973. The open meetings law does not apply to the General Assembly or any of its committees because (1) the law by its terms does not include such and (2) because of the constitutional right of each house to determine its own rules of proceedings. (Haesemeyer to Cusack, State Representative, 2/6/73) #73-2-3

The Honorable Gregory D. Cusack, State Representative: Reference is made to your letter of February 1, 1973, in which you request an opinion of the Attorney General with respect to the following:

"Does the Iowa Open Meetings Law outlined in Chapter 28A of the Iowa Code apply to constitutional bodies such as the General Assembly and its various standing and ad hoc committees?

"Specifically, does not the House Administration (Patronage) Committee have to comply with Chapter 28A? I suggest apparent violations have occured of Sections 28A.4 and 28A.5.

"What is my recourse? What is the recourse open to the General Assembly?"

The relevant statutory and constitutional provisions are found in §28A.1, Code of Iowa, 1973, and Article III, §9 of the Constitution which provide respectively:

"28A.1. Closed meetings prohibited. All meetings of the following public agencies shall be public meetings open to the public at all times, and meetings of any public agency which are not open to the public are prohibited, unless closed meetings are expressly permitted by law:

"1. Any board, council, or commission created or authorized by the laws of the state.

"2. Any board, council, commission, trustees, or governing body of any county, city, town, township, school corporation, political subdivision, or tax-supported district in this state.

"3. Any committee of any such board, council, commission, trustees, or governing body.

"Wherever used in this chapter,'public agency' or 'public agencies' includes all of the foregoing, and 'meeting' or 'meetings' includes all meetings of every kind, regardless of where the meeting is held, and whether formal or informal."

Article III, §9:

"Authority of the houses. *Each house shall* sit upon its own adjournments, keep a journal of its proceedings, and publish the same; *determine its rules of proceedings,* punish members for disorderly behavior, and, with the consent of two thirds, expel a member, but not a second time for the same offense; and shall have all other powers necessary for a branch of the General Assembly of a free and independent State." (Emphasis added)

There are two reasons why it is our opinion that Chapter 28A does not apply to the General Assembly or any of its standing or ad hoc committees, either one of which would be sufficient. First, although §28A.1 specifically includes governing bodies of counties, cities, towns, townships, school corporations, political subdivisions and tax-supported districts, the governing body of the state is not included. We must conclude that this omission was intentional. Expressio unius est exclusio alterius. Additionally, we do not consider that it can be fairly said that the General Assembly is a public agency, board, council or commission created or authorized by the laws of this state. See 1968 OAG 88.

More important, however, is the constitutional power of each house of the General Assembly under Article III, §9, to determine its own rules of proceedings. As we stated in an earlier opinion of the Attorney General on a somewhat related question, 1970 OAG 71:

"It is strictly within the competence of each house to adopt rules relative to the conduct of its own proceedings. As stated in a prior opinion of the attorney general, 'This power is not limited or restricted in any respect by any other constitutional provision'. 64 OAG 52. Elsewhere the applicable rule of law is stated somewhat differently but to the same effect:

"'Legislature rules and compliance therewith. Each house of the legislature has the power to determine for itself rules and orders to govern it in the various stages of legislation, and in relation to all matters relating to the exercise of their rights, powers, and privileges. The power to make rules is absolute, if exercised within prescribed limitations, but an act will not be declared invalid because of a non-compliance with such rules.' 82 C.J.S., Statutes, p. 60.

"'Rules of parliamentary practice are merely procedural and not substantive. The rules of procedure adopted by deliberative bodies have not the force of a public law, but they are merely in the nature of by-laws, prescribed for the orderly and convenient conduct of their own proceedings. The rules adopted by deliberative bodies are subject to revocation, modification, or waiver at the pleasure of the body adopting them. Where a deliberative body adopts rules of order for its parliamentary governance, the fact that it violates one of the rules so adopted may not invalidate a measure passed in compliance with statute. The rules of procedure passed by one legislative body are not binding on a subsequent legislative body operating within the same jurisdiction, and, where a body resolves that the rules of a prior body be adopted until a committee reports rules, the prior rules cease to be in force on the report of the committee.' 67 C.J.S., Parliamentary Law, p. 870."

In our opinion even if the Legislature were to amend Chapter 28A to specifically include itself and its various committees, either house could nevertheless thereafter at any time by rule and without the concurrence of the other house close its sessions, committee meetings or any of them. No mere statute of one General Assembly can abridge the power conferred by the people upon each house to "determine its rules of proceedings."

February 7, 1973

MOTOR VEHICLES: Inspection — §§321.47, 321.238(12), 321.238(18), Code of Iowa, 1973. The Internal Revenue Service, by reason of federal supremacy, is not required to have vehicles inspected that are sold at distraint sales. The buyer of such a vehicle would be required to have it inspected to transfer title. (Voorhees to Wehr, Scott County attorney, 2/7/73) #73-2-4

Mr. Edward N. Wehr, Scott County Attorney: This letter is in response to your request for an opinion regarding the necessity of an inspection to transfer title to a vehicle sold at an Internal Revenue Service distraint sale.

Specifically you asked:

"Are transfers of title resulting from forced sales under the Federal Internal Revenue Code for the satisfaction of delinquent taxes transfers by operation of law, and consequently exempt from the inspection requirements, or must the Internal Revenue Service present an inspection certificate in order for the Treasurer to issue a transfer of title?"

There are several relevant provisions of the 1973 Iowa Code.

Section 321.238(12) provides, in part:

"Every motor vehicle subject to registration under the laws of this state, . . . when first registered in this state or when sold at retail within or

without this state, or otherwise transferred, except transfers by operation of law as set out in section 321.47, shall be inspected . . ."

Section 321.238(18) provides, in part:

"A person shall not sell or transfer any motor vehicle, other than transfers to a dealer licensed under chapter 322, and other than transfers by operation of law as set out in section 321.47 unless there is a valid official certificate of inspection affixed to such vehicle at the time of sale . . ."

Section 321.47 enumerates what constitutes a transfer by operation of law.

"In the event of the transfer of ownership of any vehicle by operation of law as upon inheritance, devise or bequest, order in bankruptcy, insolvency, replevin, foreclosure or execution sale, . . ."

The first question raised by these provisions is whether a transfer resulting from an IRS distraint sale is a transfer by operation of law. Although such sales are not specifically enumerated in §321.47, they are similar to execution sales.

We have previously held that only those transfers specifically set out in §321.47 are exempted from the inspection requirement. *Expressio Unius Est Exclusio Alterius.* (See Voorhees to Faulkner, Mahaska County Attorney, 72-11-8, and the authorities cited therein).

It has been suggested that the examples in §321.47 are merely illustrative. Support for this view derives primarily from the words "as upon" in §321.47. It is contended that these words indicate an intent to exemplify and not to provide an exhaustive list of transfers by operation of law. If the question was solely one of interpreting §321.47, there might be some merit to this contention. However, we are dealing with §§321.238(12) and 321.238(18), which do not fully incorporate §321.47 but merely incorporate the list of transfers contained therein. These provisions exempt "transfers by operation of law *as set out* in section 321.47." (emphasis added). Accordingly, we are of the opinion that transfers resulting from distraint sales under the Internal Revenue Code are not transfers by operation of law within the meaning of §§321.238(12) and 321.238(18).

However, there is another aspect to this question — federal supremacy.

It is well established that the state may not tax either those agencies through which the U.S. Government has exercised its sovereign power or the Government itself. *Mayo v. United States,* 319 U.S. 441 (1943); *Van Brocklin v. Tennessee,* 117 U.S. 151 (1886); *Telegraph Company v. Texas,* 105 U.S. 460 (1881); *M'Culloch v. Maryland,* 17 U.S. 316 (1819). The *Mayo* case is especially applicable here. In that case, the state attempted to collect an inspection fee from the federal government in connection with its distribution of fertilizer which it owned under the Soil Conservation and Domestic Allotment Act. The U.S. Supreme Court held that the state could not exact such an inspection fee, even though the purpose of the inspection was to assure consumers that they would obtain the quality of fertilizer for which they had paid and that substances deleterious to the land would be excluded from the fertilizer sold.

In view of the above authorities, we are of the opinion that the IRS cannot be compelled to have vehicles inspected that are sold at distraint sales.

While the IRS is relieved of the duty to have vehicles inspected under §321.238(18), there remains the requirement under §321.238(12) that all vehicles must be inspected when transferred. Ordinarily §321.238(18) would take care of this requirement by imposing on the seller the duty to have vehicles inspected. In this instance, the seller is relieved of that duty, and it would appear that this duty has been shifted to the buyer. The duty imposed by §321.238(12) is in addition to that imposed by §321.238(18). We do not believe that the federal government's supremacy exemption to §321.238(18) would extend to the buyer. The requirement imposed by §321.238(12) remains, and would fall on the party not exempt — the buyer.

The theory behind exempting the IRS from the inspection requirement is that imposing the duty to have vehicles inspected upon the IRS would amount to an attempt to tax the federal government. (See authorities cited above). Requiring the buyer to have the vehicle inspected does not result in any substantial burden on the federal government.

Support for this position is found in *Graves v. New York,* 306 U.S. 466 (1939). Therein, the Court stated that the theory, which once won qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable. The Court held that the immunity from state taxes of the Home Owners' Loan Corporation did not extend to an employee of that agency, and that his salary was taxable by the state of New York.

The Court summarized the rationale for its holding as follows:

"So much of the burden of a nondiscriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments."

That rationale would seem to be applicable to this question. The buyer at an IRS distraint sale may be willing to pay slightly less knowing that he will have to pay the inspection fee of $5.41, or perhaps make some repairs. However, the burden thus imposed on the IRS is minimal. In addition, the buyer at such sales bears less relationship to the federal government than the employee of the Home Owners' Loan Corporation did in the *Graves* case. If the Court was unwilling to extend immunity to the government employee in the *Graves* case, it is difficult to see how immunity could be extended to someone only incidentally related to the federal government, as in the case of a buyer at an IRS distraint sale.

February 7, 1973

CITIES AND TOWNS: Civil Service — §365.11, Code of Iowa, 1973. "Vacancy" as used in Chapter 365 does not include those situations where the person occupying the position in question is on vacation or a temporary leave of absence. (Blumberg to Rodenburg, Pottawattamie County Attorney, 2/7/73) #73-2-5

Mr. Lyle A. Rodenburg, Pottawattamie County Attorney: We are in receipt of your opinion request concerning Chapter 365, 1973 Code of Iowa. You specifically asked:

"Section 365.11, (last paragraph) provides in pertinent part:

'. . . Any person temporarily filling a vacancy in a position of higher grade for 20 days or more shall receive the salary paid in such higher grade.'

The question related to what is meant by the word "vacancy" as used in the above quoted section."

Your question is asked in the context of a situation where a civil service employee goes on vacation or a temporary leave of absence and another person performs the duties on a temporary basis.

Section 365.11 provides for temporary appointments to fill vacancies. The first paragraph of that section sets forth the manner in which newly created offices or other vacancies are filled from eligibility lists. The last paragraph provides that if there is no eligibility list, a vacancy may be filled temporarily, for a period not exceeding ninety days, until such a list is available from which to *permanently* fill the vacancy. The last sentence of that paragraph states that any person temporarily filling a vacancy, as described in the paragraph, for a period exceeding twenty days, shall receive the full compensation for that period.

It appears, putting the sentence you quoted into the full context of the paragraph, that the legislature is referring to permanent vacancies where the person previously occupying the position will not be returning to it. "Vacancy" is defined in *Black's Law Dictionary* 1717 (4th ed. 1951) as a place which is empty; an unoccupied or unfilled post or position; an existing office without an incumbent; an office not occupied by one who has a legal right to hold it and to exercise the rights and perform the duties pertaining thereto. We believe that this is what is meant by "vacancy" as it is used in Chapter 365.

Accordingly, we are of the opinion that "vacancy" as used in Chapter 365 does not encompass a situation where the person occupying the position is on vacation or a temporary leave of absence, and has a right to return and occupy the position.

February 7, 1973

CITIES AND TOWNS: Group Insurance for Employees' Dependents — Chapters 400 and 509A, Code of Iowa, 1973; Chapter 1088, Acts of the 64th G.A., Second Session. Municipal light and power trustees may not pay insurance premiums for the dependents of employees. (Blumberg to Griffee, State Representative, 2/7/73) #73-2-6

Honorable William B. Griffee, State Representative: We are in receipt of your opinion request of January 16, 1973, concerning group insurance for employees. In your situation, the city of New Hampton owns its own municipal light and power plant. The employees of the plant are paid from revenues earned by the sale of power. You also made reference to opinions of September 25, 1957, and April 10, 1970, and to the fact that the city is in the process of adopting the new municipal code of Iowa. You specifically asked:

"The questions I would like to raise are these: (1) Are the Municipal Light Plant trustees acting properly in paying for the health insurance for the family

members of the Light Plant employees? (2) Is there anything new in Iowa law since the Attorney General's Opinions mentioned above were rendered which would change the rulings at this time? I am particularly thinking about the provisions of the Home Rule Law."

Chapter 509A, 1973 Code of Iowa, is entitled "Group Insurance for Public Employees." It gives governmental subdivisions authority to set up group insurance programs for employees. Our prior opinions, two of which you referred to, state that governmental subdivisions may not pay the premiums on such insurance for families of the employees. Your situation appears to be different in that it would be the municipal light and power trustees who would pay these premiums out of revenues earned.

Chapter 400, 1973 Code of Iowa, provides for group insurance for waterworks employees in cities having a population of 125,000 or more. Section 400.3 provides in part that "[S]uch plan for group insurance may include insurance coverage for an employee's dependents." There is no similar provision for trustees of municipal utility plants. Because the Legislature specifically provided for group insurance for waterwork employees' dependents with respect to cities having a population of 125,000, without providing for the same with respect to municipal utility plant employees, it is obvious that prior to the Home Rule, insurance premiums could not be paid for families of municipal utility plant employees.

The Home Rule Amendment to the Iowa Constitution provides:

"Municipal corporations are granted home rule power and authority not inconsistent with the laws of the General Assembly to determine their local affairs and government . . . .

The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state."

Chapter 1088, Acts of the Sixty-Fourth General Assembly, Second Session, is the new City Code of Iowa, and the Home Rule law that you referred to earlier. This Act does not give cities home rule, since the constitutional amendment had accomplished that in 1968. Rather, this Act took out many of the prohibitions to further implement home rule. Section 10 of the Act provides that a city may exercise any power and perform any function it deems appropriate, except as expressly limited by the Constitution and if *not inconsistent* with any other law of the legislature.

The words "not inconsistent" have been underscored because any other statute inconsistent with home rule would obviously take precedence. Chapter 509A is controlling as to group insurance for public employees. Our prior interpretations of that chapter's provisions indicate that it prohibits a governmental subdivision or the State from paying the premiums for dependents of employees. The prior rulings were based in part on the fact that public funds should not be used to pay such premiums. The same reasoning applies here. Although these premiums may not be paid out of a city's general fund, the funds involved are still impressed with the public trust, and therefore should be considered as public funds.

Accordingly, we are of the opinion that the municipal light and power trustees may not pay the insurance premiums of the dependents of employees.

February 7, 1973

STATE OFFICERS AND DEPARTMENTS: Revocation of nonresident trapping licenses — §110.1, Code of Iowa, 1973. Upon refund of the fee paid for a nonresident trapping license and in the absence of any other expense incurred in reliance thereon, such licenses may be revoked at the will of the legislature. (Peterson to Mendenhall, State Representative, 2/7/73) #73-2-7

Honorable John C. Mendenhall, State Representative, 13th District: Receipt is hereby acknowledged of your letter of January 15, 1973, wherein you requested an opinion of the Attorney General as follows:

"Currently the Iowa law permits nonresident trappers license. All of our neighboring states, except Nebraska, do not issue nonresident trappers license and do not propose to do so, reciprocal or otherwise. I am proposing a bill to discontinue all Iowa nonresident trappers license. If this bill passes, and I feel that it will, it will not become law until July 1, 1973. We would like to make it retroactive to January 1, 1973. Can we do this legally and constitutionally? I checked with the State Conservation Commission and this will be no problem to them. If any license is issued the money would be refunded and the license cancelled."

A state may require persons wishing to engage in hunting, fishing, or trapping activities within its borders to procure a license from the state to do so. Such a requirement is permitted as an exercise by the state of its general police powers. 35 AmJur2d Fish and Game §29, and authorities cited. The State of Iowa has seen fit to adopt such licensing regulations by its enactment of Section 110.1, Code of Iowa, 1973, which statute provides for the issuance of trapping licenses to nonresidents.

Licenses may be revoked for cause at any time in accordance with the provisions of the licensing statute or ordinance or in the certificate. It is also the general rule that a license may be revoked through the exercise of the same police power that authorized its issuance in the first instance whether or not the power to revoke is expressly or impliedly reserved in the licensing statute. 53 CJS Licenses and Permits §44.

Revocation under the police power for other than cause may be limited on constitutional grounds where contractual or property rights are involved.

In *Rehmann v. City of Des Moines,* 1925, 200 Iowa 286, 204 NW 267, the Iowa Supreme Court stated at page 291: "It is no doubt the general rule that a mere license may be revoked at the pleasure of the licensor." [citing authorities] "But where money has been expended in reliance upon the license, the rule has been frequently held to be otherwise." [citing authorities] This case involved the attempted revocation of a building permit issued by a city after the permittee had incurred expense in reliance thereon (partial construction of basement) in addition to the fee paid the city for the permit. The court held that such building permit issued pursuant to restrictions and regulations in force is more than a mere license revocable at the will of the licensor.

It seems highly improbable that the nonresident holder of an Iowa trapping license would have incurred any expense in reliance thereon other than the fee paid to the state for the license.

We are, therefore, of the opinion that, upon refund of the fees paid to the state for nonresident trapping licenses, such licenses may be revoked at the will of the legislature.

February 7, 1973

STATE OFFICERS AND DEPARTMENTS: Agreements for care and maintenance of state-owned areas by municipalities — §111.27, Code of Iowa, 1973. Final authority for management of a state-owned area which a municipality has agreed to care for and maintain pursuant to §111.27 remains vested in the State Conservation Commission. (Peterson to Ferguson, State Representative, 2/7/73) #73-2-8

The Honorable William R. Ferguson, State Representative, 55th District: We are in receipt of your request for an opinion of the Attorney General as follows:

"The State Conservation Commission has entered into an agreement under Code Chapter 111.27 with the Carroll County Board of Supervisors for the operation and management of Swan Lake State Park in Carroll County. Title to the lands of said park rests with the state, however, under the agreement, management and operation of the park are the responsibility of the Carroll County Board of Supervisors and the Carroll County Conservation Board. County tax money is used for operating the park.

The question which has arisen is this. Does the County Board of Supervisors have the right to set rules for park operation which might be in conflict with operational rules of the State Conservation Commission? The specific rule under discussion is one closing the park at 10:30 p.m. Can the Carroll County Board of Supervisors or the County Conservation Board set the closing time at 11:30 p.m. or later without specific approval of the State Conservation Commission?

Essentially the question is larger than just the matter of the closing time, rather it is a question of final authority to set operational rules for the park."

Pertinent to the ultimate question stated above is Chapter 111, Code of Iowa, 1973, and specifically Section 111.27 which states:

"111.27. Management by municipalities. The commission may enter into an agreement or arrangement with the board of supervisors of any county or the council of any city or town whereby such county, city, or town shall undertake the care and maintenance of any lands under the jurisdiction of the commission. Counties, cities, and towns are authorized to maintain such lands and to pay the expense thereof from the general fund of such county, city or town as the case may be."

Although the catchword title might suggest that the state conservation commission is thereby empowered to enter into agreements permitting management of areas under the jurisdiction of said commission, the section itself authorizes only care and maintenance by such municipalities.

We have also examined the specific agreement between the State Conservation Commission and the Board of Supervisors of Carroll County dated April 26, 1971. Although this document is entitled "Management Agreement", the authority therein delegated by the Commission to said Board of Supervisors deals solely with care and maintenance. Specifically negating any concept of a broader delegation than one relating to care and maintenance is Paragraph 1(b) of the Agreement which states:

"Carroll County agrees to care and maintain said property as a recreation area for the citizens thereof and for the people of Iowa in substantially the same manner as state recreation areas are cared for, maintained *and managed* by the State Conservation Commission." (Emphasis supplied)

The County thereby agrees to provide care and maintenance in substantially the same manner as other state areas are cared for, maintained and managed by the Commission.

Thus, the answer to the ultimate question posed is found in the words "care and maintenance" and the import threof in Section 111.27. Useful to this purpose are the meanings ascribed to said terms by authorities cited as follows:

CARE

". . . painstaking or watchful attention . . ." Webster's Seventh New Collegiate Dictionary.

". . . safekeeping, preservation, security . . ." *Fox West Coast Threatres v. Union Indemnity Company.* 167 Wash. 319, 9 P.2d 78.

MAINTENANCE

". . . the upkeep of property or equipment . . ." Webster's Seventh New Collegiate Dictionary.

". . . The upkeep or preserving the condition of property to be operated . . ." *Orleans Parish School Board v. Murphy,* 156 La. 935, 101 So. 268.

MANAGE

". . . handle, control . . ." Webster's Seventh New Collegiate Dictionary.

"Maintenance connotes a state of physical repair; management and control refer to the manner of its use." *Frye v. Augst,* 1965, 28 Wis.2d 575, 137 NW 2d 430; *Hasselstrom v. Rex Chainbelt, Inc.,* 1971, 50 Wis.2d 487, 184 NW 2d 902.

In light of the above, we are of the opinion that an agreement between a municipality and the state conservation commission consummated pursuant to Section 111.27, Code of Iowa, 1973, may provide for the upkeep and preservation by the municipality of the state-owned area that is the subject of the agreement, but that final authority for management and control of the area remains vested in the state conservation commission, subject to other provisions of Code Chapter 111.

February 12, 1973

SCHOOLS: Teacher's Certificates — §272A.6, Code of Iowa, 1973. Professional Teaching Practices Act enlarges the grounds for which the Board of Educational Examiners may revoke or suspend a teacher's certificate. (Nolan to Benton, State Superintendent, 2/12/73) #73-2-9

Dr. Robert D. Benton, State Superintendent of Public Instruction: You have requested an opinion as to whether or not the provisions of §272A.6, Code of Iowa, 1973, have the effect of enlarging upon the grounds or causes for which the Board of Educational Examiners may revoke or suspend a certificate. As you point out in your letter, §272A.6 places responsibility on the professional teaching practices commision to "develop criteria" for "unprofessional practice" and provides that the commission may hold hearings on violations of such criteria. The commission may recommend that the State Board of Educational Examiners suspend or revoke the certificate of any person for violations as determined by the commission following a hearing.

Prior to the enactment of the Professional Teaching Practices Act (Chapter 272A) the State Board of Educational Examiners had power under §260.23 of

the Code to suspend or revoke certificates "for any cause which would have authorized or required a refusal to grant the same". Code §260.2 sets forth the qualification for teacher certificates as follows:

"The board of educational examiners shall have authority to issue certificates to applicants who are eighteen years of age or over, physically competent and morally fit to teach, and who have the qualifications and training hereinafter prescribed."

The legislature in §272A.6 authorized an additional basis for suspension or revocation of a certificate by the State Board of Educational Examiners with the following language:

"A violation, as determined by the commission following a hearing, of any other criteria so adopted shall be deemed to be unprofessional practice and a legal basis for suspension or revocation of a certificate by the state board of educational examiners."

Accordingly, it is our opinion that the language cited above does have the effect of enlarging upon the grounds for which the Board of Educational Examiners may revoke or suspend a certificate.

February 20, 1973

WELFARE: Mental Health — Legal Settlement — §§230.1, 252.16, Code of Iowa, 1973. An escaped mental patient is presumed incapable of establishing a legal settlement in a county other than that under which he was originally committed. (Williams to Smith, O'Brien County Attorney, 2/20/73) #73-2-10

Mr. Richard T. Smith, O'Brien County Attorney: By your letter of January 9, 1973, you have requested an opinion of the Attorney General as to what county is responsible for the care of a mental patient who has escaped and subsequently been readmitted to a State Mental Health Institute and in which you state:

"1. Patient was admitted to the State Hospital at Cherokee, Iowa, from O'Brien County, Iowa, on November 6, 1967, and was committed to the State Mental Health Institute on November 24, 1967. On December 4, 1967, the patient was transferred to the O'Brien County Home Farm. There is no record in the Office of the Clerk of the District Court in and for O'Brien County, as to his escape. (The Clerk apparently was not notified of his escape.) After his escape the patient resided outside of O'Brien County, Iowa. He was never discharged from the O'Brien County commitment.

"2. That patient has now been readmitted and committed to the State Mental Health Institute. Since his escape he apparently established a new residence outside of O'Brien County, Iowa, and perhaps out of the State of Iowa.

"3. Is O'Brien County responsible for the patient's care and keep in the State Mental Health Institute on this new commitment, or is the County or State of his most recent residence responsible for this care and keep?"

The question you wish answered may be summarized as follows:

"May an escaped mental patient establish a new legal settlement in a county other than that county under which he had originally established legal settlement?"

Chapter 230, 1973 Code of Iowa, prescribes which county shall be responsible for the costs of care and treatment of persons committed to a state hospital.

Section 230.1, 1973 Code of Iowa, provides that such costs shall be paid:

"1. By the county in which such person has a legal settlement, or

"2. By the state when such person has no legal settlement in this state, or when such settlement is unknown.

"The legal settlement of any person found mentally ill who is a patient of any state institution shall be that existing at the time of admission thereto."

Section 252.16, 1973 Code of Iowa, provides how legal settlement may be acquired or changed and reads in pertinent part as follows:

"A legal settlement in this state may be acquired as follows:

"1. Any person continuously residing in any county in this state for a period of one year acquires a settlement in that county.

"2. Any person having acquired a settlement in any county of this state shall not acquire a settlement in any other county until such person shall have continuously resided in said county for a period of one year.

"3. * * * "

It appears from the facts quoted in your letter there is no question that O'Brien County was the county of legal settlement of the patient, at least until the escape of the patient from the O'Brien County Home. It further appears that the patient has resided outside of O'Brien County since his escape in 1968. In the ordinary situation, it is most likely that such a person may have established a new legal settlement outside of O'Brien County under §216, 1973 Code of Iowa. However, the question remains as to whether an escaped mental patient is capable of doing so.

Initially, it must be noted that the terms "residence" and "settlement" are not necessarily synonomous.

The Supreme Court of Iowa, in *State v. Story County,* 207 Iowa 1117, 224 N.W. 232 (1929), discussed the concepts of residence and settlement as follows:

". . . Residence and legal settlement are not synonomous terms. It may be one in one county and the other in another; *but continuous residence for one year . . . makes the place of legal settlement.* The mere fact that he is in the asylum in another county does not change his residence during the period of commitment . . ." [Emphasis added].

Thus, in order to establish legal settlement a person must first establish a residence. The Iowa Courts have long held that the establishment of a residence is a matter of intention. *In re Estate of Jones,* 192 Iowa 78 (1921).

The general rule is that a mentally ill person is incapable of forming the requisite intent to voluntarily change his place of residence.

In 25 AM. JUR. 2d *Domicil,* Sec. 77 it is stated:

"An adult who, because of unsoundness of mind, lacks the actual mental capacity to entertain an intent or to make a choice, necessarily lacks the

capacity to change his domicil voluntarily and by his own act. Therefore, after an adult has been shown or has been judicially determined to be a mental incompetent at the time he departed from his previously established domicil for a new residence or place of abode, it is held that he is, or is presumed to be, incapable of acquiring a domicil of choice absent an affirmative showing that he in fact has sufficient mentality to choose a new domicil, and his domicil therefore continues to be what it was when he became incompetent."

See also, 96 A.L.R. 2d 1231, 1243; Restatement, *Conflict of Laws*, §40, Comment (a).

A previous opinion of the attorney general, although not precisely on point, bears directly on the question you present.

In 1946, O.A.G. 121, the Attorney General held that where a patient in the Clarinda State Mental Health Institute was paroled and discharged as "not cured", it must be presumed that the patient's insanity would continue. *Foy v. Metropolitan Life Insurance Company*, 220 Iowa 628, 263 N.W. 14 (1935). Therefore such a patient could not form the intent to change her residence and it would be impossible for the patient to acquire a different legal settlement than that under which she was committed.

The result reached in 1946 O.A.G. 121 would be even more applicable in the situation of an escaped mental patient, for the reason that in such a situation there is not even a provisional discharge or parole involved.

Although it does not appear that the Iowa courts have been faced with the exact question posed by you, the Iowa Supreme Court has dealt with the problem of domicile of mentally ill persons, and has indicated that it would take a rather negative view as to whether an insane person is capable of changing his domicile.

In Hindorff v. Woodmen, 150 Iowa 185 (1911), the Supreme Court stated:

"There is no question as to the proposition that the legal domicile of a minor child is that of the father, regardless of the actual place of residence of such child, *and that a person of unsound mind is incapable of a voluntary change of domicile*, [Emphasis Supplied].

In *Sullivan v. Kenney*, 148 Iowa 361 (1910), the Court found that an adult could not change his domicile from Iowa to California because he lacked the mental capacity to do so, *even though the man had not been formally adjudged mentally ill*. [Emphasis supplied].

In *Turner v. Ryan*, 223 Iowa 191 (1937), the Court held that a child who was not a "normally developed child" and was a fit subject for guardianship could change her domicile from Des Moines to California. Arguments that she was incompetent to do so were dismissed by the Court primarily for the following reason:

". . . The difficulty with the trustee-Ryan's contention is that the record fails to show that Susie P. Turner *is an idiot or imbecile, or that she was ever adjudged so.*" [Emphasis Supplied].

Other jurisdications have held, in particular cases, that a mental patient may change his domicile, but such cases are of little precedental value, since each such case turns on its own facts. *Mathews v. Mathews*, 141 So. 2d 799 (1962).

It is therefore our opinion that O'Brien County would remain the county of legal settlement of the escaped mental patient upon his readmittance to one of the State Mental Health Institutes. It would be incumbent upon the county to rebut the presumption that the patient remained insane and incapable of forming the intent to change his place of residence, and consequently his legal settlement. This conclusion remains, notwithstanding the provisions of §230.1, 1971 Code of Iowa, providing that the legal settlement of a person admitted to a state institution is that existing at his time of admission thereto, for the reasons discussed previously in this opinion.

February 23, 1973

COUNTIES AND COUNTY OFFICERS: Sheriff — §340.7, Code of Iowa, 1973. County has authority to provide quarters to house the jailer and if supervisors determine that quarters formerly provided the Sheriff are better suited for the jailer then the Sheriff is entitled to be furnished a residence or the allowance provided by §340.7, Code of Iowa, 1973. (Nolan to Faulkner, Mahaska County Attorney, 2/23/73) #73-2-11

Mr. Hugh V. Faulkner, Mahaska County Attorney: You have requested an opinion of the Attorney General on the question of whether the Sheriff may house the jailer in the old Sheriff's quarters and receive the residence allowance provided by §340.7, Code of Iowa, 1973. According to your letter the county has quarters for the Sheriff to reside and the Sheriff in the past has resided within those quarters which are next to the county jail. However, there is no place for the jailer to live other than in a jail cell where in the past the jailer has lived. The Sheriff intends to employ a jailer to live in what used to be the Sheriff's quarters while he himself will be living in his own home.

Section 340.7, Code of Iowa, 1973, provides:

" * * *

"13. In counties where the sheriff is not furnished a residence by the county, an additional sum of seven hundred and fifty dollars per annum in addition to the foregoing schedule. The foregoing additional allowance for residence shall not be considered as salary in computing the salary of deputies as provided in section 340.8."

In the opinion of this office issued on February 1, 1971, this office advised that the county is required to furnish only one residence for the Sheriff and the Board of Supervisors has discretion to determine whether the residence is suitable and adequate for the Sheriff and his family. There is no provision that the Deputy Sheriff or jailer be provided with a residence or a residence allowance. 1966 OAG 109.

Further, the opinion stated that it depends upon whether or not the Board of Supervisors has consented to the jailer occupying housing formerly provided for the Sheriff. If this is the case and the residence is no longer available to the Sheriff, then he should be paid the residence allowance. Accordingly, it is not for the Sheriff to turn over to a Deputy Sheriff the quarters provided him by the county and then to receive the statutory allowance in lieu thereof. However, it may be fairly implied that the county has authority to provide quarters for housing the jailer, and if the supervisors determine that quarters formerly provided the Sheriff are better suited to the jailer, then the Sheriff is entitled to the residence allowance as set out in §340.7 of the Code, supra.

February 23, 1973

STATE OFFICERS AND DEPARTMENTS: State Mine Inspector — §§68A.7, 82.1(4), 82.12, Code of Iowa, 1973. The State Mine Inspector has the responsibility for preparing a biennial report and the State Mining Board may not set guidelines to be followed in that report. The State Mine Inspector may exclude production data for individual mines from his report, and such data could be kept secret if it would reveal a trade secret or give an advantage to competitors. (Voorhees to Aubrey, State Mine Inspector, 2/23/73) #73-2-12

Mr. W. Dean Aubrey, State Mine Inspector: This letter is in response to your request for an opinion regarding the administrative duties of the State Mining Board, with particular reference to the biennial report of the State Mine Inspector.

There are two relevant provisions of Chapter 82, Code of Iowa, 1973.

Section 82.1 provides:

"There is hereby established a department of mines and minerals which shall consist of the state mine inspector and a state mining board as hereinafter created:

* * *

"4. To make available to all interested parties information relative to the production of coal and other minerals within the state . . ."

Section 82.12 provides:

"The *three inspectors* shall maintain a general office at the seat of government and keep therein all records, correspondence, documents, apparatus, or other property pertaining to their office; they shall at the time provided by law, *make a biennial report* to the governor of their official doings, including therein all matters which by this chapter are specially committed to their charge, adding such suggestions as to needed future legislation as in their opinion may be important." (Emphasis added).

Section 82.1 gives the State Mining Board and the State Mine Inspector joint responsibilities for carrying out the provisions of that section, including those set out in paragraph 4 above. The Board and the Inspector may disseminate information, including or in addition to that contained in the Inspector's biennial report. The Board would have the authority, along with the Inspector, to determine how best to carry out this duty.

However, §82.12 specifically directs the State Mine Inspector to make a biennial report. The State Mining Board may not set guidelines to be followed in that report. The biennial report is the responsibility of the Mine Inspector, not the Board. The question of whether production data from individual mines should be included in the biennial report is to be determined by the Mine Inspector. Section 82.12 sets up general guidelines for the format of the report, but does not specifically require the inclusion or exclusion of such data.

There is another aspect to this question, however. Chapter 68A, Code of Iowa, 1973, provides that any Iowa citizen has the right to examine the records of any governmental agency, with the exception of certain confidential records. Thus, it is possible that the Department of Mines and Minerals could be required to release production data from individual mines even though such data could be excluded from the Inspector's biennial report.

Section 68A.7 provides that certain records may be kept confidential.

"The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information:

* * *

"3. Trade secrets which are recognized and protected as such by law.

* * *

"6. Reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose."

There may be some circumstances in which the revealing of production data from individual mines would reveal trade secrets or give an advantage to competitors. We are not in a position to judge when this would be the case. The custodians of this data are in the best position to make that judgement. We would only caution that this data could not be kept secret without good cause.

February 23, 1973

COURTS: Judge or Magistrate to hear cases involving use of alcohol — Art. V, §§16 and 17; §§602.18(11), 602.42-602.65, Code of Iowa, 1973. A provision of the Unified Trial Court Act which authorizes the Governor to appoint another judge or magistrate to serve so long as federal funds are available to pay for his salary and support and to hear cases in which the use of alcohol is evident is unconstitutional. (Haesemeyer to Wythe Willey, Executive Assistant to the Governor, 2/23/73) #73-2-13

Mr. Wythe Willey, Executive Assistant to the Governor: Reference is made to your letter of January 26, 1973, in which you state:

"In considering the possibility of the Governor appointing a judge under Section 7 of the new Uniform Trial Court Bill, several questions have been raised considering the constitutionality of this Section.

"Therefore, we respectfully request your opinion as to whether or not an appointment under this section of the law would be constitutional and proper."

The Uniform Trial Court Act was enacted as Chapter 1124, 64th G.A., Second Session (1972) and has since been codified in Chapter 602, Code of Iowa, 1973. The provision of the Session Laws to which you make reference, Section 7, is found in Section 602.18(11) which provides:

"The governor may appoint a person to serve as a judge or magistrate whenever federal funds are available for his salary, the cost of courtroom space, and the salary of any additional court staff. The person appointed by the governor shall fill the position until his successor is appointed or until federal funds are no longer available as required in this section. The person appointed under this section may hear all cases in which the use of alcohol is evident, and any prosecution under section 321.281 may be transferred within the judicial district to the jurisdication of the person appointed under this subsection."

It is quite clear that to the extent the language quoted above purports to give the Governor the authority to appoint another judge, it is unconstitutional. With the enactment of the Uniform Trial Court Act there is only one kind or class of judge known to the law and that is a District Court Judge. Municipal Courts are abolished and the creation of new Municipal Court judgeships

prohibited. Section 602.35. There is a provision in Section 602.28 for phasing out sitting Municipal Court judges through the device of designating them as District Associate Judges. Obviously, Section 602.18(11) is not speaking of Supreme Court Justices or Judges.

The constitutional provisions with respect to the appointment and tenure of the District Court Judges are quite plain and clearly at odds with Section 602.18(11). The latter provision purports to give the Governor the authority to appoint another judge but the Constitution, Article V, Section 16, requires any appointments to the District Court Bench to be made from nominees selected by District Judicial Nominating Commissions. In addition. Section 602.18(11) provides that the person appointed to the additional judgeship is to fill the position until his successor is appointed or until federal funds are no longer available. But Article V, Section 17 of the Constitution provides:

"Members of all courts shall have such tenure in office as may be fixed by law, but terms of Supreme Court Judges shall be not less than eight years and terms of District Court Judges shall be not less than six years. Judges shall serve for one year after appointment and until the first day of January following the next judicial election after the expiration of such year. They shall at such judicial election stand for retention in office on a separate ballot which shall submit the question of whether such judge shall be retained in office for the tenure prescribed for such office and when such tenure is a term of years, on their request, they shall, at the judicial election next before the end of each term, stand again for retention on such ballot. Present Supreme Court and District Court Judges, at the expiration of their respective terms, may be retained in office in like manner for the tenure prescribed for such office. The General Assembly shall prescribe the time for holding judicial elections."

Since the tenure of a District Court Judge appointed pursuant to Section 602.18(11) would by the terms of the statute be contingent upon the availability of federal funds, it is evident that he would not necessarily be in a position to serve the specified terms provided in Section 17 of Article V of the Constitution.

Questions similar to the one that you have presented have been dealt with in the Iowa Court system previously. In *Wilson v. Shaw,* 1922, 194 Iowa 28, 188 N.W. 940, the Supreme Court held that the office of the District Judge is a constitutional office, and neither the Legislature nor the Court can give such mandatory provisions a meaning other than that prescribed by the fundamental law. It has been consistently held by the State Supreme Court that the Legislature may enact any law not clearly and plainly prohibited by State or Federal Constitution, *Carrol v. City of Cedar Falls,* 1935, 221 Iowa 277, 261 N.W. 652; *Becker v. Board of Education of Benton County,* 1965, 258 Iowa 277, 138 N.W.2d 909. The Supreme Court has stated repeatedly, the General Assembly has the power to enact any kind of legislation it sees fit, provided it is not clearly and plainly limited by its own Constitution, *State v. Arluno,* 1936, 222 Iowa 1, 268 N.W. 179; *Dickinson v. Porter,* 1949, 240 Iowa 393, 35 N.W.2d 66, appeal dismissed 338 U.S. 843. It should also be noted that whenever the Constitution and a statute conflict, the Constitution has always prevailed, *Patterson v. Iowa Bonus Board,* 1955, 246 Iowa 1087, 71 N.W.2d 1; *Selzer v. Synhorst,* 1962, 253 Iowa 936, 113 N.W.2d 724.

Accordingly, it is our opinion that to the extent that Section 602.18(11) authorizes the Governor to appoint an additional Judge, the same is unconstitutional by reason of its provisions with respect to appointment and tenure.

However, Section 602.18(11) also used the term magistrate. Since as we have seen the Governor may not appoint an additional Judge under the provision, we must next seek to determine whether or not he may appoint an additional magistrate. The Unified Trial Court Act, Sections 602.42 through 602.65 lays out in considerable detail the manner of appointment, term of office, qualifications, method of removal and jurisdiction of the judicial magistrates authorized under Chapter 602. These provisions are clearly at odds with the terse language of Section 602.18(11) authorizing the appointment of an additional judge or magistrate where federal funds are available. The inconsistency is obvious. On one hand the Legislature devised a system of appointment through an appointing board but on the other hand, they waive this procedure and give the Governor appointing power. It should be noted though, that it has been consistently held by the Iowa Courts that all parts of an act are to be construed if possible so as to harmonize various provisions and give force and effect to each and every part. Each part of a statute must be preserved if reasonably possible, see *Brutsche v. Incorporated Town of Coon Rapids,* 1934, 218 Iowa 1073, 256 N.W.914; *Ledyard Community School District v. County Board of Education of Kossuth County,* 1967, (Iowa), 153 N.W.2d 697. At this point then, we are to determine if the granting to the Governor of the power to appoint judicial magistrates under the Unified Trial Act is possible and reasonable.

An examination of Section 602.18(11), Code of Iowa, 1973, reveals a number of construction and interpretation problems. Line one states:

"The governor may appoint a person to serve as a judge or magistrate whenever federal funds are available for his salary, the cost of court room space, and the salary of any additional court staff."

As stated earlier, the appointment of a "district court judge" is unconstitutional under Article V of the Iowa Constitution; we presume the Legislature did not mean "municipal court judge" because that species of judicial office is being phased out by Section 602.35, Code of Iowa, 1973. The phrase "whenever federal funds are available" is a very general statement in light of the complexity of federally funded programs. Is this to mean, whenever there are matching funds provided by the State or when there is total federal backing?

A question also arises as to what would happen if there are sufficient funds to pay for a magistrate's salary and costs of court room space but not the additional court room staff? Would the magistrate be dismissed or would the State pick up the slack — Section 11 seems to demand full expense payment by the federal government. Also, what is additional court room staff — a court reporter, the magistrate's secretary, his clerk or even a court-appointed attorney?

Line two of Section 11 states:

"The person appointed by the Governor shall fill the position until his successor is appointed or until federal funds are no longer available as required in this section."

First of all, this section seemingly contravenes §602.50 regarding the appointment and termination of judicial magistrates. This section deliniates specific terms for the magistrates; there are different terms for full-time and part-time magistrates. But, the wording of §602.18(11) could be interpreted to

mean a magistrate could hold office until death, until he reached age 72 (§602.52), loss of federal funds, or any combination of the above. There is no provision for a magistrate's retirement or his removal under §602.18(11) as there is under the rest of the Chapter. Probably one of the biggest problems develops because of the mandatory allottment of magistrates to a county under §§602.57 and 602.59. There is a provision for additional magistrates in a county but, §602.58 provides that the additional magistrate be appointed by a County Judicial Magistrate Commission. Would a magistrate appointed under Section 602.18(11) be included in computing the allottment described in section 602.59? These questions raise serious doubts as to the validity of this section of the Act.

Section 602.60 provides:

"Judicial magistrates shall have jurisdiction of nonindictable misdemeanors, including traffic and ordinance violations, preliminary hearings, search warrant proceedings, forcible entry and detainer actions, and small claims. They shall also have the powers specified in section 748.2. They shall have power to act any place within the district as directed, and venue shall be the same as in other district court proceedings. Judicial magistrates serving on a full-time basis and district associate judges shall have jurisdiction of indictable misdemeanors. While exercising that jurisdiction they shall employ district judges' practice and procedure."

The third line of §602.18(11) states:

"The person appointed under this section may hear all cases in which the use of alcohol is evident, and any prosecution under §321.281 may be transferred within the judicial district to the jurisdiction of the person appointed under this subsection."

Again, the confusion from the vagueness is obvious. The phrase "in which the use of alcohol is evident" could be utilized to encompass a vast number of offenses. The term undoubtedly includes both civil and criminal actions; a quick glance at the *index* to the Code of Iowa under the word "intoxication" reveals a substantial list of offenses that involve the use of alcohol — ranging from revocation of an architect's license to injuries under the workmen compensation statutes. The exact utilization of this broad phrase would only be determined by jurisdictional battles in the magistrate's court. No doubt there would be a great number of cases including a wide range of felonies in which the use of alcohol might very well be evident. Yet Section 602.60 generally speaking would appear to limit the jurisdication of a judicial magistrate to at most indictable misdemeanors.

The various conflictions that become evident after a comparison of §602.18(11) with the rest of Chapter 602 raise serious doubts to the workability and the validity of the Subsection. Supporting the invalidity of the Subsection are a number of Iowa cases that hold that where the language of a part of a section of an act is in conflict with the language and leading design as expressed in several other sections, the leading and prevailing portions will be followed, *Noble v. State,* 1848 (Iowa), 1 G. Greene, 325; *In re Sale of Liquors in Valley Junction,* 1915, 169 Iowa 162, 150 N.W. 86. The "leading design" of Chapter 602 of the Iowa Code provides for the establishment of appointing commissions, specified terms of office and a mandatory allottment of magistrates but Subsection 11 of §602.18 ignores these procedures. It is a general rule of statutory construction in Iowa that when a particular expression in one part of a statute, not so large and extensive in its import as other

expressions in the same statute, will yield to the larger and more extensive expressions, with the latter embody the real intent of legislature, *In re Sale of Liquors in Valley Junction,* 1915, 169 Iowa 162, 150 N.W. 86; *Story County v. Hansen,* 1916, 178 Iowa 452, 159 N.W. 1000; (See also *In Re Brown,* 1971, (D.C. Iowa) 329 F. Supp. 422).

In light of the foregoing, it is our opinion that Section 602.18(11) is void for vagueness, so incomplete and inconsistent that it cannot be executed, is irreconcilably in conflict with the manifest purpose and leading design of the unified Trial Court Act as found in the other provisions of Chapter 602, and is insusceptible of a construction which could give intelligent purpose to its provisions.

February 23, 1973

CITIES AND TOWNS: Councilmen — Ch. 1024, Acts of the 64th G.A., 2nd Session (1972). Terms of incumbent councilmen are not cut short by mere ward boundary changes. (Turner to Synhorst, Secretary of State, 2/23/73) #73-2-14

The Honorable Melvin D. Synhorst, Secretary of State: It has come to our attention that a number of questions have been raised concerning the application of our opinion to you of December 1, 1972, as clarified by our subsequent opinion of December 12, 1972, relative to the necessity of city councilmen to have their terms cut short by reason of changes in ward boundaries and reprecincting required pursuant to Chapter 1024, 64th G.A., 2nd Session (1972), as a result of the 1970 Census.

The portion of our December 1, 1972, opinion which requires clarification reads as follows:

"Any time there is a change in a ward, such as we have had in 1972, there is a change in the complexion of the electorate of that ward. To require the electorate of a new ward to accept the representation of an incumbent, chosen by the old electorate beyond the next general election, is repugnant and contrary to the principle of equal representation. The purpose of reapportionment and reprecincting is not only to provide for more equal representation, but also to provide for representation, as soon as possible. To keep the incumbent in office in a new ward beyond the next general election is contrary to this belief and principle. It is in the best interests of the electorate that elections for new wards be held at the next general election. Consequently, we are of the opinion that all incumbent councilmen whose wards have been changed in 1972 should run for re-election in 1973."

Our conclusions set forth above were predicated primarily on the sweeping language employed and broad relief granted in the last legislative redistricting decision of the Iowa Supreme Court. *In Re Legislative Redistricting of General Assembly,* Iowa, 1972, 193 N.W.2d 784. In that decision the Supreme Court, in the face of a constitutional provision for four year terms for Senators, nevertheless cut short the terms of all state Senators regardless of whether or not they were thrown into a district with another Senator. However, in so doing the court had the benefit of constitutional authority for its action. Article III, §35.

In the case of city councilmen there is no express provision for cutting short terms either as a statutory or constitutional matter. Under §4, Chapter 1024, 64th G.A., 2nd Session (1972), all cities and towns were required to establish

new election precincts where it was necessary to do so to comply with the requirements of Chapter 1024, 64th G.A., 2nd Session (1972) and §49.5, Code of Iowa, 1973. Under §49.5 requirements were imposed relative to redistricting city election precincts. The precincts were required to follow the boundaries of areas for which official population figures were available from the most recent Federal Decennial Census, every precinct was required to be contained wholly within an existing legislative district and no precinct was permitted to have a population in excess of 3,500 persons. These requirements, coupled with the extensive redrawing of legislative district lines by the Supreme Court, made it necessary for many cities to establish new election precincts. And in so doing they also made changes in their ward boundaries.

In an earlier opinion of the Attorney General the question was raised as to whether or not where a form of city government was changed from a five member council to a ward system there would be any holdover councilmen. In that opinion, 1968 OAG 200, we observed:

"There is no doubt of the power of the legislature which creates an office to abolish it or to change it, and the legislature may shorten or lengthen the term of office itself, in the absence of constitutional inhibition. 43 Am.Jur., Public Officers, §151. However, it is well settled that statutes will not be construed to change the terms of incumbent officers unless the intent is plainly and clearly expressed. 67 C.J. S. 201."

Counsel for Respondents in both of the most recent legislative reapportionment cases strenuously urged the rationale of *Selzer v. Synhorst,* 1962, 253 Iowa 936, 113 N.W.2d 724, upon the court. The court, however, chose to reject these arguments resting its conclusion primarily on the fact that the Iowa constitution authorized it to cut short the terms of incumbents. Nevertheless the court did not specifically overrule *Selzer v. Synhorst.* In that case the court said at 253 Iowa 947:

"The idea that we are personally represented and represented only by officials for whom we have voted stretches too far the theory of representative government."

And at page 948:

"A Senator represents either the people of the state as a whole as suggested by the trial court, or the people within the district existing during the tenure of his office. He is not a mere mouthpiece for those who voted for him. He is a legislative representative of the people exercising his authority for the welfare and protection of all. We cannot think any member of the Senate would be so narrow as to confine his representation solely to those who voted for him or those counties assigned to him."

And at page 950:

"As soon as there is a Senator to be elected from their district, they can vote. Until there is an election or some one or some thing to vote for, the question of the right to vote is academic but not real. There is no denial of a right to vote until there is an election. There is no disenfranchisement as to a particular office when there is no vacancy to be filled. The Constitution does not say a voter is entitled to vote for every office in our national or state government at every election. It does say he is entitled to vote at all elections authorized by law. That simply means he is entitled to vote on candidates and propositions submitted to the voters in his voting precinct."

It is evident from *Dunham v. Sauter,* 201 N.W.2d 75, that the Iowa court imposes less stringent standards of population equality on the districts of political subdivisions and it is reasonable to assume that a liberal view would be taken with respect to the desirability of recognizing the aspects of continuity of government operations by allowing incumbent officers to complete the terms to which they were elected wherever possible.

Accordingly, it is our opinion that terms of incumbent city councilmen are cut short only where two or more councilmen are thrown together in the same ward. This opinion is intended to clarify the December 1, 1972, opinion. Obviously, where the only changes are in the boundaries of election precincts as opposed to wards, there would be no problem and duly elected councilmen would continue to represent their wards.

February 23, 1973

STATE OFFICERS AND DEPARTMENTS: Terrace Hill Committee, Copyright and Trade-Name — Chapter 548, Code of Iowa, 1973. The name "Terrace Hill" may not be copyrighted, however, it is likely that it could be registered as a trade-name. (Haesemeyer to Mills, Chm. Terrace Hill Committee, 2/23/73) #73-2-15

Mr. George Mills, Chairman, Terrace Hill Committee: This opinion is in response to your request as to whether the name "Terrace Hill" could be copyrighted.

It is the opinion of this office that the name "Terrace Hill" may not be copyrighted. First of all, copyright control is under the exclusive power of the Fedeal government, see Article I, §8 of the U. S. Constitution. Section 202.1 of Title 37 of the Code of Federal Regulations states:

"The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:

"(a) Words and short phrases such as *names, titles,* and *slogans;* . . ." (Emphasis Added)

It has been consistently held that items such as names and slogans are not subject to copyright, *Wilson v. Hecht,* 1915, 44 App. D.C. 33; *Gray v. Eskimo Pie Corp.,* Dec. 1965, 244 F.Supp. 785 D.C.

It should, however, be noted that one who produces or deals in a particular thing or conducts a particular business may acquire a trade-name. Trade-names may be established without copyright. 'Geographical terms and words in common use to designate a locality, a country or a section of a country cannot be monopolized as trade-names but a geographical name not used in a geographical sense to denote place of origin, but used in an arbitrary or fanciful way to indicate origin or ownership regardless of location, may be sustained as a trade-name, *Allen B. Wrisley Co. v. Iowa Soap Co.,* C.C.A. Iowa 1903, 122 F. 796, 59 C.C.A. 54. The 64th General Assembly officially designated the new Governor's mansion as "Terrace Hill", Laws of the 64th G.A. Chap. 293, First Session and Laws of 64th G.A., Chap. 1132, Second Session. The feasibility of utilizing "Terrace Hill" as a trade-name is balanced between two points. Because it is now a geographical term in a sense, i.e. the location of the Governor's mansion, there is some Iowa case law that discourages such use, see *Allen B. Wrisley Co. v. Iowa Soap Co., supra* and *Shaver v. Heller & Merg Co.,* C.C.A. Iowa 1901, 108 F. 821, 48 C.C.A. 48, 65 L.R.A.

878. However, use of the trade-name "White House" was held valid in a 1906 action, *Dwinnell-Wright Co. v. Cooperative Supply Co.,* C.C. Pa. 1906, 148 F. 242. Even though "White House" is a geographical term in a strict sense, the courts initiate the geographical term limitation only in situations where the term is used to denote place of origin. The Iowa courts and other Federal district courts appear to only limit the use of geographical terms and words that designate *locality, a country,* or *a section of a country;* not specific residences or street addresses. Therefore, it would seem that "Terrace Hill" may be used as a trade-name but, before this may be done the requirements of Title 15, Chapter 22 of the U. S. Code regarding trade-marks and trade-names must be satisfied. The law of trade-marks and trade-names is identical, *Farmers' Educational and Coop. Union of America v. Iowa Farmer's Union,* 1957, 150 F. Supp. 422, affirmed *Stover v. Farmers' Coop. Union of America,* 1957, 250 F2d. 809, cert, denied, 356 U.S. 976.

Your attention is also directed to Chapter 548, Code of Iowa, 1973, relative to registration of trade-marks and trade-names with the Iowa Secretary of State.

March 6, 1973

STATE OFFICERS AND DEPARTMENTS: Drainage Districts — Interest bearing warrants with maturity date — §455.77, Code of Iowa, 1973. It is within sound discretion of governing boards of drainage districts to issue interest bearing warrants with a maturity date stated thereon to meet the cost of drainage improvements, such maturity date to be clearly stated on face of the warrant in a place and manner reasonably calculated to provide notice thereof to holders of such warrants. (Peterson to Stromer, State Representative, 3/6/73) #73-3-1

The Honorable Delwyn D. Stromer, State Representative: Receipt is hereby acknowledged of your request for an opinion of the Attorney General on the following questions:

"Would you please render me an opinion if it is legal for a board of supervisors to issue interest bearing warrants with a specific maturity date on each warrant for drainage district improvements as described in Sec. 455.77, Code of Iowa, 1971? Is so, can the board of supervisors use their own [discretion] in affixing the date and where on the warrant would this date be affixed?"

Your attention is directed to the first unnumbered paragraph of Section 455.77, Code of Iowa, 1973, which relates to the questions posed in the following terms:

"455.77 Installment assessments — interest-bearing warrants — improvement certificates. The board may provide by resolution for the payment of assessments in not more than twenty annual installments with interest at not to exceed seven percent per annum. The board may issue warrants bearing interest at the same rate, which warrants shall be numbered and state a maturity date in which event they shall bear interest from the date of issuance without being presented for payment and marked unpaid for want of funds. The warrants may be sold by the board for cash in an amount not less than the face value thereof, together with accrued interest, if any."

Said paragraph was added to Section 455.77 by the enactment of House File 16, Sixty-third General Assembly, which became effective July 1, 1969, except that the five percent (5%) interest rate specified therein was subsequently increased to seven (7) [Chapter 1032, Section 5, Sixty-third General Assembly,

Second Session]. House File 16 was formulated by the Drainage Laws Study Committee of the General Assembly following a four-year study. An explanation of the proposed addition of the paragraph above, contained in the Report of the Iowa Legislative Research Committee, 1969, in pertinent part, states:

"[House File 16] permits drainage and levee districts to provide for payment of assessments on benefitted land in up to twenty equal installments, with interest at not to exceed five percent per year, and to issue warrants, bearing interest at the same rate, which show a specified maturity date in lieu of being stamped to indicate nonpayment for lack of funds. This additional authority will give drainage and levee districts added flexibility in financing their improvements."

Thus, in clear and unambiguous terms, Section 455.77 empowers the governing boards of levee or drainage districts to issue interest bearing warrants to meet obligations arising from district improvements.

Since Chapter 455 also authorizes such boards to fund such improvements by various other means with no priority or legislative preference stated, the means of funding such improvements within the methods authorized by Section 455.77 is left to the sound discretion of the governing board.

Although not specifically required by Section 455.77 above, the date of maturity of such warrants as determined by the governing board should be clearly stated on the face of the warrant in a place and manner reasonably calculated to provide notice thereof to holders of such warrants.

March 6, 1973

STATE OFFICERS AND DEPARTMENTS: Beer & Liquor Control Department; Authority to director to regulate retail beer prices. Chapter 131, §21(6), Acts of the 64th General Assembly, First Session (1971). The director of the Iowa Beer and Liquor Control Department does not have the authority to regulate prices of beer at the retail price level. (Jacobson to Gallagher, Director Iowa Beer & Liquor Control Department, 3/6/73) #73-3-2

Rolland A. Gallagher, Director, Iowa Beer and Liquor Control Department: This is to acknowledge receipt of your letter dated November 1, 1972, in which you requested an opinion from this office as follows:

"Section 21, Paragraph 6, Chapter 131, Acts of the 64th General Assembly reads as follows:

" '6. Providing for the issuing and distributing of price lists showing the price to be paid by purchaser for each brand, class, or variety of liquor kept for sale under this Act. Provide for the filing or posting of prices between class "A" beer permit holders and retailers as provided in this Act, and establish or control such prices as may be based on minimum standards of fill, quantity, or alcoholic content for each individual sale of intoxicating liquor or beer as deemed necessary for retail or consumer protection.'

"Our Beer & Liquor Control Department Council interprets this, that we do have the authority to regulate the posting of price lists between Class "A" beer permit holders and retailers. However, there is a question in our minds as to whether or not we have the authority to regulate prices at the retail level and to establish minimum price mark-up."

Your question can be answered by making an analysis of the second sentence of §131.21(6), Acts of the 64th General Assembly, First Session. That sentence begins by giving the director the authority to, "Provide for the filing

or posting of prices between class 'A' beer permit holders and retailers of beer." The sentence continues with the language "and establish or control such prices . . ." This latter language is the crux of your inquiry. Since the phrase "and establish or control such prices . . ." begins with the word "and", which is conjunctive in nature, it is apparent because of the use of the word "and", that the legislature intended that part of the sentence to be read in conjunction with the language which immediately proceeds it. In the case of *Holmes v. Gross,* 250 Iowa 238, 93 N.W.2nd 714 (1958) the Iowa Supreme Court held that the word "and" is used to add something to what has already been said. Thus, the language "and establish or control such prices," refers back to the prices spoken of in the first part of the sentence; i.e. the prices between class "A" beer permit holders and retailers. Therefore, it is the opinion of this office that this Section should not be read as giving the director the authority to regulate prices at the retail level.

March 6, 1973

WELFARE: Social Services, Food Stamp Program — §§234.11 and 234.6, Code of Iowa, 1973. The County Department of Social Services, not the County Board of Supervisors, is responsible for local administration of the Food Stamp Program. County Food Stamp employees are under the jurisdiction of the County Department of Social Services and the Iowa Department of Social Services, not the County Board of Supervisors. (Williams to Wehr, Scott County Attorney, 3/6/73) #73-3-3

Mr. Edward N. Wehr, Scott County Attorney: Iam in receipt of your letter of December 6, 1972, in which you request an opinion of the attorney general as to the following questions:

"1. Under the Iowa law, is not the County Board of Supervisors, vis-a-vis the Department of Social Services, the body responsible for the food stamp program in the county?

"2. Are the employees engaged in the food stamp program County Employees, hence under the jurisdiction of the Board of Supervisors?

"3. What organization would be responsible for the actual dispensing of food stamps?"

In answer to the first question posed by you, I refer you to 7 U.S.C. §2019(b) "Food Stamp Program" [P.L 88-525 88th Congress, H.R. 10222, August 31, 1964, "Food Stamp Act of 1964" subsection 10(b)]. That subsection reads in part as follows:

"(b) The State agency of each participating State shall assume responsibility for the certification of applicant households and for the issuance of coupons: PROVIDED, That the State agency may, subject to State law, delegate its responsibility in connection with the issuance of coupons to another agency of the State government . . ."

Subsection 10(e) of the Food Stamp Act of 1964, as amended by P.L. 91-671, 91st Congress, H.R. 18582, January 11, 1971 [7 U.S.C. §2019(e)] provides:

"(e) The State agency of each State desiring to participate in the food stamp program shall submit for approval a plan of operation specifying the manner in which such program will be conducted within the State, the political subdivisions within the State in which the State desires to conduct the program, . . ."

The Federal Regulations promulgated pursuant to the above-cited Congressional Acts, as found in Federal Register, Title 7, Chapter II, Subchapter C, Section 270.3(b) (July 1, 1972), provide in pertinent part as follows:

"The State agency shall, except as provided in this subchapter, be responsible for the administration of the program within the State, . . . If such administrative responsibility is delegated as permitted by this section, the other agency of the State government shall administer the applicable provisions of this subchapter under the direction of the State agency . . . ."

On November 18, 1971, the "Iowa Food Stamp Program — State Plan of Operation" was approved by the Food and Nutrition Service of the U.S. Department of Agriculture. Said "State Plan" identified the Iowa State Department of Social Services as the single State Agency authorized to administer the Federal Food Stamp Program within the State of Iowa, pursuant to Section 234.6, 1973 Code of Iowa.

The "State Plan" further provides, (See: Division III) under the heading, *Responsibility of County Agencies,* as follows:

"The County Department of Social Services is responsible for the local administration of the program within State and Federal Guidelines . . ."

Section 234.11, 1973 Code of Iowa, reads in part:

"Each county shall participate in federal commodity or food stamp program."

The Iowa Department of Social Services, pursuant to authority granted by Section 234.6, 1973 Code of Iowa, has promulgated certain Rules and Regulations relating to the operation of the Food Stamp Program within the State of Iowa. These Rules and Regulations are duly published as Title VII, *Food Stamp Program,* Chapter 65, page 147 of the July 1972 Supplement of the Iowa Departmental Rules. Pertinent portions of these Rules read:

"65.1(3) County. Whenever "county" is used in this title it shall mean the county department of social services."

"65.2(234) Chief administrator. The commissioner of the department shall be the chief administrator of the program."

"65.3(234) Department responsibilities. The Department shall have overall responsibility for the administration of the program. These responsibilities shall include but not be limited to:

65.3(1) The over-all supervisory responsibility for the program."

Thus, the actual responsible body for the local administration of the food stamp program in Iowa is in the County *Department* of Social Services under the "over-all supervisory responsibility" of the Iowa *Department* of Social Services.

II

In your second question you ask if the employees working in the food stamp program are under the jurisdiction of the Board of Supervisors.

To this question, the answer is no. They are "county employees" [as distinguished from "state employees" under *Fenton v. Downing,* 261 Iowa 965 (1968)] but those working in the food stamp program can be either employees

hired by the County Board of Welfare *or* the employees *hired* by the County Board of Supervisors, depending upon the arrangements worked out between the two Boards in each particular county with the approval of the State Department of Social Services as supervisory agent. *In either event, however, whether they are County Board of Supervisors' employees working in the food stamp program or are County Board of Social Services' employees, they are responsible to the County Department of Social Services, (not County Board of Social Welfare) under the "State Plan" approved by the Federal agency NFS* (Nutrition Food Services of the Department of Agriculture) *and the Iowa Departmental Rules as hereinbefore cited.*

However, salaries received by employees of either Board for the time spent in the food stamp program are paid ultimately from county funds allocated by the Board of Supervisors together with matching Federal funds.

III

I believe the answer to your third question, as to what organization would be responsible for the actual dispensing of food stamps, is contained in the answers to your other questions, i.e., it is the County Department of Social Services, through employees of either the County Board of Supervisors or employees of the County Board of Social Welfare, or both Boards, as agreed upon by the Boards with the approval of the Iowa Department of Social Services as supervisory agency.

March 6, 1973

WELFARE: Mental Health; Parental Liability — §§222.78, 230.15 and 226.8, Code of Iowa, 1973. The parents of a mentally retarded child who is committed to the State Mental Health Institute at Clarinda, Iowa, are not liable for the support of said child after his twenty-first (21st) birthday. (Munsinger to Sawin, Shelby County Attorney, 3/6/73) #73-3-4

Mr. John Sawin, Shelby County Attorney: Your predecessor in the office of County Attorney, David B. Moore, has requested an opinion of the Attorney General as follows:

"Are the parents of a mentally retarded child committed to the Mental Health Institute of Clarinda, Iowa, liable for the support of said child after his 21st birthday?"

Section 222.78, 1973 Code of Iowa, provides that the father and mother of a mentally retarded child admitted to a hospital school [Woodward or Glenwood] or a special mental retardation unit at one of the state mental health institutes are not liable for the support of such a person after he has reached the age of twenty-one (21) and reads in pertinent part as follows:

"The father and mother of any person admitted or committed to a hospital-school or to a special unit, as either an inpatient or an outpatient, and any person, firm, or corporation bound by contract hereafter made for support of such person shall be and remain liable for the support of such person . . . Provided forther that the father or mother of such person shall not be liable for the support of such person after such person attains the age of twenty-one years . . ."

In 1966 OAG 127, we stated that Section 222.78, 1973 Code of Iowa, exempts the father and mother of a mentally retarded child, over twenty-one years of age, from involuntary liability for his support.

See also, 1970 OAG 382.

Your question relates to whether the non-liability provision extends to parents of a mentally retarded child who has been committed to a state mental health institute.

Section 222.78, 1973 Code of Iowa, must be read in conjunction with Section 226.8, 1973 Code of Iowa, which provides in pertinent part as follows:

". . . Charges for the care of any mentally retarded person admitted to a state mental health institute shall be made by the institute in the manner provided by chapter two hundred thirty (230) of the Code, *but the liability of any other person to any County for the cost of care of such mentally retarded person shall be as prescribed by section two hundred twenty-two point seventy-eight (222.78) of the Code.*" (Emphasis Added)

Thus, personal liability for mentally retarded persons admitted to a state mental health institute continues to be governed by Section 222.78, 1973 Code of Iowa. Therefore, the father and mother of a mentally retarded child, admitted to a state mental health institute, would not be liable for the support of said child after his twenty-first (21) birthday.

It should be noted, however, that Section 222.78, 1973 Code of Iowa, provides that the father and mother of a mentally retarded child "shall be and remain liable" for the support of said child until he reaches the age of twenty-one. Therefore, under Section 222.81, 1973 Code of Iowa, the estates of the father or mother are subject to a claim of the sixth class for the amount of assistance furnished a mentally retarded child before he has reached the age of twenty-one.

March 8, 1973

STATE OFFICERS AND DEPARTMENTS: Secretary of State, Patent — §10.7, Code of Iowa, 1973. Correction of errors created in departments other than the Secretary of State which errors are transfered onto new patents may only be corrected by correction of departmental records, recession of all departmental actions leading up to a request for a patent, and creation of a new record by application to the Executive Council. (Wietzke to Wellman, Secretary of Executive Council of Iowa, 3/8/73) #73-3-5

W. C. Wellman, Secretary, Executive Council of Iowa:

Re: Correction Patent — Decatur 1-35-1(11)5—01-27
E. A. Sexauer, Ankeny, Iowa

In reply to your letter of February 8, 1973, which asks if a correction patent can be used to correct an error arising in a department other than the Secretary of State's Office, a correction patent appears to be limited only to use in cases of error created in the Secretary of State's Office.

Section 10.7, Code of Iowa, 1973, provides:

"The secretary is authorized and required *to correct all clerical errors of his office* in name of grantee and description of tract of land conveyed by the state, found upon the records of such office; he shall attach his official certificate to each conveyance so corrected, giving the reasons therefor; record the same with the record of the original conveyance, and make the necessary corrections in the tract and plat books of his office. Such corrections, when made in accordance with the foregoing provisions, shall have the force and effect of a deed originally correct, subject to prior rights accrued without notice."

It would appear there are prior opinions of this office which have allowed the use of correction patents (Highway Commission Patents #1202 & 1203, ltr. August 5, 1971, and July 16, 1971; and Conservation Commission, ltr. August 2, 1971.) However, such holdings are contradicted by Mr. Strauss' letter of December 13, 1967, and official opinion of March 25, 1968, at page 613. In the letter of December 13, 1967, Mr. Strauss states:

"In reply thereto I advise that in view of the lack of statutory power in the Secretary of State to issue a corrected patent in the circumstances described and there appearing to be no statute providing the highway commission with a method of making corrections in its own records necessary to secure a new patent, I am of the view that the highway commission should rescind its action leading up to the request for a patent to the land now appearing to be misdescribed and proceed to make a new record based upon the correct description of the land sold and request the issuance of a new patent upon such record."

This opinion resulted in a further opinion as to how the Secretary of State's office should handle the new patent, 1968 O.A.G. 613, as follows:

"1. There is no authority in you to void the presently outstanding patent. The new patent should issue in accordance with the executive council's direction. You should require the return to you of the outstanding patent before delivery of the new patent.

"2. In order to clarify this situation of record you should make a memorandum in your record of the action of the executive council in ordering the original patent and also the action of the council in ordering the new patent.

"3. You should require the grantee in the original patent to execute and deliver to you a quit claim deed to the state of Iowa of the property described containing therein an explanation why such quit claim deed is executed."

These cited opinions were again used in a letter of December 7, 1972, to correct a Department of Social Services error. The above reasoning appears to be much more carefully developed than the complete lack of reasoning contained in the letters cited at the very beginning of the above paragraph and relied upon by the Highway Commission. The statute specifically refers to clerical errors made in the Secretary of State's Office and contains a clear intent to exclude errors made in any other office. The clear legislative intent is to limit the broad powers to correct errors and potential evils for the indiscriminate use of such power in a situation involving vast sums of money unless there is the normal administrative checks involving approval by the executive council and an opinion by the Attorney General.

Since the only additional work involved in correcting errors in other departments is the retyping of four or five pages of the material originally submitted to the Executive Council, a one page Attorney Generals opinion, and the two week delay while such matters are processed; this appears to be a minor expense for the greater protection afforded the state. The infrequent use of this procedure because of the few errors made also demonstrates the wisdom of the legislature in limiting this broad power. Inconsistent previous opinions concerning this matter are either not applicable or prospectively overruled by this letter.

March 8, 1973

CRIMINAL LAW: Carrying concealed weapons — §§695.7 and 695.18, Code of Iowa, 1973. County Sheriffs can issue a concealed weapons permit to an individual nineteen or twenty years of age. Federal law prohibits the sale of a firearm other than a shotgun or rifle, by a licensee, to any individual less than twenty-one years of age. (Beamer to Fitzgerald, State Representative, 3/8/73) #73-3-6

The Honorable Jerry Fitzgerald, State Representative: Reference is herein made to your letter of February 8, 1973, in which you stated:

"Under present Iowa law there seems to be come question as to whether or not a county sheriff can issue a permit to carry a concealed weapon to an individual nineteen or twenty years old."

In reply thereto I advise as follows:

The authority for a sheriff to issue a permit to carry a concealed weapon is found under the provisions of §695.7, Code of Iowa, 1973, which provides:

"It shall be the duty of the sheriff to issue a permit to go armed with a revolver, pistol or pocket billy to all peace officers and such other persons who are residents of his county, and who, in the judgment of said official, should be permitted to go so armed."

The only requirements under this chapter pertaining to age are found under §695.18, Code, 1973, which provides as follows:

"It shall be unlawful to sell, to keep for sale, or offer for sale, loan, or give away, dirk dagger, stiletto, metallis knuckles, sandbag, or skull cracker, silencer, *and no pistol or revolver shall be sold to any person under the age of nineteen years.* The provisions of this section shall not prevent the selling or keeping for sale of hunting and fishing knives. (Emphasis Added)

In connection with age requirements it is important to note the appropriate federal legislation under 18 United States Code Section 921, "Possession or Receipt of Firearms". 18 U.S.C. §922, which states:

"(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver — (1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age."

For purposes of the federal firearms law the term "firearms" is described in 18 U.S.C. §921(a)(3) as follows:

"(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm."

Clearly, a pistol or revolver as contemplated by §695.18 is included within the definition of a firearm under 18 U.S.C. §921(a)(3).

It is the opinion of this office that a permit to carry a concealed weapon may be issued to an individual nineteen or twenty years of age. By the enactment of

§695.18 which makes it lawful to sell hand guns to individuals of that age, the legislature must have intended to include nineteen and twenty-year olds in that group of persons who in the judgment of the sheriff should be allowed a concealed weapons permit.

The federal law does prohibit a licensed manufacturer, licensed dealer or licensed collector from selling a pistol or revolver to any individual less than twenty-one years of age. However, under some circumstances a nineteen or twenty year old could acquire a firearm other than from said licensee, for instance by gift, bequest or intestate succession. Assuming the revolver or pistol was lawfully acquired, the person would be eligible, at least on the basis of age, to apply for a concealed weapons permit.

March 12, 1973

CITIES AND TOWNS: Revenue — §§24.9 and 404.24, Code of Iowa, 1973. The provisions of Code Sections 404.24 and 24.9 apply to the receipt and expenditure of unanticipated revenue by municipal corporations. (Nolan to Shaw, State Senator, 3/12/73) #73-3-7

The Honorable Elizabeth Shaw, State Senator: This opinion is written in response to your oral request for an answer to the letter sent by your constituent Bill H. Myers, Alderman at Large in the City of Davenport. In Mr. Meyers' letter he states that in recent months the City of Davenport has received over $300,000 from the State of Iowa in what has been termed "unanticipated income". He further states that the money has been credited to the city's general fund without an amendment to the budget. Further, he states,

"It has always been my understanding that if the City wants to spend money on projects not listed in the budget, the budget must be amended and a public hearing held before the sums could be spent. The actions of the Finance Committee chairman appear to me to be wrong.

"I would therefore appreciate it if you would seek an Attorney General's opinion as to the procedures to be followed upon receipt by a City of unanticipated income if the sum is to be spent. I would like to know if a proposed amendment should be presented, debated at a public hearing, and then formally voted upon by the Council before the money is spent."

Under the provisions of Ch. 404, Code of Iowa, 1973, municipal corporations have the power to cause taxes to be levied for a fund known as the general fund. Proceeds may be allocated from the general fund for ten purposes enumerated in §404.6 of the Code. The first of these being for "general and incidental expenses".

Section 404.24, Code, 1973, provides:

"Any income to a municipal corporation not designated by law to be placed in or credited to a certain existing fund enumerated in this chapter or otherwise provided by law shall be credited to the functional fund or funds enumerated in this chapter, which are allocable to the purpose or class of purposes most nearly related to the type of transactions from which the income arose."

It is our view that the anticipated income received by revenue sharing is properly credited to the general fund of the municipality receiving such unanticipated income. However, the provisions of the local budget law, particularly

§24.9, Code of Iowa, 1973, thereafter apply. Section 24.9 provides in pertinent part:

"Budget estimates adopted and certified in accordance with this chapter may be amended and increased as the need arises to permit appropriation and expenditure during the fiscal year covered by such budget of unanticipated cash balances on hand at the close of the preceding fiscal year and which cash balances had not been estimated and appropriated for expenditure during the fiscal year of the budget sought to be amended, and also to permit appropriation and expenditure during the fiscal year covered by such budget of amounts of cash anticipated to be available during such year from sources other than taxation and which had not been estimated and appropriated for expenditure during the fiscal year of the budget sought to be amended. Such amendments to budget estimates may be considered and adopted at any time during the fiscal year covered by the budget sought to be amended, by filing such amendments and upon publication of the same and giving notice of public hearing thereon in the manner required in this section. Within twenty days of the decision or order of the certifying or levying board, such proposed amendment of the budget shall be subject to protest, hearing on such protest, appeal to the state appeal board and review by such body, all in accordance with the provisions of section 24.27 to 24.32, inclusive, so far as applicable. . . ."

Accordingly, proposed expenditures of unanticipated income for purposes not included in the city budget should be presented at a public hearing and no money should be spent unless the budget is amended as provided by law.

March 12, 1973

COUNTIES AND COUNTY OFFICERS: Zoning — Chapter 358A, Code of Iowa, 1973. Proposed legislation requiring that a majority of the members of the county zoning commission and of the board of adjustment live outside the boundaries of a city or town does not violate constitutional principles of "one man, one vote," no taxation without representation or home rule. (Nolan to Cusack, State Representative, 3/12/73) #73-3-8

The Honorable Gregory D. Cusack, State Representative: Reference is made to your request for an opinion of the constitutionality of House File 3 as amended relating to the appointment of members of the county zoning commission and boards of adjustment. According to the proposed bill a majority of the members appointed to such board or commission must reside within the county but outside the corporate limits of any city or town.

In *Mandicino v. Kelly,* 1968, 158 N.W.2d 754, the Iowa Supreme Court looked at the powers of the Board of Supervisors and determined that they included authority to make a substantial number of decisions that effect all citizens whether they resided inside or outside the boundaries of a city or town. Finding that the County Board of Supervisors possess such powers the court held that such county boards are subject to the principle of one man, one vote in the election of members. The court also said at page 761:

"We hold the apportionment standards which apply to states also apply to those governmental units of the state that exercise general governmental functions and powers delegated to them by the state and are designed to be controlled by the voters of the geographic area served by the body; the county is a governmental instrun.entality or division of the state and the board of supervisors is the legislative body of the county. The board exercises legislative powers delegated to it by the state; and the state may exercise its legislative powers only in a legislative body apportioned on a population basis, any

general elective municipal organ to which it delegates certain of its powers must be subjected to the same basic constitutional requirement."

Under Chapter 358A the powers of the County Zoning Commission are essentially administrative. Section 358A.8 provides that the commission shall:

". . . Recommend the boundaries of the various original districts, and appropriate regulations and restrictions to be enforced therein . . . Prepare preliminary report and hold public hearings thereon before submitting its final report; . . . From time to time, recommend to the board of supervisors amendments, supplements, changes or modifications [to the zoning regulations and restrictions enacted by the board of supervisors]."

The Board of Adjustment also performs a nonlegislative function. Its actions are "quasi-judicial" although it is authorized by §358A.12 to adopt rules in accordance with the provisions of any regulation or ordinance adopted by the Board of Supervisors, its primary function as set out in §358A.15 is [1] to hear and decide appeals from an administrative order enforcing the provisions of the chapter, [2] to hear and decide special exceptions when required by ordinance and [3] to authorize variances in specific cases not contrary to the public interest where literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Inasmuch as neither board performs an essentially legislative function nor are such individuals chosen to represent any specific geographic area without regard to the population of such area, there appears to be no violation of the one man, one vote principle.

Whether or not there is taxation without representation in the selection of the membership of such boards on the basis of House File 3 as amended it is dubious. It should be noted that the provisions of Chapter 358A pertaining to county zoning apply only to "land and structures located within the county but lying outside the corporate limits of any city or town". (§358A.3, Code of Iowa, 1973). Thus, it is logical to require that at least a majority of the members of the board be residents of the area affected. This is presumably a reasonable classification. Similarly, since the actions of the county zoning commission or the board of adjustment do not involve any question arising from within the territorial limits of cities and towns, there could hardly be any violation of home rule statutes.

Accordingly, looking at your specific request for consideration of the constitutionality of H.F. 3 with particular attention to a possibility of (1) taxation without representation, (2) violation of one man, one vote principles, or (3) violation of home rule statutes, it is the opinion of this office that the proposed legislation will meet the challenges to constitutionality which you have presented.

March 12, 1973

COUNTIES AND COUNTY OFFICERS: Hospital bonds — §§347.8 and 453.1, Code of Iowa, 1973. Proceeds of sale of county hospital bonds should be invested pursuant to §347.8, Code of Iowa, 1973, if so directed by the board of supervisors, otherwise such proceeds should be deposited pursuant to §453.1 (Nolan to Carr, Delaware County Attorney, 3/12/73) #73-3-9

Mr. E. Michael Carr, Delaware County Attorney: Reference is made to your request for an interpretation of §347.8 of the 1973 Code of Iowa, which provides for investment of proceeds from the sale of hospital bonds:

"The county treasurer shall dispose of the bonds in the same manner as other county bonds, and the same shall not be sold for less than par with accrued

interest. Upon the issuance of the bonds as herein authorized and the sale thereof by the county treasurer the board of supervisors may direct the county treasurer to invest the proceeds from the sale of said bonds in United States government bonds which said proceeds, when so invested, and the accumulation of interest on the bonds so purchased shall be used for the purposes for which said hospital bonds were authorized; such investment when so made shall remain in said United States government bonds until such time as in the judgment of the board of supervisors it is deemed advisable to commence the construction of said county hospital or in the case of an addition to an already existing hospital until such time in the judgment of the board of hospital trustees it is deemed advisable to commence the construction of such addition."

You have submitted two questions with respect to the foregoing section as follows:

"1. Does this exclude the right to invest said funds in certificates of deposit in local banks as provided for in Section 453.5 of the 1973 Code of Iowa?

"2. May proceeds referred to above be invested at a rate of interest higher than that for which the bonds were sold until such time as actual construction begins?"

When the word "may" is used in a statute without other directive, such word is interpreted to imply an exercise of discretion rather than the mandate of a duty. See §4.1(37), Code, 1973. In this instance §347.8 authorizes the Board of Supervisors to direct the County Treasurer to invest the proceeds from the sale of hospital bonds in United States government bonds until it is deemed advisable to commence the construction of a county hospital or an addition thereto.

Unless the supervisors direct the treasurer to invest the proceeds pursuant to §347.8, the treasurer would be authorized by §453.1 to invest such funds, subject to the limitations on deposit imposed by the board of supervisors in time deposits at current interest rates.

Accordingly, investment of such funds in accordance with §453.5 is not necessarily "excluded", and the rate of interest on such deposit is not required to be the same as that for which the bonds were sold.

March 12, 1973

STATE OFFICERS AND DEPARTMENTS: State Historical Society, gifts and bequests. §§565.5 and 304.13, Code of Iowa, 1973. Gifts and bequests to the State Historical Society (except those given for historical markers) need not be paid into the State Treasury but may be dealt with by the Society's governing board in such manner as may be deemed essential to the purposes for which the gift or bequest was made. (Haesemeyer to Smith, State Historical Society, 3/13/73) #73-3-11

Mr. W. Howard Smith: On behalf of the Board of Curators of the State Historical Society, you have requested an opinion of the Attorney General and state:

"An unresolved controversy has arisen as to whether the Iowa law requires that the State Historical Society turn over to the State Treasury all funds given or bequeathed to it by individuals or groups for the use and benefit of the Society, or whether under the applicable law, the Board of Curators of the Society is free to control, invest and reinvest those funds as it deems best for the Society. In view of the fact that the State Auditor has adopted the former

view, the Board has authorized this request for your opinion as to the extent of the Iowa law in this regard. (See State Auditor's Report for the year 1970-1971).

"Due to two general bequests of some $250,000.00 to the State Historical Society of Iowa, a trust fund was established at the Iowa State Bank and Trust Company in Iowa City several years ago. The position taken by the State Auditor is that under Section 304.13 of the 1971 Code, these funds should be turned over to the State Treasury for investment. We do not agree for the following reason.

"Prior to the enactment of Chapter 257, Laws of the 61st General Assembly in 1965, (of which Section 304.13 is a portion) it appears the Board of Curators of the Society, under the authority of Section 565.5 of the Code, possessed the power and authority to invest funds not specifically directed as to use, which were received by gift, "devise or bequest as it felt desirable and beneficial to the Society. This section in part states, 'gifts, devises, or bequests of property, real and personal, made to any State institution for purposes not inconsistent with the objects of such institutions, may be accepted by its governing board and such board may exercise such powers with reference to the management, sale, disposition, investment or control of property so given — as may be deemed essential to its preservation and the purposes for which the gift was made.'

"It seems to us that Chapter 257, Laws of the 61st G.A., did not intend to amend, diminish, or repeal the provisions of Section 565.5 of the Code. It does appear Section 6 of Chapter 257, which the Code Editor placed in Chapter 304 of the Code, does in no way alter the existing law, but only relates to 'gifts, appropriations, and bequests made to establish and maintain' a uniform official historical marker system in this State.

"An examination of Chapter 257, Laws of the 61st G.A., clearly reveals the intent and purpose of this law. The title states, 'An Act *Granting* the Board of Curators of the State Historical Society The Authority To Establish a Uniform Official Historical Marker System and to *Provide* an Appropriation Therefor.' (Emphasis ours) Neither in this title nor in the Act is there anything to indicate a legislative desire to restrict the power of the Board previously granted the Board by Section 565.5 of the Code, to invest funds given the Society for general use in conducting the affairs of this Society.

"It is therefore our conclusion that the provisions of Section 304.13 apply only to gifts, appropriations or bequests given to establish and maintain historical markers, and that it has no application to the power of the Board to control or invest funds received by gifts or bequests from the general conduct of Society business.

"It appears to us that the language granting power to the Board to control and use funds received from such sources 'in accordance with the wishes of the donor, if expressed,' and directs, 'funds received shall be paid into the State Treasury and shall be paid out on order of the Board,' refer only to those given the Board for use in establishing and maintaining historical markers. It would therefore appear that the above referred investment of $250,000.00 in a trust fund in a local Bank does not conflict with any applicable law in Iowa, and that this investment is legal and proper and, "The Board of Curators of the State Historical Society of Iowa prays that it be advised as to the law in this regard.

"One other feature of this area of the law which gives us concern and upon which we desire advice is whether Section 304.13 requires said Board to transfer the funds received by the Society from the sale of memberships in the Society to the State Treasury.

"We must first point out that these funds are not obtained from the sale of publications or books, but this is simply a manner of joining the Historical Society. True, books and publications are often given to members as gifts, but no agreement exists that such are included in the membership fee.

"Our question then is, are the funds obtained from these membership dues to be sent to the State Treasury, or are they subject to the investment, control, management, and disposition of the Board of Curators as it deems proper for the benefit of the Society."

In our opinion, the State Historical Society is only required to pay over to the State Treasury gifts and bequests given for the establishment and maintenance of historical markers and gifts and bequests for other purposes may be retained by the Society and utilized as provided by §565.5 of the Code. Prior to the enactment of Chapter 257 in 1965, 61st G.A., there was no question as to the Society's powers with respect to the management, sale, disposition, investment and control of property given to it because of the provisions of §565.5 which you set forth in your letter to us. Such chapter 257 consists of seven sections, the last being an appropriation of $10,000 for the 1965-66 biennium. The first six sections were placed by the Code Editor in the sound exercise of his discretion in Chapter 304 of the Code as §§304.8 through 304.13. Looking at §304.13 as it appears in the Code, one gains the impression that all gifts and bequests to the State Historical Society are to be placed in the State Treasury:

"The board of curators may accept gifts, appropriations, and bequests and shall use such gifts, appropriations, and bequests in accordance with the wishes of the donor if expressed. Funds received shall be paid into the state treasury and shall be paid out on order of the board. All state boards, commissions, departments and institutions are directed to cooperate with the board in the performance of its duties. The board may accept the aid, support, and co-operation of county, city, and town agencies and of any person in executing board projects."

However, when one looks at the Session Laws, it is evident that what is now §304.13 was intended merely to apply to gifts and bequests given for historical markers. For example, Chapter 257 is entitled as: "AN ACT granting the board of curators of the state historical society the authority to establish a uniform and official historical marker system, and to provide an appropriation therefor." The explanation on the bill merely stated:

"The purpose of this bill is to establish a historical marker commission.

* * *"

Nowhere in Chapter 257 is there any mention of Chapter 304 of the Code. The decision to codify Chapter 257 as part of Chapter 304 was one which was made by the Code Editor and would appear to be in all respects quite logical. However, we cannot conclude from the foregoing that the Society's powers to deal with gifts and bequests to it was changed in any way except that gifts and bequests for historical markers would have to go into the State Treasury. The same reasoning would have to apply to memberships and unless they were to be given with the proviso that they be used for historical markers, §304.13 would not operate to require them to be paid into the State Treasury.

March 13, 1973

COURTS: Appointment of Counsel — Absent a knowing and intelligent waiver, no person may be imprisoned for any offense without the representation of counsel at his trial. (Blumberg to Kemp, Cedar County Attorney, 3/13/73) #73-3-10

Mr. Edward W. Kemp, Cedar County Attorney: We are in receipt of your opinion request of July 12, 1972, regarding counsel for indigents in misdemeanor cases. You specifically asked:

"1. If a justice of the peace or similar judicial officer thinks that there is a possibility that he might impose a jail sentence on the accused, must the accused be afforded a court appointed attorney if indigent? Or does the mere fact that a statute provides for a jail sentence in the alternative to a fine require that an attorney be appointed?"

"2. If a judicial officer fines an accused, and the accused lacks the sufficient funds to pay the fine, is the judicial officer prohibited from incarcerating the accused if said accused is indigent and was not represented by court appointed counsel?"

"3. Certain misdemeanors carry mandatory jail sentences (e.g. Section 321.218 of the 1971 Code of Iowa). In such cases must an indigent be afforded a court appointed attorney?"

"4. Finally, in all circumstances in which such attorney must be appointed, what guidelines for indigency should be applied, and who should make the appointment?"

In the recent case of *Argersinger v. Hamlin,* 92 S.Ct. 2006, the United States Supreme Court held that no jail sentence may be imposed upon a person in a trial for any offense unless the accused is represented by counsel, absent a waiver. In response to your first question, Mr. Justice Douglas stated, citing to *Application of Stevenson,* 254 Or. 94, 458 P.2d 414, 419 (92 S.Ct. 2012, 2013):

"We hold, therefore, that absent a knowing and intelligent waiver, no person may be *imprisoned* for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." (Emphasis added)

In addition, Mr. Justice Douglas stated (92 S.Ct. at 2014):

"Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore, know when to name a lawyer to represent the accused before the trial starts."

It is apparent from this language that it is within the court's discretion, based upon the court's knowledge of the facts, when to appoint counsel. The thrust of the opinion seems to be that it is the facts of the case as to the possibility of a jail sentence being imposed that is controlling, not that a jail sentence is provided in the alternative by a statute. And, in no event may a person be imprisoned for any offense, absent a waiver, if not represented by counsel.

In answer to your second question, the cases of *Tate v. Short,* 1971, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 and *State v. Snyder,* 1972, 203 N.W.2d 280 (Iowa) are helpful. In *Tate,* the United States Supreme Court held that imposing a jail sentence on an accused because he was too poor to pay the fine imposed "worked an invidious discrimination" on indigents, and therefore violated the Equal Protection Clause. The *Snyder* case holds similarly and contains a vast discussion of this theory with reference to several other opinions. The point to be gleaned from these cases is that the courts refrained from expressly applying these cases to those situations where there is a willful refusal to pay the fine or the non-payment of the fine after a reasonable alternative has been set forth. The Court in Tate, cited with approval in *Snyder,* held (401 U.S. at 400-401, 91 S.Ct. at 672, 28 L.Ed. 2d at 134-135):

"We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so. Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case."

Thus, the implications of these cases is that the imprisonment of an indigent for a mere non-payment of a fine is a violation of the Equal Protection Clause. However, reasonable alternatives must be set up, and the failure to satisfy these alternatives or the willful refusal to pay the fine, because they are not covered by *Tate, Snyder* and other similar cases, may still result in imprisonment. Such a determination would have to be based, however, on the individual fact situations.

Your question goes farther than this. It asks whether an attorney must be present if the indigent is imprisoned for failure to pay the fine. Keeping in mind that the reasoning set forth in the previous paragraph applies here, the question becomes how far *Argersinger* is to be applied. *Argersinger* deals with the initial imposition of a sentence, whereas *Tate* and *Snyder* concern the administration of that sentence. However, we do not feel that such a distinction means that *Argersinger* does not apply. Assuming that imprisonment is a viable alternative for failure to comply with reasonable alternatives to a fine or a willful refusal to pay or comply, it matters not whether that imposition or imprisonment is part of the original sentencing procedure or is a totally new one, for *Argersinger* would apply in both instances. By stating that no person, absent a waiver, may be imprisoned for any offense, the Court in *Argersinger* made no distinction as to which types of actions it applied to. We believe that the Court intended *Argersinger* to apply in all instances where a person is imprisoned. Therefore, at that point of the proceedings where a person is to be imprisoned for failure to comply with reasonable alternatives, or refuses to comply, an attorney must be present if not waived.

In anser to your third question, an attorney must be appointed or present if a mandatory jail sentence is required unless the defendant knowingly and intelligently waives his right to counsel. This is an agreement with our answer to your first question.

With respect to your last question, there are no set rules for determining indigency in this State. However, in *Bolds v. Bennett,* 1968, 159 N.W.2d 425, the Iowa supreme court listed some guidelines which a trial court should employ to aid in determining indigency. They are (159 N.W.2d at 428): Ready availability of "(1) real or personal property owned; (2) employment benefits; (3) pensions, annuities, social security and unemployment compensation; (4) inheritances; (5) number of dependents; (6) outstanding debts; (7) seriousness of the charge; and (8) any other valuable resources not previously mentioned." The courts of this state, as indicated in numerous cases, exercise discretion in appointing counsel. It is the trial court that appoints the counsel when necessary.

March 13, 1973

CORPORATIONS — Reinstatement — §496A.130, Code of Iowa, 1973. A corporation whose charter was legally cancelled for failure to file annual reports, may, in the discretion of the Secretary of State, be reinstated after

the five year period in which reinstatement is mandatory upon application filing of reports and the payment of fees and penalties. (Nolan to Synhorst, Secretary of State, 3/13/73) #73-3-12

The Honorable Melvin D. Synhorst, Secretary of State: Reference is made to your recent request for an official opinion on the question of whether or not the Secretary of the State of Iowa has legal power discretion to grant reinstatement of a corporation legally canceled under the provisions of §496A.130, Code of Iowa, 1973, at a point in time more than five years from the date of the issuance of the certificate of cancellation.

The Code section in question provides in pertinent part as follows:

"The secretary of state may cancel the certificate of incorporation of any corporation that fails or refuses to file its annual report for any year prior to the first day of October of the year in which it is due or fails to pay prior to the first day of October any fees or penalties prescribed by this chapter by issuing a certificate of such cancellation at any time after the expiration of thirty days following the mailing to the corporation of notice of the certification to the attorney general of the failure of the corporation to file such annual report or pay such fees and penalties as required by section 496A.92, provided the corporation has not filed such annual report or paid such fees and penalties prior to the issuance of the certificate of cancellation. Upon the issuance of the certificate of cancellation, the secretary of state shall send the certificate to the corporation at its registered office and shall retain a copy thereof in the permanent records of his office.

"Upon the issuance of the certificate of cancellation, the corporate existence of the corporation shall terminate, subject to right of reinstatement as herein provided, and the corporation shall cease to carry on its business, except insofar as may be necessary for the winding up thereof or for securing reinstatement and the right of the corporation to the use of its name shall cease and such name shall thereupon be available to any other corporation or foreign corporation or for reservation, registration or use as a trade name as provided in this chapter. The cancellation of the certificate of incorporation shall not take away or impairr any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred prior to such cancellation, but no action or proceeding thereon may be prosecuted by such corporation until it shall have been reinstated. . . . A copy of the certificate of cancellation, certified by the secretary of state, shall be taken and received in all courts as prima-facie evidence of the cancellation of the certificate of incorporation as stated therein.

"If the certificate of incorporation of a corporation has been canceled by the secretary of state as provided in this section for failure to file an annual report, or failure to pay fees or penalties, such corporation shall be reinstated by the secretary of state at any time within five years following the date of the issuance by the secretary of state of the certificate of cancellation upon:

"1. The delivery by the corporation to the secretary of state for filing in his office of an application for reinstatement, . . ."

All that is set out above is susceptible to two interpretations as far as reinstatement is concerned. First, we think it can be read to provide a mandatory duty on the part of the Secretary of State to reinstate any company which makes application for reinstatement and then files the required reports and pays its penalties and fees within the five year period in compliance with the provisions of this section after which the power to reinstate such company is discretionary with the secretary. On the other hand, this language might be

read to preclude all reinstatements unless application is made within the five year period specified. It is our view that the first of these two interpretations is preferable. When the Iowa Business Corporation Act (Ch. 496A, Code of Iowa, 1973) was enacted in 1959 (58 G.A., Ch. 321), the language authorizing the Secretary of State to cancel the certificate of incorporation as it now appears in §496A.130 was not a part of the original act. This language was added by the 60th General Assembly in 1963 (60 G.A., Ch. 287) to give the secretary greater enforcement power.

It is well settled in Iowa that the Secretary of State has broad discretionary powers to approve any documents submitted to him. Such power is stated in Code §496A.134 as follows:

"The secretary of state shall have the power and authority reasonably necessary to enable him to administer this chapter efficiently and to perform the duties therein imposed upon him."

In a recent case in the Federal District Court for the Southern District of Iowa, the court observed that there appeared to be no cases construing the portions of §496A.130 in question here. The court then observed that the "whole tenor of the applicable portions of the section is that reinstatement was intended to provide for uninterrupted corporate existence when the required reports had been filed and the fees and penalties paid". *Stutzman Feed Service, Inc. v. Todd & Sargeant, Inc.*, S.D. Iowa, 1972, 336 F.Supp. 417, 418. While this case involved an automatic reinstatement within the five year period after the notice of cancellation, it is, we believe, indicative of the view of the court that every presumption is to be indulged in favor of the continuation of legal existence of a corporation after it has gone into operation. The statute in question does not require cancellation, it merely authorizes such. Forfeiture of a corporate charter is a harsh procedure and in the absence of a plain statutory requirement it should be granted only where it appears that the public interest demands such forfeiture. *State ex rel Robbins v. Selzburg Grain and Lumber Co.*, 1952, 243 Iowa 734, 53 N.W.2d 143.

In view of all the above, this office is of the opinion that your question may be answered affirmatively.

March 14, 1973

COUNTIES AND COUNTY OFFICERS: Medical Examiner — §339.13, Code of Iowa, 1973. Iowa law does not permit the County Medical Examiner to send a body of a deceased person to another state for autopsy. (Nolan to Erb, Floyd County Attorney, 3/14/73) #73-3-13

Mr. James A. Erb, Floyd County Attorney: This letter is written in response to your request for an Attorney General's opinion on the question of whether autopsies performed by the Mayo Clinic in Rochester, Minnesota, upon written request of the Floyd County Medical Examiner, are legal. Your letter states that the procedure of sending the body out of state for autopsy is followed because Floyd County does not have the necessary equipment to perform an adequate autopsy, and the Mayo Clinic provides the nearest and best such facilities. Further, you state that the request for such autopsy is made only after the medical examiner has had a chance to observe the body and ascertain the available facts surrounding the death.

It is our view that the present law of this state prohibits such procedure. We have carefully read pertinent provisions of §339.13, Code of Iowa, 1973, which states:

"It shall be unlawful to cremate, bury, or send out of the state the body of a deceased person when death occurred in a manner specified in §339.6, until a medical examiner shall certify in writing that he has viewed the body and has made personal inquiry into the cause and manner of death and that all necessary autopsy or postmortem examinations have been completed."

It appears that medical examiners in certain other border counties have utilized the services of pathological laboratories in adjoining states but have severed the part of the body to be examined in the laboratory rather than sending the corpse. The medical examiner may use the laboratory report in making the autopsy. Section 339.3. However, the county medical examiners can in no way contract away the specific duty imposed upon them by statute. 1962 OAG 134-135. Accordingly, it is improper to send a dead human body out of this state for autopsy.

March 14, 1973

CONSERVATION: State park boundary fences — Chapter 113, Code of Iowa, 1973. State is responsible for erecting and maintaining proper fence along all boundary lines of Wild Cat Den State Park pursuant to provision in the deed to a portion of the park land. (Peterson to Priewert, Director Iowa State Conservation Commission, 3/14/73) #73-3-14

Fred A. Priewert, Director, Iowa State Conservation Commission: Receipt is hereby acknowledged of your request for an opinion of the Attorney General as follows:

The State Conservation Commission requests an opinion on the State's responsibility to construct and maintain boundary fences at Wild Cat Den State Park where no obligation exists in the property deeds.

In the early development of Wild Cat Den State Park the entire Park was fenced by the Federal Government through the Civilian Conservation Corps (CCC) of the early 1930's. The Federal Government assumed all fencing costs. There were no fencing agreements made at that time. At least there are none in the State Conservation Commission files and the adjoining landowners have been unable to produce any.

Through the years the Park Officer has done most of the repairs on this fence. The damage to the fence was usually caused by trees falling from the park onto the fence. Most of the land adjoining the park was either pasture or agricultural land.

After forty years the fence has reached the place where it is no longer repairable and must be replaced. The adjoining landowners feel that since the State has done most of the repairs to this fence through the years they are responsible for its replacement.

Attached are copies of the warranty deeds for the ownership of the land at Wild Cat Den State Park. Some of the deeds do stipulate that the State is responsible for the boundary fence line. We are honoring those and there is no conflict with these adjoining landowners. Because we are required by deed to maintain the fence line of some landowners, the remaining landowners feel that we should also be required to maintain the boundary fence and replace it between their property and the State.

A property plat is also attached showing in red the boundary fences being maintained as stipulated in the deeds."

Determinative of the issue of responsibility for said park fences is a condition in the deed to a portion of the park land from Emma C. Brandt and Clara L. Brandt to the State of Iowa. Said deed recites consideration of one dollar ($1.00) and other considerations and lists various conditions relating to the acquisition, use and name of the park area, among which are conditions specifically relating to fencing as follows:

"(7) That the State of Iowa shall erect and maintain proper fences along all boundary lines of the Park Area, including division lines between the Park Area and land of Emma C. Brandt and Clara L. Brandt.

"(8) That the State of Iowa shall take possession of said Park Area and proceed to fence and otherwise improve said Park Area commencing with the date of the delivery of this deed."

Section 113.13, Code of Iowa, 1973, gives effect to agreements relating to partition fences as follows:

"113.13 Orders and agreements — effect. Any order made by the fence viewers, or any agreement in writing between adjoining landowners, when recorded in the office of the recorder of deeds, as in this chapter provided, shall bind the makers, their heirs, and subsequent grantees."

We are of the opinion that, as either a contractual responsibility or a fencing agreement, imposed by provision in the deed to a portion of the park land, the State is responsible for erecting and maintaining a proper fence along all boundary lines of Wildcat Den State Park.

March 15, 1973

SCHOOLS: Nonresident Tuition — §§282.1, 282.20, 285.11, Code of Iowa, 1973. A school district which waivers the right to collect tuition from a nonresident pupil must provide equal treatment to all other nonresident pupils enrolled in its schools. (Nolan to Freeman, State Representative, 3/15/73) #73-3-15

The Honorable Dennis L. Freeman, State Representative: This will acknowledge receipt of your letter requesting an Attorney General's opinion interpreting §282.1 of the 1973 Code of Iowa. The parents of a child in your district live in the Newell School District but because of problems of bus routes have elected to send their child to school in Albert City. The Albert City school bus does not go out of its way to pick up this child. You ask whether the Albert City School Board can accept this student without charging him tuition.

Section 282.1 provides:

"Persons between five and twenty-one years of age shall be of school age. A board may establish and maintain evening schools for all residents of the corporation regardless of age and for which no tuition need be charged. Nonresident children and those sojourning temporarily in any school corporation may attend school therein upon such terms as the board may determine."

In 1911-12 OAG, at page 539, a former Attorney General advised that a school district could waive any right it might have under the law to collect tuition where the exercise of such right might be construed to prevent a child

from receiving an education. However, if it is clear that the parents of a nonresident child are well able to pay the tuition for the child, an action of the board requiring that such child pay tuition in order to attend the public school is entirely legal.

A school board cannot discriminate in the matter of tuition which it charges pupils for the same school advantages. 1928 OAG 368. If the school board waives its right to collect tuition from one nonresident child, it should do the same for all nonresident children attending its schools. Section 282.20 requires such equal treatment by providing the following:

". . . It shall be unlawful for any school district to rebate . . . any portion of the tuition collected or to be collected or to authorize or permit such pupils to receive at the expense of the district, directly or indirectly, any special compensation, benefit, privilege, or other thing of value that is not and cannot legally be made available to all other pupils enrolled in its schools."

The fact that the school bus route does not go out of its way to pick up such child does not affect our determination, since under §285.11 school boards in districts operating buses may "transport nonresident pupils who attend public school . . . who are not entitled to free transportation provided they collect the pro rata cost of transportation from the parents".

March 19, 1973

CONSTITUTIONAL LAW: Appropriations, transfers. Article III, §24, Constitution of Iowa; §8.39, Code of Iowa, 1973. A statute which authorizes the Comptroller with the approval of the Governor to transfer funds within an agency from one purpose to another or to transfer funds from the appropriation of one agency to the appropriation of another is not unconstitutional. (Haesemeyer to Crabb, State Representative, 3/19/73) #73-3-16

The Honorable Frank Crabb, State Representative: In reply to your letter of February 15, 1973, you have asked for an opinion of the Attorney General on the question of whether or not §8.39, Code of Iowa, 1973, is constitutional.

Such §8.39 provides:

"No appropriation nor any part thereof shall be used for any other purpose than that for which it was made except as otherwise provided by law; provided that the governing board or head of any state department, institution, or agency may, with the written consent and approval of the governor and state comptroller first obtained, at any time during the biennial fiscal term, partially or wholly use its unexpended appropriations for purposes within the scope of such department, institution, or agency.

"Provided, further, when the appropriation of any department, institution, or agency is insufficient to properly meet the legitimate expenses of such department, institution, or agency of the state, the state comptroller, with the approval of the governor, is authorized to transfer from any other department, institution, or agency of the state having an appropriation in excess of its necessity, sufficient funds to meet that deficiency."

This section in its present form has been in the Code since 1941 (Chapter 62, §5, 49th G.A.) and has been used on various occasions since then by successive governors and comptrollers presumably with legislative knowledge and acquiesence. Indeed this department in the past has been the recipient of transfers under §8.39 to enable it to perform its duties under the law. In 1966

while Attorney General Scalise was in office, $40,000 was transferred to the Attorney General's budget. More recently in 1972 $74,562 was transferred and in 1973 $123,500 was added to the appropriation to the Department of Justice.

Presumably your question concerning the validity of §8.39 arises because of the constitutional provision concerning appropriations found in Article III, §24.

Such Article III, §24, Constitution of Iowa, provides:

"No money shall be drawn from the treasury but in consequence of appropriations made by law."

Your question, then, centers around whether or not §8.39 amounts to an unconstitutional delegation of the Executive branch of the Legislative power to make appropriations.

It is to be observed that there are essentially two parts to §8.39. The first paragraph involves intra-agency transfers and allows an agency head with the consent and approval of the Governor and State Comptroller to use a portion of the appropriation to his department for a purpose other than that for which it was made so long as it is within the scope of the department, institution or agency. In an earlier opinion of the Attorney General involving a question as to the authority of the Comptroller and Governor to transfer a portion of funds appropriated for the operating costs of the Law Enforcement Academy to its capital appropriation, we concluded that this first paragraph of §8.39 was constitutional and that therefore the transfer could be made. 1968 OAG 859. This was consistent with an earlier opinion of the Attorney General, 1930 OAG 155, in which the Attorney General said it was proper for the Board of Control to use part of an appropriation for construction of water facilities at an institution under the Board's control to supplement an appropriation for water facilities at another institution under its control. In a subsequent opinion of the Attorney General, 1970 OAG 663, we did conclude that no funds could be transferred from the portion of the primary road fund appropriated for highway construction to the support and maintenance portion of the primary road fund under §8.39 but that was because of a special statute dealing with the situation.

We believe the 1932 and 1968 opinions reached the correct conclusion as to the first paragraph of §8.39 and that such paragraph is constitutional.

On the question of the constitutionality of the second paragraph of §8.39, we would point out that the 1970 opinion of the Attorney General previously referred to does contain the following language:

"As a general rule funds may be transferred from one department to another whenever the appropriation of one department is insufficient to properly meet legitimate expenses of such department. This transfer of funds, however, must be made by the State Comptroller with the approval of the Governor, all as required by §8.39 of the Code of Iowa, 1966."

While the Iowa Supreme Court has never directly come to grips with the question of the constitutionality of §8.39, there is some indication in *Prime v. McCarthy*, 1894, 92 Iowa 569, 61 N.W. 220, that the Court would deal liberally with Legislative delegations of authority to disperse funds. In the *Prime* case, the statute in question granted to the Executive Council authority to pay "such other and necessary and lawful expenses as are not otherwise provided

for" and provides that "warrants drawn therefor be paid by the Treasurer of the State." The Court found that this was sufficient authorization for the payment of certain expenses incurred by the National Guard in sending eight companies of men to Pottawattamie County to deal with the group known as Kelly's Army.

In asserting that an emergency transfer of funds provision is constitutional, the author of *Statutes,* 14 Iowa L. Rev. 369, 370 (1920) stated:

"As it is obvious that a deficiency cannot be foreseen, and that when it arises legislative action is likely to be impossible, it seems entirely proper that some agency should be provided to remedy the situation. One of the primary functions of the Executive Council being the conduct of the affairs during the adjournment of the legislature, the delegation of the power to it seems entirely appropriate unless other constitutional restrictions intervene."

This reasoning approximates that of other jurisdictions holding statutes similar to Iowa's constitutional.

The most significant case in the area of emergency appropriations dealt with a Wisconsin provision identical in effect to Iowa's.

The Wisconsin Statute, (Wisconsin Code section 20.74) read:

"There is annually appropriated such sums as may be necessary, payable from any moneys in the general fund *or other available funds* not otherwise appropriated, as an emergency appropriation to meet operating expenses of any state institution, department, board, commission or other body for which sufficient money has not been appropriated to properly carry on the ordinary regular work. No moneys shall be paid out under this appropriation except upon the certification of the governor, secretary of state and state treasurer that such moneys are needed to carry on the ordinary regular work of the institution, department, board, commission or other body for which the moneys are to be used and that no other appropriation is available for that purpose." (Emphasis added)

State v. Zimmerman, 1924, 183 Wisc. 132, 197 N.W. 823, interpreted this provision as operative on the contingency of failure of funds and not void as a delegation of the legislative power of appropriation. The state constitutional provision (Art. 8) provided: "No moneys shall be paid out of the treasury except in pursuance of an appropriation by law." *See* 197 N.W. at 831. [The Iowa constitutional provision reads similarly: "No money shall be drawn from the treasury but in consequence of appropriations made by law." *See* Art. III, §24]. It was further held (197 N.W. at 826) that legislative discretion in allowing these expenditures by the executive was not to be controlled by the courts in the absence of a constitutional violation. Relying on reasoning similar to that used in 1970 OAG 859 Iowa as to the absence of challenges to statutes of this type, the court concludes that there are few dangers in surrendering control of funds to the executive in view of safeguards that (1) appropriations can be made by the executive for public purposes only, (2) the purpose of the funding is to carry on the regular work of the agency or institution [or as worded in Iowa Code §8.39 "to properly meet the legitimate expenses of such department."], and (3) the appropriation is to be made only when funds on hand are clearly insufficient. The above safeguards are present in the Iowa statute as well.

In addition to Wisconsin, the Courts of a number of other states have upheld statutes similar to §8.39 of the Iowa Code. In Utah, in *Chez v. Utah State*

Building Commission, Utah 1937, 74 P2d 687, a statute was upheld which provided "the governor shall have authority to reduce or transfer items or parts thereof within any appropriation, or eliminate any appropriation made herein, or *transfer* any appropriation or part thereof to the general fund." (Emphasis added)

A Vermont statute authorizing an emergency board "to appropriate moneys in addition to the sums herein provided, for any department or endeavor of the state" was upheld in *State Highway Board v. Gates,* Vermont 1938, 1 A2d 825. In California the statute provided that "if the funds designated in the appropriations bill are insufficient, an emergency fund has been provided in the general appropriations bill, the administration of which is committed to the discretion of the Department of Finance." *Raymond v. Christian,* 138, 24 Cal. App.2d 92, 74 P2d 536. In *Commonwealth v. Johnson,* Ky. 1942, 166 S.W.2d 409, the Court in upholding that state's statute said, ". . . certainly the legislature would not be required to anticipate every item for which it might become necessary to expend money in the course of the operation of the affairs of the State." Other cases along the same lines as those we have discussed above are: *Crane v. Frohmiller,* Ariz. 1935, 45 P2d 955; *Hocker v. Parkin,* Ark. 1962, 357 S.W.2d 534; *In re: Opinion of the Justices,* Mass. 1939, 19 N.E.2d 807; *LePage v. Bailey,* W.Va. 1933, 170 S.E. 457.

The only successful attacks on the constitutionality of provisions granting emergency powers of appropriation to the executive have been in line with *Peabody v. Russell,* 1922, 302 L. 111, 134 N.E. 150, where the state constitution required that appropriation bills specify the object and purposes for which appropriations are made before a sum may be apportioned between governmental departments. The Illinois constitution provided:

"No money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution."

This case is not applicable in some states, like Iowa, without such a constitutional provision.

We must also be cognizant of the well settled presumption of the constitutionality of legislative acts. As we said in 1968 OAG 132 at 139:

"Declaring an act of the legislature unconstitutional is a 'delicate function.' *Miller v. Schuster,* 1940, 277 Iowa 1005, 289 N.W. 702. It is well settled that a statute is presumed to be constitutional. The presumption is strong and the courts will not declare an act of the legislature unconstitutional unless the conclusion is unavoidable. They will do so then only when the violation is clear, plain, palpable and free from doubt. The Iowa court has even gone so far as to say that a person challenging the constitutionality "has the burden of negativing every conceivable basis which might support it. *Dickinson v. Porter,* 1948, 240 Iowa 393, 35 N.W.2d 66. Where a statute is fairly open to two constructions, one of which will render it constitutional, and the other doubtful, or unconstitutional, the construction upon which it may be upheld will be adopted. *Eyesink v. Board of Supervisors of Jasper Co.,* 1941, 229 Iowa 1240, 296 N.W. 376. If any reasonable state of facts can be conceived which will support constitutionality, it will be sustained. An attacker must negative every possible hypothesis of constitutionality. *Lewis Consolidated School District v. Johnston,* 1964, 256 Iowa 236, 127 N.W.2d 118."

In view of the foregoing, it is our opinion that both the first and second paragraphs of §8.39 are constitutional and do not amount to an unlawful

delegation of legislative authority to make appropriations. In the normal situation, the appropriations would already have been made and the only authority conferred would be to make transfers between or among them utilizing the guidelines given in §8.39 to wit, that on one hand there is an insufficient appropriation to properly meet legitimate expenses and on the other hand that there is an excess in another appropriation.

It should be borne in mind that we are here dealing only with the constitutionality of transfers under §8.39 between *existing* appropriations. We are not dealing, as we were in 1968 OAG 132 with an attempt to utilize §8.39 to fund a newly-created agency.

March 20, 1973

ELECTIONS: Municipal elections, special charter city, ward or precinct lines. §§49.1, 49.3, 49.5, 363.7, 363.8, 420.126-420.138, Code of Iowa, 1973. The city of Davenport, a special charter city, may not eliminate election precincts altogether nor may it establish precincts for municipal elections different from those established for other elections. (Haesemeyer to Higgins, State Representative, 3/30/73) #73-3-17

The Honorable Thomas J. Higgins, State Representative: Reference is made to your letter of February 26, 1973, in which you state:

"The city of Davenport proposes to remap the city for the 1973 municipal election by (1) re-drawing the ward lines and (2) eliminating precincts and precinct designations in favor of designated voting places in each ward. The ward lines will, of course, cross legislative district lines as allowed by statute.

"I believe this proposal is constitutional but in behalf of the City Council and the Mayor of Davenport I would like to request an opinion from you on the following question:

'May a municipality alter its ward boundaries and eliminate precincts or precinct designations so long as it provides designated voting places within each ward; and if so, what then becomes the status of persons previously elected as precinct committeemen?' "

Sections 49.1, 49.3 and 49.5, Code of Iowa, 1973, provide respectively:

"49.1 Elections included. The provisions of this chapter shall apply to all elections known to the laws of the state, except school elections."

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

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

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

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

"4. Each incorporated town, for town elections."

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

"Election precincts shall be of as nearly equal population as possible within the limitations of reliable data on the populations of various parts of such city, and the boundaries of each precinct shall follow the boundaries of areas for which official population figures are available from the most recent federal

decennial census. A city having a population of more than three thousand five hundred shall cause the federal decennial census to be taken on a block-by-block basis and shall preserve block statistics. Every precinct shall be contained wholly within an existing legislative district. No election precinct shall have a total population in excess of three thousand five hundred, as shown by the most recent federal decennial census, except that:

"1. If in any area of the city it is not possible to devise a contiguous precinct having a population of less than three thousand five hundred by the most recent federal decennial census, because one or more of the smallest population units for which census data are available are composed of noncontiguous territory, the city council may utilize other reliable and documented indicators of population distribution in establishing precincts within that area.

"2. Where an unavoidable conflict arises between the requirements of this section relating to population of precincts and the requirement that each precinct be contained wholly within an existing legislative district, the latter requirement shall take precedence.

"The council shall make any changes necessary to comply with this section no earlier than July 1 and not later than December 31 of each year immediately following a year in which the federal decennial census is taken, unless the general assembly by joint resolution establishes different dates for such compliance. Any or all of the publications required by section 49.11 may be made after December 31 if necessary.

"If the council fails to fix election precinct boundaries by the deadlines established pursuant to this section, the state commissioner of elections shall fix or cause to be fixed the boundaries as soon as possible. Expenses incurred by the state commissioner of elections shall be assessed to the city and paid by the city.

"The state commissioner of elections may request the services of personnel of the legislative service bureau and material available to the legislative service bureau for the purpose of fixing the boundaries of election precincts as provided in this section.

"Nothing in this section shall prohibit a city council which has complied with the applicable requirements of this section by December 31 of any year following a year in which the federal decennial census is taken, from thereafter changing the boundaries of any precinct in the manner and within the limitations provided by this section, at any time prior to or during the year in which the next federal decennial census is taken, if the council concludes that the changes in precinct boundaries are necessary to best serve the voters affected.

"The state commissioner of elections shall be notified when precinct boundary lines are changed and a map delineating the new boundary lines supplied."

It is clear from §49.5 that certain requirements are laid down by law with respect to city election precincts. They must be of as nearly equal population as possible, they must follow the boundaries of areas from which official population figures are available, each precinct must be contained wholly within an existing legislative district and no election precinct may have a population in excess of three thousand five hundred. We do not think that the use of the word "may" in the first paragraph of §49.5 furnishes any authority to a city to totally dispense with election precincts. To place this construction on the statute would be in direct conflict with manifest purpose of the rest of the section and in direct conflict with the provisions authorizing the state commissioner of elections to fix or cause to be fixed the boundaries of election

precincts if a city council fails to fix them by the deadlines established pursuant to §49.5. Also, the elimination of election precincts would make numerous other sections of the Code inoperable. For example, §49.9 provides that no person shall vote in any precinct other than that of his residence. §49.11 requires the council to number or name the precincets established and cause their boundaries to be recorded. Political party precinct caucuses are provided for by law. §43.4. Indeed, there are so many provisions in our election laws which depend on the existence of election precincts for their meaningful operation and workability that we must assume that the Legislature intended that the establishment of election precincts was considered a mandatory requirement.

However, while it seems clear that the city of Davenport may not dispense with election precincts altogether and that the precincts it establishes must comply with §49.5, the question remains as to whether they must use these precincts for *city* elections. Section 363.7 provides in relevant part:

"Cities may be by ordinance divided into wards, new wards created, or the boundaries changed, but in all cases the boundaries of wards shall be as far as practicable established so as to give all wards an equal population.

* * *"

Section 363.8 provides:

"Except as hereinafter provided, regular municipal elections shall be held on the Tuesday next, after the first Monday in November, of odd-numbered years, and elective officers shall be chosen biennially to succeed officers whose terms expire at noon of the second secular day in January, following said election. Voting places shall be fixed by the council, and at least one polling place provided for each precinct or ward, as the case may be."

Because of the existence of these statutory provisions, an earlier opinion of the Attorney General concluded:

". . . I am of the opinion that by ordinance the council may divide a city so organized into voting precincts, or one voting precinct, for general elections, and for election of its governing body the city may be divided into wards . . ." 1962 OAG p. 215, 216.

However, it must be borne in mind that at the time the 1962 opinion was issued, §49.5, Code of Iowa, 1962, merely provided:

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

It is to be observed that none of the extensive requirements with respect to equality of population of precincts, maximum size, use of census figures and legislative district lines were then present. These were added by subsequent general assemblies. In this connection, consideration must be given to §4.8 of the Code which provides:

"If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment by the general assembly prevails. If provisions of the same Act are irreconcilable, the provision listed last in the Act prevails."

Your attention is also directed to our opinion of June 6, 1972, to Secretary of State Melvin D. Synhorst in which we stated:

"We can find nothing in Ch. 49, as amended, which would support the contention that the precincts established by city councils are applicable only for city elections and that the Board of Supervisors can establish different voting precincts for elections other than municipal or school elections."

Moreover, Davenport is in a position different from other cities because of the fact that it is a special charter city subject to the provisions of Chapter 420 of the Code. As such, it has partisan elections, precinct caucuses, city conventions and so forth. Sections 420.126-420.138. While theoretically it might be possible to conduct the municipal election process with precincts different from those established for general elections, it seems to us that the proposal would create some difficult problems. First, it is doubtful whether voter registration lists would be available for precincts different from general election precincts. Voters would almost certainly be confused by having one precinct and voting place for general elections and another for municipal elections. In any event, the wards established would still have to be of nearly equal population. In addition, as you recognize, there is the problem of what to do with elected precinct committeemen. Under the law they are entitled to hold office for a two year term. §420.131. And there is no provision for holding special elections to replace anyone ousted as a result of reprecincting.

Thus, it is our opinion that the City of Davenport could not eliminate precincts altogether because of the requirements of Chapter 420 previously mentioned which depend on precincts to give them meaning. Moreover, for the reasons stated, precincts different from general election precincts could not be established for municipal elections.

March 20, 1973

SAVINGS & LOANS: Election of Directors. §534.67(1), Code of Iowa, 1973. Authorization for directors to elect directors merely runs from year to year and not perpetually until revoked by vote of members. Directors may be elected by directors at any meeting of the directors. (Nolan to Sheppard, Auditor of State's Office, 3/20/73) #73-318

Mr. Richard G. Sheppard, Supervisor, Savings and Loan Associations: This opinion is written in response to your request for an interpretation of §534.67(1), Code of Iowa, 1973, and specifically the sentence that states, "If authorized by a vote of the members, the directors may elect all the directors". Your letter states that in 1969 the members of a certain savings and loan association, at an annual meeting, authorized the directors to elect all directors and since that time the directors have been electing directors without presenting the question each year to the members at the general business meeting. It appears that when the annual meeting of the members is adjourned, the annual directors meeting commences for the purpose of electing directors and all non-director members are excluded. A complaining party objects to being excluded from the meeting at which the directors are elected. Your questions are as follows:

"1. Does Section 534.67(1) of the Code and Section 11 of the Model Articles of Incorporation which states the same thing, permit the board of directors to continue to elect directors until revoked by the members or must this be voted on at each annual meeting by the members?

"2. When election of directors by directors has been approved by the members, is the election to be at the annual meeting of the members or at a private meeting of the board of directors?"

The quoted language of §534.67(1) set out above has not previously been construed by this office to permit an authorization by the members to run perpetually until revoked. We do not so construe it now. If such authorization were intended to be permanent, it would be more logical for the statute to make reference to such a provision in the articles of the association instead of "authorized by vote of the members".

Elsewhere in §534.67 the directors are permitted to fill vacancies until the next annual meeting when the members of the association fail to elect a new member to fill a vacancy and to elect new directors to fill vacancies created by an increase in number of directors when such increase is authorized by the members. In either case the statute seems to contemplate that the members will have an opportunity to exercise their right to vote at the next annual meeting.

In answer to your second question, it is our view that when the members authorize the directors to elect other directors, such election is not required to take place at the annual meeting of the members but may be conducted by the directors at any subsequent meeting of the directors prior to the next annual meeting of the members.

March 26, 1973

STATE OFFICERS AND DEPARTMENTS: Vehicle Dispatcher, low bids on purchase of new motor vehicles, §21.2(4), Code of Iowa, 1973. The State Vehicle Dispatcher may properly consider resale value in awarding bids for new automobiles. (Haesemeyer to Schroeder, State Representative, 3/26/73) #73-3-19

Hon. Laverne Schroeder, State Representative: This opinion is in response to your letter dated March 5, 1973, regarding the legality of accepting a specified bid for the purchase of patrol cars. It appears that your primary objection arises from the fact that the State Vehicle Dispatcher utilized in his decision, the "resale value" of the cars; when this factor was not included in the bid specifications outlined in the bid invitation to automobile dealers.

The authority and duties of the State Vehicle Dispatcher in regard to the purchase of state automobiles are listed in §21.2(4) of the 1973 Code of Iowa. That section states:

"The state vehicle dispatcher shall purchase all new motor vehicles for all branches of the state government. Before purchasing any motor vehicle he shall make requests for public bids by advertisement and he shall purchase the vehicles from the *lowest responsible bidder* for the *type and make of motor vehicle designated.* No passenger motor vehicle except the motor vehicle provided by the state for the use of the governor, ambulances, buses, trucks, or station wagons shall be purchased for an amount in excess of the sum of three thousand three hundred dollars; provided that if the passenger motor vehicle is to be used by the highway patrol or the drug enforcement division or the division of criminal investigation and bureau of identification for actual law enforcement, the maximum amount shall be three thousand eight hundred dollars. Provided further, that for station wagons the maximum amount shall be three thousand five hundred dollars." (Emphasis added)

This section has been previously interpreted by this office as giving the Dispatcher the authority of considering other factors besides the lowest bid; for example availability of service and parts, see OAG, Nov. 15, 1968. In this connection we would observe that as the Vehicle Dispatcher stated to you in his letter of February 19, 1973, resale was not the only additional factor considered. He mentioned also "the satisfactory service and low down time experienced on prior Mercurys."

Granted, these factors give the Dispatcher some discretionary authority in his choice, but under the circumstances of his position and the subject matter of the bid, this is not unreasonable. Besides the resale value, there are many other factors considered when selecting a bid; such as, the quality of service given by a dealer in prior years, the reputation of the dealer in the state for service, and other matters that are not capable of being specified on a bid sheet. In response to your objection concerning the resale price, it should be noted that the individual dealers have no control over the depreciation value of their autos. The National Automobile Dealer's Association, (NADA), issues yearly calculations concerning the resale prices of different models and brands. Therefore, the resale price is not an item that could be competitively bid upon by the various dealers when drawing up their offers.

It is the opinion of this office that the bid specifications given by the Dispatcher and his consideration of resale prices is within the boundaries of §21.2 of the Code and therefore legal.

March 28, 1973

STATE OFFICERS AND DEPARTMENTS: Iowa American Revolution Bicentennial Commission; traveling expenses of members. Chapter 1286, 63rd G.A., Second Session (1969). Members of the Iowa American Revolution Bicentennial Commission from outside Des Moines may be reimbursed for their expenses of attending board meetings here in Des Moines. (Haesemeyer to Dillon, Chairman Iowa American Revolution Bicentennial Commission, 3/28/73) #73-3-20

Mr. Robert W. Dillon, Chairman, Iowa American Revolution Bicentennial Commission: This opinion is in response to your letter of February 23, 1973, concerning traveling expenses of Iowa American Revolution Bicentennial Commission members. You asked in your letter,

"Can commissioners from outside Des Moines be reimbursed for their expenses when attending board meetings here in Des Moines as prescribed by the State Comptroller rules?"

It is our opinion that Bicentennial Commission members may be reimbursed for their traveling expenses incurred in the pursuit of Commission business.

First of all, House File 1339 of Chapter 1286 of the 63rd G.A. Second Session, creating the Commission, utilizes fairly broad language when discussing expenditures. Section 4 of that Chapter states:

"There is hereby appropriated the sum of one thousand (1,000) dollars, or so much thereof as may be necessary, to the Iowa American revolution bicentennial commission, for the purpose of employing necessary personnel, purchasing supplies and printed material, *and carrying on the duties of the commission.* The moneys herein appropriated shall become available to the commission at such time as the governor shall determine the commission is officially organized and ready to transact its business." (Emphasis added)

Language such as this has been interpreted to manifest a liberal appropriation policy by the Legislature. In an October 28, 1971, opinion, this office held that language, such as used above.

". . .is sufficient and in our opinion a member of a state board or commission who is not receiving a state salary or per diem would be entitled to receive expenses for trips made on behalf of the board or commission of which he is a member, provided (1) the purpose of the trip is specifically within the scope of the statute creating the commission or board; (2) the trip was specifically authorized by the board or commission concerned (and by the executive council where out-of-state travel is involved, §8.13, Code of Iowa 1971); and (3) there is an appropriation to the commission or board from which the expenses can be paid."

The preceding interpretation appears to be consistent with the rule enunciated in *Hill v. City of Clarinda,* 1897, 103 Iowa 409, 72 N.W. 542, where the court stated:

"When a duty is required of an officer, and no provision is made for expenses, they are properly charged to the public body for which benefit it is done," see also *Schanke v. Mendon,* 1958, 250 Iowa 303, 93 N.W.2d 749; *Cobb v. City of Cape May,* 1971, 113 N.J. Super. 598, 274 A.2d 622; OAG, July 15, 1971.

March 29, 1973

CONSERVATION: Annual limit on cost of uniforms furnished by county conservation boards. §111.4(10), Code of Iowa, 1973. Cost of uniforms furnished by county conservation board to executive officer and employees designated by him may not exceed a total of three hundred dollars in any given year for all uniforms furnished. (Peterson to Fenton, Polk County Attorney, 3/29/73) #73-3-22

Mr. Ray A. Fenton, Polk County Attorney: Receipt is hereby acknowledged of your request for an opinion of the Attorney General with regard to Section 111A.4(10), Code of Iowa, 1973, as follows:

"The Polk County Conservation Board is confused about how the above section is to be interpreted, the question being, are the costs of the uniforms not to exceed $300.00 for an individual officer per year or is the $300.00 the total sum that may be spent for all uniforms of the officers."

Said Section 111A.4 provides, in pertinent parts, as follows:

"111A.4 Powers and duties. The county conservation board shall have the custody, control and management of all real and personal property heretofore or hereafter acquired by the county for public museums, parks, preserves, parkways, playgrounds, recreation centers, county forests, county wildlife areas, and other county conservation and recreation purposes and is authorized and empowered:

* * *

10. To furnish suitable uniforms for the executive officer and such employees as he may designate to wear, when on official duty. The cost of said uniforms not to exceed three hundred dollars in any given year. The uniforms shall at all times remain the property of the county."

We find no confusion in the terms used to authorize county conservation boards to furnish suitable uniforms to the executive officer and employees so

designated by him or in the terms used to limit to three hundred dollars the annual cost of said uniforms. The board is authorized to provide *uniforms* with the annual cost of *said uniforms* limited to three hundred dollars. The limitation is clearly stated as the total annual cost of the uniforms furnished.

A statute clear and unambiguous on its face is not subject to the process of statutory interpretation. See Sutherland Statutory Construction, Horack, 3rd Edition, Section 4502 and 4702, and numerous authorities cited therein including Mallory v. Jurgena, 1958, 250 Iowa 16, 92 NW 2d 387.

We are, therefore, of the opinion that a county conservation board may furnish suitable uniforms for the executive officer and such employees as he may designate at an annual cost not to exceed three hundred dollars for all uniforms furnished.

March 30, 1973

MOTOR VEHICLES: Inspection — §§321.238(12), 321.238(18), Code of Iowa, 1973. Motor vehicles sold in Iowa that are to be licensed in another state must be inspected. (Voorhees to Knoke, State Representative, 3/30/73) #73-3-23

The Honorable George J. Knoke, State Representative: This letter is in response to your request for an Attorney General's Opinion regarding the necessity to have inspected a motor vehicle sold in Iowa that is to be licensed in another state.

The motor vehicle inspection statute, §321,238, Code of Iowa, 1973, contains the following provisions relevant to your question.

"*Every motor vehicle* subject to registration under the laws of this state, except motor vehicles registered under section 321.115, when first registered in this state or *when sold at retail within or without this state,* or otherwise transferred, except transfers by operation of law as set out in section 321.47, shall be inspected at an authorized inspection station unless there is affixed to the motor vehicle a valid certificate of inspection which was issued for such motor vehicle not more than sixty days prior to the date on which such vehicle was sold." §321.238, Code of Iowa, 1973. (Emphasis added)

"A person shall not sell or transfer *any motor vehicle,* other than transfers to a dealer licensed under chapter 322, and other than transfers by operation of law as set out in section 321.47 unless there is a valid official certificate of inspection affixed to such vehicle at the time of sale." §321.238(18), Code of Iowa, 1973. (Emphasis added)

It would appear from these provisions that a motor vehicle sold for delivery outside the state would have to be inspected. Section 321.238 makes no exception to the inspection requirement for such vehicles, but, quite to the contrary, specifically requires that motor vehicles sold "within or without this state" be inspected. Accordingly, we are of the opinion that a motor vehicle sold in Iowa to be licensed in another state must be inspected.

March 30, 1973

MENTAL HEALTH: Commitment of the mentally ill — Chapter 229, Code of Iowa, 1973. A proposed amendment to Chapter 229, 1973 Code of Iowa, relating to the emergency detention of the mentally ill, provides a constitutionally permitted method of detaining those persons believed to be mentally ill. The proposed amendment would allow a wrongfully detailed

person to bring an action for false arrest, or false imprisonment. (Munsinger to Gallagher, State Senator, 3/30/73) #73-3-24

Senator James V. Gallagher, State Senator: You have requested an Opinion of the Attorney General as to the constitutionality of a proposed amendment to Chapter 229, 1973 Code of Iowa, relating to the emergency detention of mentally ill persons.

In your letter of February 13, 1973, you state as follows:

"The Senate Judiciary Committee is presently considering a proposed act relating to the emergency detention of the mentally ill. I have reason to doubt its constitutionality, based on the provisions within the proposed act which allows any peace officer or physician, without a warrant, to have detained a person for a period of 72 hours for purpose of examination."

"Under this proposed act, the detained party has little, if any, recourse to civil action."

The questions you pose essentially involve a construction of the entire proposed amendment. Since it is impossible to quote from the proposed amendment without deleting material portions thereof, it is necessary to set out the amendment in full. The proposed amendment provides as follows:

"A BILL FOR

An Act relating to the emergency detention of the mentally ill. Be it Enacted by the General Assembly of the State of Iowa:

Section 1. Chapter two hundred twenty-nine (229), Code 1966, is amended by adding a new section as follows:

When a person must be immediately detained due to mental illness, and the person cannot be immediately detained by following the standard provisions of Chapter 229 of the Code relating to the commitment of the mentally ill or Chapter 225 for commitment to state psychopathic hospital, then any peace officer or any physician who has reason to believe that a person is mentally ill and, because of the illness, is likely to injure himself or others, if he is not immediately detained, may, without a warrant, take or cause the person to be taken before the closest available magistrate as defined in Section 748.1 of the Code and state or cause to be stated the reasons for the need for immediate detention, and if the magistrate finds that the reasons are sufficient, then he shall enter a written order for said person to be taken into custody and transported to a state mental health institute or to the state psychopathic hospital or an appropriate public or private hospital. The written order of the magistrate shall reveal the circumstances under which the person was taken into custody and the reasons therefor and a certified copy of said order shall be delivered to the chief medical officer of the hospital at the time said person is delivered.

The chief medical officer of the hospital or his physician designate shall examine and may detain, care for and treat the person for a period not to exceed seventy-two (72) hours, excluding Saturdays, Sundays and holidays. Within said seventy-two (72) hours, the person shall be discharged from the hospital unless an information is filed with the Commission of Hospitalization in accordance with the provisions of Chapter 229 of the Code or unless the alternate provision of Section 229.1 is followed or proceedings under Chapter 225 are commenced. The detention by any peace officer, physician or hospital shall not render such peace officer, physician, or hospital liable, in a criminal or civil action, for false arrest or false imprisonment provided the peace officer, physician or hospital shall have reasonable grounds to believe that the person detained was mentally ill and likely to injure himself or others.

The cost of hospitalization at a state hospital of a person detained temporarily under the provisions of this section, shall be paid for in the same way as persons committed otherwise as mentally ill."

The constitutionality of the emergency detention of mentally ill persons, by any citizen, without warrant or any judicial proceedings, is well-settled in Iowa. *Chavennes v. Priestly,* 80 Iowa 316, 45 NW 766 (1890); *Bisgaard v. Duvall,* 169 Iowa 711, 151 NW 1051 (1915); *Maxwell v. Maxwell,* 189 Iowa 7, 177 NW 541 (1920).

In *Bisgaard v. Duvall,* supra, the Supreme Court of the State of Iowa stated as follows:

"An insane person stands upon a different plane from that of a criminal, and for his own good, as well as for the protection of the community, he may often be restrained by any person, especially by anyone having an interest in him, or, by one whose safety may depend upon his detention, be taken in charge without a warrant . . ."

* * *

"Of course, all such arrests or restraints must be reasonable and in good faith . . ."

And in *Maxwell v. Maxwell,* supra, the Iowa Supreme Court further stated:

"The right to restrain an insane person is not governed by the general law which provides that no one shall be deprived of life, liberty, or property without due process of law. Restraint under such conditions does not offend against the constitutional inhibition."

Thus, under Iowa case law, the emergency detention of a mentally ill person is not a violation of the due process clause of either the Iowa or Federal Constitutions.

The proposed amendment to Chapter 229, 1973 Code of Iowa, not only codifies the existing case law on the subject, but in addition, provides additional procedural safeguards for the person taken into custody, not present at common law.

The proposed amendment limits those who may take a mentally ill person into custody to a peace officer or physician, while at common law "any citizen" could do so.

In addition, the proposed amendment would require that the mentally ill person be taken before a magistrate who would make an initial determination as to whether "sufficient" reasons exist for taking the person into temporary custody for examination purposes. This judicial predetermination was unknown at common law.

The proposed amendment limits the temporary emergency detention period to three working days. At the expiration of this time the person in custody must be discharged or commitment procedures commenced. There was no specific limitation period for emergency detention at common law.

Other jurisdictions have enacted statutes very similar to the proposed Amendment and such statutes have withstood claims of unconstitutionality on due process grounds.

These statutes are discussed in 41 Am. Jur. 2d Incompetent Persons, §38 at page 576, as follows:

"Statutes providing additional procedure for confinement of insane persons before determination of sanity have been enacted in several jurisdictions. A statute authorizing a court or judge to order the temporary confinement or restraint of a person alleged to be insane and a fit subject for confinement to an institution pending proceedings to determine that question, is not unconstitutional as depriving the person affected of his constitutional rights."

Therefore, in answer to your first question, the proposed amendment would not be violative of procedural due process.

The second question you ask relates to the remedies a wrongfully detained person may have under the proposed amendment.

The proposed amendment provides that the peace officer, physician or examining hospital shall not be liable, in a civil or criminal action, for false arrest or false imprisonment, if there were reasonable grounds to believe that the person detained was mentally ill and likely to injure himself or others. Thus, neither a peace officer, physician or examining hospital is completely absolved of potential civil liability. A wrongfully detained person could still bring a civil action charging false arrest or false imprisonment, for damages, against any of these parties. It would then be incumbent upon the defendant peace officer, physician or hospital to show that reasonable grounds existed for his belief that the person detained was mentally ill and likely to injure himself or others. *Maxwell v. Maxwell,* supra. Although the Proposed Amendment lessens the burden of proof of Defendant from that existing at common law, it is clearly within the power of the legislative to do so. *In re Wills of Proestler,* 232 Iowa 640, 5NW 2nd 922, (1942).

Furthermore, the detained party, if subsequently determined to be mentally ill and committed to a state institution, has available to him the remedy of habeas corpus pursuant to Chapter 663, 1973 Code of Iowa.

Therefore, in answer to your second question, I would state that the Proposed Amendment would not leave a wrongfully detained person without an appropriate remedy, civil or otherwise.

March 30, 1973

COUNTIES AND COUNTY OFFICERS: §§309.3, 381.2, Code of Iowa, 1973. County has primary responsibility for repair or replacement of bridge on secondary highway extension within corporate limits of municipality of less than 2000 population if the municipality has not enacted ordinance assuming control of bridge. (Schroeder to Norland, Worth County Attorney, 3/30/73) #73-3-25

Phillip N. Norland, Esq., Worth County Attorney: You have requested an opinion of the Attorney General with respect to the following:

"whether the town of Northwood or the county of Worth should be responsible for the repair or the replacement of a bridge located within the city limits of Northwood, but which serves an important extension of county highway."

Section 309.3, Code of Iowa 1973, states:

"Secondary bridge system. The secondary bridge system of a county shall embrace all bridges and culverts on all public highways within the county except on primary roads and on highways within *cities* which control their own

bridge levies, except that culverts which are thirty-six (36) inches or less in diameter shall be constructed and maintained by the city or *town* in which they are located."

Since Northwood is a town, bridges on highways within the town would not be excluded from the secondary bridge system.

Section 381.2 provides:

"Towns may by ordinance assume the care, supervision, and control of any public bridge, . . . within their corporate limits. A town which has so assumed the care, supervision and control of any such public bridge, . . . shall, with respect thereto, have all of the duties and powers of a city under the provisions of Section 381.1."

If the town has not enacted such an ordinance it would not have the responsibility imposed on cities by Section 381.1.

In specific answer to your questions, it appears that the county is primarily responsible for the bridge.

March 30, 1973

STATE OFFICERS AND DEPARTMENTS: Highways — §§313.21, 314.5 and 313.27, Code of Iowa, 1962. Highway Commission had authority to relocate extension of primary highway in city without obligation of placing abandoned route in any specified condition of repair. (Schroeder to Kelly, State Senator, 3/30/73) #73-3-26

The Honorable E. Kevin Kelly, State Senator: This is in response to your recent letter in which you asked the following questions:

"1. What is the authority for the Iowa Highway Commission to relocate a primary extension and what steps, if any, must the Commission follow in so doing?

2. Is there any obligation on the part of the Commission to put in good repair the roadway and its structures upon relocation of a primary extension.

3. Assuming the Commission did not follow proper procedure, what remedies and rights are available to the city to obtain economic assitance from the Commission to repair the roadway and its structures."

The above questions were asked in connection with the alteration of the route of the extension of U.S. highway 77 in the city of Sioux City in the year 1962.

Section 313.21, Code of Iowa 1962 stated:

"The State Highway Commission is hereby given authority, subject to the approval of the Council, to construct, reconstruct, improve and maintain extensions of the primary road system within any city or town including the construction, reconstruction, and improvement of storm sewers and electrical traffic control devices reasonably incident and necessary thereto, provided that such improvement, exclusive of storm sewers, shall not exceed in width that of the primary road system and the amount of funds expended in any one year shall not exceed twenty-five (25%) per-cent of the primary road construction fund.

The phrase, 'subject to the approval of the Council', as it appears in this section, shall be construed as authorizing the Council to consider said proposed improvements in its relationship to municipal improvements (such as sewers,

water lines, sidewalks and other public improvements, and the establishment or re-establishment of street grades). The location of said primary road extensions shall be determined by the State Highway Commission."

Section 314.5 contained a similar admonition but extended the application to "the Board of Commission in control of any secondary road or primary road . . . ," thus making the provision applicable to both the Board of Supervisors of a county with regard to secondary roads as well as to the State Highway Commission with regard to primary roads. That Section concluded with the same general admonition that the "locations of such road extensions shall be determined by the Board or Commission in control of such road or road system."

With respect to bridges, specifically, Section 313.27 stated:

"The State Highway Commission may construct or aid in the construction, and may maintain bridges, viaducts, and railroad grade crossing eliminations on primary road extensions in cities and towns."

Since there was no specific statute in 1962 commanding the establishment of primary road extensions, the act of so doing was left to the discretion of the Highway Commission and the city council of the city within which the extension was to be located. The changes of the routing of such extensions were also discretionary with the Commission under authority of the last sentence of Sections 313.21 and 314.5, Code of Iowa 1962.

There was no imposition of obligation on the State Highway Commission to place a primary road extension in any particular degree of condition of maintenance before abandoning the route and relocating the extension on a new route.

With regard to your third question regarding the assumption that the Commission did not follow proper procedures, I believe the foregoing has indicated that there were no such "proper procedures" to follow and the question is therefore obviated.

April 4, 1973

LIQUOR, BEER & CIGARETTES: Age of persons who may be employed on licensed premises, Chapter 131, sec. 49, subsection (f) Acts of the General Assembly, First Session. State Law does not prohibit persons under legal age from employment on licensed premises if the employment does not involve the selling and/or serving of Alcoholic Beverages or Beer. (Jacobson to Klinger, Assistant Linn County Attorney, 4/4/73) #73-4-1

Mr. Phillip O. Klinger, Assistant County Attorney, Linn County: This is to acknowledge receipt of your letter dated November 27, 1972, in which you requested an opinion from this office regarding the following matter:

"In regard to the above captioned matter, Section 49(f) of Chapter 131 of the Acts of the 64th General Assembly, First Session, states:

"'After July 1, 1971, any person under legal age shall not be employed in the sale or serving of alcoholic liquor or beer for consumption on the premises where sold unless the person shall be at least eighteen years old and the business of selling food or other services constitutes more than fifty percent of the gross business transacted therein, and then only for the purpose of serving or clearing alcoholic beverages or beer as incidental to a meal. This paragraph shall not apply to Class 'C' beer permit holders.'"

". . . Therefore, we would request an Attorney General's opinion on the following question:

"'Does said Section prohibit minors performing any service on the premises, or, does it prohibit them only from performing services wherein they are directly handling liquor and beer?'"

The general prohibition of the above quoted section of Chapter 131 Acts of the 64th General Assembly, First Session, is that a person under legal age, which is now nineteen years of age or more, shall not be employed in the sale or serving of alcoholic liquor or beer for consumption on the premises where sold. The one exception to this prohibition is that a person 18 years of age may serve or clear alcoholic beverages or beer incidental to a meal if the business of selling food or other service constitutes more than fifty percent of the gross business transacted in the establishment where that person is employed. It should be noted that effective July 1, 1973, legal age will be 18 years of age or more. See S.F. 82, Acts of the 65th General Assembly. On that date the distinction created by Section 131.49(f) as it relates to the age of those persons who may sell and serve alcoholic beverages or beer incidental to a meal as opposed to the age of those persons who may generally serve alcoholic beverages or beer will no longer exist. The age of those persons selling or serving alcoholic beverages or beer will no longer depend on the nature of the business of the licensed premises.

There is nothing in Section 131.49(f) or in the entire Iowa Beer and Liquor Control Act, which would prohibit persons under legal age employed by a licensee or permitee from performing services not involving the serving or clearing of alcoholic beverages or beer. However, cities and towns have the power to enact ordinances banning all persons not of legal age from licensed premises subject to the exception created by Section 131.49(f) (which will only be in effect until July 1, 1973). *City of Des Moines v. Reisman,* 248 Iowa 821, 83 N.W.2d 197 (1957). There is no specific statutory provision prohibiting persons under legal age from premises where alcoholic liquors or beer are sold, therefore, such regulations must emanate from the local governing bodies or from the Iowa Beer and Liquor Control Department, 1964 O.A.G. 283. An examination of the Departmental Rules of the Iowa Beer and Liquor Control Department reveal no such prohibition. It is, therefore, the opinion of this office that if there is no local ordinance banning persons not of legal age from premises which sell and serve alcoholic liquors or beer, then such persons may be employed on said premises as long as said employment does not involve the sale or serving of alcoholic liquors or beer.

April 5, 1973

CONSTITUTIONAL LAW: Legislature, rules of procedure — §9, Art. III, Iowa Constitution. Senate may adopt a dress code and require conformance by everyone in the Senate Chamber. (Beamer to Brinck, State Representative, 4/5/73) #73-4-2

Honorable Adrian Brinck, State Representative: This will acknowledge receipt of your letter in which you submitted the following:

"This morning (March 30) I had occasion to visit with Senator Blouin while the Senate was in session. When I attempted to enter the chamber I was told that I could not enter because of improper dress. I ignored the door keepers' remarks and went on over to see Senator Blouin. As I finished my conversation with Sen. Blouin, Lt. Gov. Neu came over and told me that I would have

to leave the floor of the Senate because I was improperly attired. He said that it was not a written rule of the Senate but that it was the custom of the Senate to abide by the unwritten rule.

"My question is this: Can a duly elected member of the Iowa legislature of either house be restricted from the floor of the other because of non-conformity with a dress code?

"We will soon be in the part of the year in which the temperature in the chambers gets to be quite hot and it has been the custom of many House members to come to the floor in their shirtsleeves.

"Therefore I would appreciate a very early reply to my question."

In reply thereto I would advise the following: Section 9 of Article III of the Constitution of Iowa provides with respect to the authority of the houses of the Legislature:

"Each house shall sit upon its own adjournments, keep a journal of its proceedings, and publish the same; determine its rule of proceedings, punish members for disorderly behavior, and, with the consent of two thirds, expel a member, but not a second time for the same offense; and shall have all other powers necessary for a branch of the General Assembly of a free and independent State."

You will note that §9 of Article III confers the powers on each house of the Legislature to "determine its rules of proceedings". This power is not restricted or limited by any other provision in the Constitution.

Although the rules of the Iowa Senate have not been the subject of any case considered or adjudicated by the Iowa Supreme Court, the extent of this power has been considered in 81 C.J.S. at page 930, stating that:

"The houses of the legislature are ordinarily organized and governed in accordance with recognized principles of parliamentary law, subject to any special provisions of the state constitution; *and each house has the power to make its own rules.*" (Emphasis Added)

This principle was recognized in a California case, *French v. State Senate,* 146 Cal. 604, 80 P. 1031. Also in *Re Speakership of the House of Representatives,* 15 Colo. 520, 25 P. 707, 710, the following was stated in regard to legislative authority:

"The house must judge for itself in such matters, and its jurisdiction to so judge and decide is exclusive. As to those matters confided exclusively to each legislative branch of government, if a wrong or unwise cause be pursued there is no appeal under our system of government except to the ballot box."

The authority for a legislator to be in the Iowa Senate while it is in session is found in Rule 44, Senate Rules of Procedure, 1973-74, Sixty-fifth General Assembly. Addressing your attention to that rule it appears as follows:

"While the senate is in session and for a period of ten minutes before the convening of any session, *only legislators,* employees of the legislature, authorized interns, and legislative aides shall be allowed in the senate chamber. A person or group accompanied by a senator or persons going directly to committee meetings may be admitted during recess. Former legislators not registered as lobbyists in either house shall also be admitted to the senate floor. News reports shall be permitted to occupy the seats assigned for the press and to go to or from those seats. No other persons shall be allowed on the senate floor without express permission of the presiding officer of the senate." (Emphasis Added)

This authority for a legislator to be in the Senate chamber while it is in session is not qualified or limited by any other Senate rule, and specifically is not limited by a dress code. You have stated that a rule of custom was invoked by Lt. Gov. Neu. In other words, it apparently is traditional in the Senate to require legislators to conform to an unwritten dress code. The fact the rule is unwritten is insignificant in this case as long as it is supported by the members of that body. The rule is a creature of their own making, to be maintained, enforced, rescinded, suspended or amended as they deem proper. The observation of their rules is a matter entirely subject to legislative control and discretion, not subject to be reviewed by the courts, *Dow v. Beidelman,* 49 Ark. 325, 5 S.W. Rep. 297. Such rules, including constitutionality thereof are not subject to review by courts. 64 O.A.G. 52.

As a duly elected member of the Iowa Legislature you are entitled to be present in the Senate while in session in accordance with its rules. The authority of the legislature in the enactment or recognition of rules is absolute and the courts have no power to control, direct, supervise or forbid its exercise.

April 6, 1973

COUNTY AND COUNTY OFFICERS: Newspaper — §§618.3, 349.2, Code of Iowa, 1973. Place of mailing a newspaper is placed where it is "published", not where it is printed. (Murray to McQuire, Howard County Attorney, 4/6/73) #73-4-4

Mr. Kevin C. McQuire, Howard County Attorney: You have requested the opinion of this office concerning the interpretation of §618.3 and §349.2, Code of Iowa, 1973, in relation to a dispute between two newspapers who wish to be certified by your board of supervisors under the provisions of the above mentioned sections.

You have also mentioned that you had been advised by this office that an earlier Attorney General's opinion, dated July 22, 1930, had been furnished to you and that it was the opinion of this office that that opinion controlled the dispute between the papers in your county. In that opinion this office held that the word "published" meant where the newspaper is deposited for general circulation and not at the point where it is printed. 1940 OAG 334.

Section 618.3 of the Code states as follows:

"'Newspaper' defined. For the purpose of establishing and giving assured circulation to all notices and/or reports of proceedings required by statute to be published within the state, where newspapers are required to be used, newspapers of general circulation that have been established, published regularly and mailed through the post office of current entry for more than two years a bona fide paid circulation recognized by the postal laws of the United States shall be designated for the publication of notices and/or reports of proceedings as required by law."

This particular code section merely defines the status of an "official newspaper". This section was interpreted and referred to in *Widmer v. Reitzler,* 1970, 182 N.W.2d 177, as follows:

"* * * Section 618.3 says, in essence, a paper in which such notices may be carried must be, (1) of general circulation; (2) published regularly and mailed through the post office of current entry for more than two years; and (3) for the same period had a bona fide circulation recognized by the postal laws."

We will assume for the purposes of your inquiry that the papers under consideration qualify under the above definition.

Chapter 349, on the other hand, relates to the circumstances under which a board of supervisors may select an official newspaper for the purposes of publishing official proceedings of the board for the ensuing year. In other words §618.3 directs itself at defining an official newspaper on a state-wide basis and therefore establishes the list from which a county can work for the purposes of determining an official newspaper in *local* area for the purposes of giving notice to interested citizens in a geographical area such as the county.

Section 349.2 states as follows:

"Source of selection. Such selection shall be from newspapers published, and having the largest number of bona fide yearly subscribers, within the county. When counties are divided into two divisions for district court purposes, each division shall be regarded as a county."

As is apparent, this section uses the word "and" in a conjunctive sense thus requiring two elements to occur, (1) published in, (2) having the largest number of bona fide yearly subscribers, *within the county*. Under this statute place of printing is not material.

That the place of printing should not control is also the general consensus of the industry individuals with whom we discussed this question. They have advised that many of the smaller weeklys are printed at various places throughout the state and on some occasions outside of the state in order to take advantage of more modern printing methods and lower costs. We think this is a reasonable rule which is also shared as a general rule of law and stated in 58 Am.Jur.2d 139:

"§12. Generally. As a general rule, legislatures have the power to require that newspapers, in order properly to be designated as publishers of official notices, advertisements, etc., shall be published within a certain locality. And while in one sense a paper is published in every place where it is circulated or its contents are made known, nevertheless it has been held by some courts that the 'place of publication' of a newspaper designated or selected for the publication of official notices, as the term 'place of publication is used in a statute,' is the place where the paper is first put into circulation, where it is first issued to be delivered or sent, by mail or otherwise, to its subscribers. Under this rule, it is immaterial where the printing is done, and it has been held that a newspaper is published at the place where it is entered in the post office as second class matter."

This general rule was also followed in another opinion from this office, 1944 OAG 8, where it was stated:

"If the paper in question was actually a newspaper of Eldon, Wapello County, Iowa, having its principal place of business in Eldon, it would not be necessary that the actual printing be done at that place. The word 'published' was not used in the section in question in the narrow sense of printing and binding but we believe the word 'published' was intended to make known publicly or to put into circulation."

You have also asked us to give an opinion on the facts submitted under the contest between two newspapers in your county. This office, of course, if it were to do so, would be usurping the jurisdiction of the board of supervisors in this area, therefore, we must decline to do so. I am enclosing a copy of a 1962

opinion of this office wherein the procedures to be used under Chapter 349 were discussed and a suggestion was made as to how the board of supervisors should conduct a hearing of this nature. You will note that this opinion indicates that a hearing of this kind is of a quasi-judicial nature, therefore a proceeding which meets the elements of a fair hearing are all that is necessary and no official rules should be promulgated by this office concerning same.

The factual situation you have outlined concerns a situation where all of the matters necessary in composing one of the papers for circulation takes place in a town where the county line intersects the main street and the post office is on the other side of the street in another county. I think you will agree that this is a most unusual circumstance and that departure from the general rule which has been of long standing in the state of Iowa should not be changed without an opinion from the courts of Iowa concerning the question.

April 11, 1973

CITIES AND TOWNS: General Obligation Bonds — §§105 and 107, Ch. 1088, Acts of the 64th General Assembly, Second Session. A municipality operating under the new Minicipal Code must hold an election on the issuance of general obligation bonds for airport works. (Blumberg to Rinas, State Representative, 4/11/73) #73-4-3

The Honorable Joe Rinas, State Representative: We are in receipt of your opinion request of February 12, 1973, concerning general obligation bonds. You specifically asked:

"If a municipality adopts provisions of the home rule bill regarding cities and towns, must they call a referendum to permit the sale of general obligation bonds for airport works?"

Chapter 1088, Acts of the 64th General Assembly, Second Session, is the new Municipal Code of Iowa, Section 105 (2) provides, in part:

" 'City enterprise' means any of the following, including the real estate, fixtures, equipment, accessories, appurtenances, and all property necessary or useful for the operation of any of the following:

e. Airport and airport systems."

Section 105 (4) provides:

" 'General corporate purpose' means:
a. The acquisition, construction, reconstruction, improvement, and equipping of city utilities, city enterprises . . ."

Thus, any construction or maintenance of an airport is a general corporate purpose.

Section 107 sets forth the requirements of a city with respect to issuing general obligation bonds for a general corporate purpose. That section reads, in part:

"1. A city which proposes to carry out any general corporate purpose within or without its corporate limits, and to contract indebtedness and issue general obligation bonds to provide funds to pay all or any part of the costs of a project, must do so in accordance with the provisions of this division.

2. Before the council may institute proceedings for the issuance of bonds for a general corporate purpose, *it shall call a special city election to vote upon the question of issuing the bonds . . . .*" (Emphasis Added)

Section 107 (4) provides that a sixty percent majority vote is required for issuance of the bonds.

Accordingly, we are of the opinion that under the new Municipal Code, a municipality must hold an election on the question of issuing general obligation bonds for airport works.

April 11, 1973

STATE OFFICERS AND DEPARTMENTS: Medical Examiners. The statutory requirements of sec. 148.3(4) and regulations made pursuant thereto are satisfied by an applicant's statement made under oath declaring his intention to become a citizen where at the time of application for a medical license the applicant does not claim to be a citizen of the U.S. (Nolan to Saf, Dir. State Bd. of Medical Examiners, 4/11/73) #73-4-7

Mr. Ronald V. Saf, Executive Director, Iowa State Board of Medical Examiners: This is written in response to the request for an Attorney General opinion presented by your recent letter which states in pertinent part as follows:

"The Board of Medical Examiners respectfully requests an opinion as to the evidence, documentation, or statements the Board may accept to satisfy a requirement of our law which provides that an applicant for medical licensure must be a citizen of the United States or have legally declared his intention to become a citizen.

"Section 148.3 of the 1971 Code provides in pertinent part as follows:

* * *

"'4. Be a citizen of the United States or have legally declared his intention of becoming a citizen.'

"The Board has required a photostatic copy of a birth certificate or evidence of naturalization papers relative to the citizenship requirement. The Board has required a declaration of intention issued by the Clerk of a Federal District Court, Immigation and Naturalization Service Form N-315, as evidence that the applicant had legally declared his intention to become a citizen of the United States. The Immigration and Naturalization form bears the applicant's alien registration number, year and place of birth, personal description, photograph, name of the Clerk of the Federal District Court, and the date of issuance.

"We have been advised by the Immigration and Naturalization Service that a prerequisite for eligibility to file a declaration of intention to become a citizen of the United States is lawful permanent resident status. In order for an alien to become eligible for lawful permanent resident status an immigrant visa number must be available for his use.

"The problem confronting several foreign medical graduates in this state is the fact that they have satisfied all of the requirements for licensure, except the citizenship requirement. These physicians have made application to the Immigration and Naturalization Service for visa numbers, but since such immigration visa numbers are issued on a first come, first serve basis and the numerical allocations for natives of certain foreign countries being heavily oversubscribed, these doctors will not be able to declare their intention to become a citizen of the United States for three or more years. The Board may issue a temporary license to these physicians under the provisions of Section 148.10 of the Code, but the additional problem is that no person is entitled to practice his profession in excess of three years while holding a temporary certificate.

"Enclosed please find a copy of a letter received from R. C. Williams, District Director, Immigration and Naturalization Service, dated January 31, 1973, and a copy of the latest visa bulletin which sets out the latest visa information as of February, 1973."

The letter of the District Director of the Immigration and Naturalization Service states:

"In the past we allowed all aliens in the third preference category, such as physicians, to remain in the United States until an immigrant visa number became available, and will continue to do so for those already granted such a privilege. However, these cases are now considered on an individual basis and such privileges granted only if the case merit such action."

In a subsequent letter pertaining directly to one of the doctors now holding a temporary license in Iowa, Mr. Williams states:

"The record shows that Ismael M. Naanep was granted '3rd preference' immigration status as of June 5, 1970. Since the immigration quota for natives of the Philippines is heavily oversubscribed, Dr. Naanep is permitted to remain in the United States until he will be able to apply for permanent residence in this country. He is authorized to accept employment. It appears that about one more year must elapse before he may apply for permanent residence."

Naturalization is a privilege to be given, qualified or withheld as the Congress shall determine. *In re Pisciaptano,* D.C. Conn., 1970, 308 F.Supp. 818. If there are any doubts as to whether or not an alien applicant is entitled to citizenship, the matter should be resolved in favor of the government and against the applicant. *In re Gierstad,* D.C. Cal., 1969, 307 F.Supp. 329.

We have searched the statutory provisions of Title VIII, U.S.C.A. and do not find therein a definition of the term "legally declared his intention of becoming a citizen". The present provisions of the Federal Immigration and Naturalization Statutes were recodified June 27, 1962, and the current regulations of the Immigration and Naturalization service do make provision for an applicant to file a form designated N-300, Application to File Declaration of Intention as well as form N-315, Declaration of Intention. The application is authorized in quota situations when it appears that the alien applicant has been lawfully admitted for permanent residence in this country and has satisfied the preliminary statutory requirements for naturalization. The Declaration of Intention is a procedural form filed by the applicant in the office of clerk of the naturalization court to support his petition for naturalization (8 CFR, §334.15).

There clearly is a distinction between the petition for immigrant status made under oath and which is necessary for the alien to be "lawfully admitted for permanent residence" in the United States and the further step whereby the resident alien files a declaration of intention to become a citizen and completes the necessary requirements, including any quota preference classification, to be entitled to proceed with the application for naturalization. The Iowa statute does not require that the applicant for a license have filed an application for naturalization, it only requires that he make a showing of an intention to do so. Under Iowa law, where the state of mind of a person at a particular time is relevant to a material issue his declarations of such intent are admissible as proof on that issue. A man's intention is a matter of fact and when material he may testify directly thereto. *In re Allen's Estate,* 1960, 251 Iowa 177, 100 N.W.2d 10; *Williams v. Stroh Plumbing & Elec., Inc.,* 1959, 250 Iowa 599, 94

N.W.2d 750; *Hallegan v. Lone Tree Farmers Exchange,* 1941, 230 Iowa 1277, 300 N.W. 551. "Legal intention" is deductible from acts of the parties. *Leach v. Farmers' & Merchants' State Bank of Washington, Iowa,* 1927, 204 Iowa 493, 215 N.W. 617. A declared intention is one that is expressed. *Catasauqua Bank v. North,* 160 Penn 303, 28 A. 694, 696. The reasonableness or unreasonableness of parties versions of intentions may be considered in weighing testimony. *Steele v. Kluter,* 1927, 204 Iowa 153, 214 N.W. 522.

Affirmative uncontradicted statements made under oath, even when given on own behalf cannot be held to prove the negative and need not be rejected. *Donovan v. White,* 1937, 224 Iowa 138, 275 N.W. 889. *Williams Savings Bank v. Murphy,* 1935, 219 Iowa 839, 259 N.W. 467. *Pike v. Coon,* 1934, 217 Iowa 1068, 252 N.W. 888. However, undenied evidence must stand the test of credibility and circumstances showing improbability, unreasonableness or inconsistency. *Rhodes v. Rhodes,* 1960, 251 Iowa 430, 101 N.W.2d 1.

In an administrative proceeding a decision which is supported by substantial evidence will be presumed to be legal. *Grant v. Fritz,* 1972, 201 N.W.2d 188. Accordingly, the board should require an applicant for a medical license who does not claim to be a citizen to furnish a statement made under oath declaring his intention to become a citizen. Such a statement would, in the opinion of this office, satisfy the requirements of Code §148.3(4) and the regulations made pursuant thereto.

April 20, 1973

STATE OFFICERS AND DEPARTMENTS: Cosmetology and barber fees, use of funds — §§157.14 and 158.9, Code of Iowa, 1973. All funds collected under Ch. 157 are restricted by §157.14 for use in the administration and enforcement of the laws relating to cosmetology. Under §158.9 expenditures for administration and enforcement of Ch. 158 may not exceed fees collected under Ch. 158. (Haesemeyer to Lipsky, State Representative, 4/20/73) #73-4-5

The Honorable Joan Lipsky, State Representative: This opinion is in reference to your request dated April 11, 1973, regarding Chapters 157 and 158 of the Code of Iowa, 1973. In your request you asked:

"1. Does Chapter 157.14 restrict all monies collected under this chapter for the use of the administration and enforcement of the laws relating to cosmetology?

"2. Does Chapter 158.9 restrict the amount spent on administration and enforcement of Chapter 158 to fees collected under the same chapter?"

In regard to your first question, it is the opinion of this office that §157.14 does restrict all monies collected under this chapter for the use of the administration and enforcement of the laws relating to cosmetology. §157.14 states:

"157.14 Fees. All fees provided for by this chapter and all other fees paid to the department by practitioners of cosmetology shall be paid by the department to and receipted for by the treasurer of state, who shall keep such fees in a separate fund to be known as the cosmetology fund. Such fund shall be continued from year to year and the treasurer shall keep a separate account thereof showing receipts and disbursements as authorized by section 157.8, and the balance therein; and no part of such fund shall be used for any other purpose than the administration and enforcement of the laws relating to the practice of cosmetology."

The statute is very definite in its language. This is evidenced by the use of phrases such as "all fees", "separate fund" and "separate account". §157.14 provides that these funds *shall* be continued from year to year in a separate account (the word "shall" when addressed to public officials is mandatory, see for example, *McDunn v. Roundy,* 191 Iowa 976, 181 N.W. 453 (1921)). Lastly, the provision in §157.14, "*no part* of such fund shall be used for *any other purpose* than the administration and enforcement of the laws relating to the practice of cosmetology", is quite clear in its intent and must be followed. In determining whether statutory provisions are mandatory or directory the prime object is to ascertain the legislative intent and the ordinary rules of statutory construction apply, *Dye v. Markey,* 147 N.W.2d 42 (Iowa 1966). The language utilized is sufficient to express the legislative intent.

Your second question is in regard to the "barbering" statute, Chapter 158. §158.9 provides that:

". . . The entire cost of the administration and enforcement of this chapter *shall not* exceed in any year the receipts by virtue of this chapter for *such* year." (Emphasis Ours).

The use of the word "shall" was discussed above, but it should also be noted that Chapter 4, "statutory construction", states in §4.1, subsection 37(a) that the word "shall" imposes a duty. §158.9 definitely restricts the expenditures for administration and enforcement to the amounts collected for licenses, examinations, and other matters related to barbering requiring the payment of a fee. In an earlier attorney general's opinion concerning this statute this office held that, ". . . no expenditure should be made on account of administration of the law *in excess of receipts under the act*". OAG 1928, page 131.

We therefore conclude that any expenditures in excess of the receipts collected will contravene the express terms of §158.9.

April 23, 1973

STATE OFFICERS AND DEPARTMENTS: Iowa State Fair, promotional trips — §§8.2(2), 173.14, 173.16, 173.19, Code of Iowa, 1973. A "Discover Mexico" trip could legitimately be conducted by the Iowa State Fair Board to promote the state fair. However, funds collected from participants in the tour are state funds subject to the provision of Ch. 173 of the Code. (Sullins to Smith, Auditor of State, 4/23/73) #73-4-6

Honorable Lloyd R. Smith, Auditor of State: Reference is made to your letter of March 13, 1973, in which you request an opinion of the attorney general and state:

"Mr. Kenneth Fulk, Secretary of the Iowa State Fair Board, has lent his influence to promote the 'Discover Mexico', the 'Discover Canada' and the 'Discover Hawaii' trips. For the 'Discover Mexico' trip he served as agent for the trip, receiving all the money from participants and making the necessary disbursements.

"Mr. Fulk alleges that the 'Discover Mexico' trips were for the benefit of the State of Iowa in promoting the State Fair.

"We ask your opinion on whether the money collected from participants in the 'Discover Mexico' trip and deposited in a separate bank account at the Iowa State Bank (see attached bank statement) are state funds charged to the State Fair Board and are subject to the provisions of Chapter 173 of the Code of Iowa.

"We further request your opinion if the name 'Iowa State Fair' may be used in promoting a tour sponsored by a private entrepreneur."

§173.14, Code of Iowa, 1973, provides in relevant part:

"The state fair board shall have the custody and control of the state fairgrounds, including the buildings and equipment thereon belonging to the state, and shall have power to:

* * *

"3. Hold an annual fair and exposition on said grounds.

* * *

"8. Adopt all necessary rules in the discharge of its duties and in the exercise of the powers herein conferred."

The broad language employed in the subsections cited above necessarily carries with it authority for the fair board to undertake incidental and ancillary activities considered by it in the exercise of its good judgment to be necessary in the holding of an annual state fair. Thus it may reasonably be implied that the fair board had the power to promote a travel tour to publicize the theme of the state fair. In sponsoring such a travel tour, it is equally reasonable that the board should be empowered under §§173.14(3) and (8) to collect receipts from persons seeking to participate in the promotional tour.

Concluding as we have that the fair board had the power to sponsor the promotional trip and collect funds from the persons making the trip, the question next rises to whether such funds are to be considered as state funds. "State funds" are defined in §8.2(2) as follows:

"State funds means any and all moneys . . . collected by or for the State or an agency thereof, pursuant to authority granted by any of its laws."

Since in this case money has been collected by an agency of the state pursuant to lawful authority, it is our opinion that the money in question is in fact "state funds".

Moreover, collection of money by the state fair board is a "financial affair" of the board and thus the funds are subject to the provisions of §173.19, Code of Iowa, 1973, where it is provided that:

"Prior to the annual convention, the auditor of state shall examine and report to the executive council upon *all financial affairs* of the board." (Emphasis Added)

If the board collects money from prospective tour participants, it is to be anticipated that the state fair board is then going to be obliged to satisfy the financial obligation of the participants to the travel agency selected to conduct the tour. The satisfaction of this obligation by the state fair board is necessarily in the nature of a financial expenditure and is therefore subject to the provisions of §173.16 which provides:

"All expenditures incurred in . . . conducting the annual fair . . . shall be recorded by the secretary and paid from the state fair receipts . . ."

Turning to your last question, since as we have seen, a travel tour promotion of the state fair is a legitimate state function within the power of the fair board to undertake rather than a tour sponsored by a private entrepreneur, it necessarily follows that the term "Iowa State Fair" may be used to promote the tour.

April 26, 1973

STATE OFFICERS AND DEPARTMENTS: Travel Expenses of the State Fair Board — secs. 8.6(7), 8.13, 173.9, 173.11 and 173.17, Code of Iowa, 1973. Members and employees of the Fair Board do not need executive council authorization for out of state trips. (Blumberg to Fulk, Sec. Iowa State Fair Bd., 4/26/73) #73-4-8

Mr. Kenneth R. Fulk, Secretary, Iowa State Fair Board: We are in receipt of your opinion request of April 20, 1973, regarding travel expenses. You are asking whether members and employees of the Fair Board must receive permission from the Executive Council for out of state business trips that are not conventions, conferences or meetings.

Section 8.13 of the Code provides:

"The state comptroller shall be limited in authorizing the payment of claims, as follows:

* * *

2. *Convention expenses.* No claims for expenses in attending conventions, meetings, conferences or gatherings of members of any association or society organized and existing as quasi-public association or society outside the state of Iowa shall be allowed at public expense, unless authorized by the executive council . . . ."

There is some question as to whether the Fair Board would come under section 8.13. Pursuant to Chapter 173, the Fair Board shall prescribe rules for the presentation and payment of claims out of state fair receipts and other funds of the board. Section 173.17. The secretary of the board draws all warrants on the treasurer, section 173.9(2), and the treasurer makes payments on all warrants signed by the president and the secretary of the board from any funds available, section 173.11(2). Section 8.6(7) provides that the state comptroller shall control the financial operations of the Fair Board by charging all warrants issued to the Fair Board to advance accounts; by charging all collections made by the Fair Board to the advance accounts; and by charging all disbursements made to the allotment accounts of the Fair Board and crediting all such disbursements to the advance and inventory accounts. In other words, the Fair Board has its own accounts, issues its own warrants for salaries and expenses, and decides its own procedures for claims which it then pays for out of its own accounts. Claims for the Fair Board and its employees need not be submitted to the Comptroller for payment. Therefore, section 8.13(2) has no application to the Fair Board with respect to claims for out of state expenses.

Accordingly, we are of the opinion that members and employees of the Fair Board do not need executive council authorization for out of state trips.

April 26, 1973

STATE OFFICERS AND DEPARTMENTS: State Fair Board — sec. 173.14(7), Code of Iowa, 1973. "Special police" appointed by the Fair Board president have the powers and duties of peace officers. Other Fair employees not designated "special police" have no law enforcement power except to the extent any private citizen does. (Voorhees to Fulk, Sec. Iowa State Fair Board, 4/26/73) #73-4-9

Mr. Kenneth R. Fulk, Manager, Iowa State Fair: This letter is in response to your request for an opinion regarding the "special police" that may be appointed by the president of the Fair Board under the authority of §173.14(7), Code of Iowa, 1973. Basically your questions can be condensed to these: (1) What powers do these special police have? and (2) What law enforcement powers would traffic directors, guards, etc., have if they were not designated special police?

Section 173.14(7) provides:

"The state fair board shall have the custody and control of the state fairgrounds, including the buildings and equipment thereon belonging to the state, and shall have power to:

* * *

"7. The president of the state fair board may appoint such number of special police as he may deem necessary *and such officers are hereby vested with the powers and charged with the duties of peace officers.*" (Emphasis Added)

The duties of "peace officers" are defined in §748.4, Code of Iowa, 1973.

"It shall be the duty of a peace officer and his deputy, if any, throughout the county, township, or municipality of which he is such officer, to preserve the peace, to ferret out crime, to apprehend and arrest all criminals, and insofar as it is within his power, to secure evidence of all crimes committed, and present the same to the county attorney, grand jury, mayor or police courts, and to file informations against all persons whom he knows, or has reason to believe, to have violated the laws of the state, and to perform all other duties, civil or criminal pertaining to his office or enjoined upon him by law. Nothing herein shall be deemed to curtail the powers and duties otherwise granted to or imposed upon peace officers."

Section 695.7, Code of Iowa, 1973, authorizes peace officers to carry certain weapons:

"It shall be the duty of the sheriff to issue a permit to go armed with a revolver, pistol, or pocket billy to *all peace officers* and such other persons who are residents of his county, and who, in the judgment of said official, should be permitted to go so armed." (Emphasis Added)

These special police would have all the powers and duties of peace officers, including the power to make arrests and carry weapons. In order to have such powers, these individuals must be appointed as special police by the president of the State Fair Board. State Fair employees not so designated would have no law enforcement power except to the extent any private citizen does.

Section 755.5, Code of Iowa, 1973, gives a private citizen the power to make arrests under the following circumstances:

"1. For a public offense committed or attempted in his presence.

"2. When a felony has been committed, and he has reasonable ground for believing that the person to be arrested has committed it."

Thus, individuals not designated as special police would not be able to make arrests for traffic offenses, entering the grounds without payment, or other offenses that are not felonies, unless they actually observed the person to be arrested committing the offense. If an arrest was made that was not in accordance with §755.5, the individual making the arrest could be held liable in an action for false arrest. It would therefore seem that the best way to avoid any

problems in this area would be to place the responsibility for enforcing laws and State Fair rules with the designated special police.

In this regard, it should be noted that no Fair Board rules appear in the 1971 volume of the Iowa Departmental Rules, nor in the July 1971, January 1972, or July 1972 supplements. It is indicated in the 1971 Iowa Departmental Rules that the Fair Board rules appearing in the 1966 Iowa Departmental Rules are considered "not current." Obviously, the special police cannot enforce Fair Board rules if there are none.

May 1, 1973

CITIES AND TOWNS: Contracting Procedure — §§23.2 and 23.18, Code of Iowa, 1973. There are no requirements in Chapter 23 that a municipality must have work on a public improvement done by contract if the cost is five thousand dollars or more. (Blumberg to Berkland, Palo Alto County Attorney, 5/1/73) #73-5-1

Roger A. Berkland, Palo Alto County Attorney: In your letter of November 17, 1972, you requested an opinion from this office relating to the legality of a city doing its own gas, water and sewer line work, without contracting for such work as required by Section 23.18 of the Code of Iowa.

Section 23.18 provides in part:

"When the estimated total cost of construction, erection, demolition, alteration or repair of any public improvement exceeds five thousand dollars, the municipality shall advertise for bids on the proposed improvement by two publications in a newspaper published in the county in which the work is to be done . . . . This section shall not apply to the construction, erection, demolition, alteration or repair of any public improvement when the contracting procedure for the doing of the work is provided for in another provision of law."

The term "public improvement" is defined in Section 23.1 of the Code to include "any building or other construction work to be paid for in whole or in part by the use of funds of any municipality."

The problem revolves around the issue of whether Chapter 23, and specifically section 23.18, requires that all public improvements, the costs of which exceed five thousand dollars, be done by contract. We can find no case law dealing specifically with that issue. In a previous opinion, 1966 O.A.G. 349, the question was whether the State Fair Board, pursuant to Chapter 23, must accept bids on all its work on repair of buildings, water and sewer systems. It was held there, citing to sections 23.2 and 23.18, that the Fair Board did not have to accept bids or contracts for work when the cost of said work was under five thousand dollars. That opinion is not to be interpreted to mean that if the cost of work exceeds five thousand dollars, the work must be done by contract.

Section 23.2 provides in part that before "any municipality shall enter into any contract for any public improvement to cost five thousand dollars or more" the governing body proposing to make such a contract shall adopt plans, specifications and the like, and hold a hearing on the matter. We interpret this section to mean that a municipality *may* contract for work on a public improvement. However, if that work costs five thousand dollars or more, plans and specifications shall be adopted and a hearing held. There is nothing in this section requiring a contract for work that exceeds five thousand dollars.

The same may be said of section 23.18. That section sets forth the contracting procedures for work exceeding five thousand dollars. It cannot stand for the proposition that all work exceeding five thousand dollars must be done by contract. The last sentence of that section provides that it does not apply if the contracting procedure for a public improvement is provided for in another provision of law. A prior opinion of this office, November 24, 1965, Strauss to Mossman, dealt with the question of whether section 23.18 applied to Chapter 397, which had its own contracting procedure. We held there that because Chapter 397 had its own contracting procedure, no part of section 23.18 could be applied. The same result was reached in *Schumacher v. City of Clear Lake,* 1932, 214 Iowa 34, 239 N.W. 71. There, work consisting of curbing and paving was done pursuant to Chapter 308 of the 1927 Code, which set forth a contracting procedure with hearings, and which is similar in some respects to Chapter 391 of the present Code. The work exceeded five thousand dollars, and the issue was raised as to whether Chapter 23 (then sections 352 et. seq.) was controlling. The Court held (214 Iowa at 37, 38):

"The Court is of the opinion that the contract in this case is entirely outside the purview and purpose of the budget law, which, so far as this case is concerned, *'is to secure economy in and fair prices for building or other construction work to be paid for out of funds of the municipality'* and *'is directed to the promotion of economy in the letting of public contracts.'* See Carlson v. Marshalltown, 212 Iowa 373.

"Chapter 308, Code, 1927, makes quite adequate provisions for the accomplishment of these purposes . . . . To superimpose the provisions of the budget law would be to hamper and obstruct the municipality and the property owners in their right to make public improvements and to introduce confusion, incongruity, and uncertainty into definitely prescribed procedure therefore," [Emphasis added]

Several chapters pertaining to municipalities have set forth procedures for letting of contracts, resolutions of necessity, plats, and the like. Some of these chapters are 390A, 391, 391A, 395, 397, and 401. We specifically call your attention to section 401.6 which requires that a contract be let if the cost of the work under that chapter exceeds twenty-five hundred dollars.

Accordingly, we are of the opinion that Chapter 23 does not require contracts for work on public improvements exceeding five thousand dollars. Chapter 23, specifically sections 23.2 and 23.18, sets forth procedures required if a contract is to be let for work exceeding five thousand dollars. In addition, section 23.18 does not apply where the contracting procedures are provided for in another provision of law.

May 1, 1973

UNIFORM COMMERCIAL CODE: §554.9403(3), Code of Iowa, 1973 — Continuation statements; premature filing. A continuation statement may not be filed more than six months prior to the expiration date of the financing statement. (Haesemeyer to Synhorst, Secretary of State, 5/1/73) #73-5-6

The Honorable Melvin D. Synhorst, Secretary of State: You have requested an opinion of the Attorney General with respect to a question involving an interpretation of Section 554.9403(3), Code of Iowa, 1973, which was presented to you in a letter from a County Recorder in the following terms:

"Please provide me with a legal opinion as to the filing of continuations. Can continuations be filed prior to six months of the expiration date of the

financing statement? The code says 'they may be filed within six months' but does not say they cannot be filed prior to this time.

"One of our local banks filed a continuation on June 1, 1971, on a financing statement which would have expired on December 29, 1971. Bank examiners would not accept this continuation stating since it was filed prior to the six month period, it was not valid. Bank personnel had to have a new financing form signed and filed."

Section 554.9403(3) is the same as Article 9 §403 of the Uniform Commercial Code and reads as follows:

"3. A continuation statement may be filed by the secured party (i) within six months before and sixty days after a stated maturity date of five years or less, and (ii) otherwise within six months prior to the expiration of the five-year period specified in subsection 2. Any such continuation statement must be signed by the secured party, identify the original statement by file number and state that the original statement is still effective. Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in subsection 2 unless another continuation statement is filed prior to such lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement. Unless a statute on disposition of public records provides otherwise, the filing officer may remove a lapsed statement from the files and destroy it."

The language of the statute is quite clear and free from ambiguity. The dates within which a continuation statement may be filed are explicitly set forth as follows:

"(i) within six months before and sixty days after a stated maturity date of five years or less, and (ii) otherwise within six months prior to the expiration of the five year period specified as subsection 2."

In our opinion this statute does not admit of an interpretation which would permit the filing of a continuation statement more than six months prior to the expiration date of the financing statement.

One of the most important reasons for the filing rule is that set forth in *Re Steffens,* 31 F. 2d 660 (1929) that "A creditor who finds the original mortgage on file should not be required to search the records before the beginning of the proper period for refiling to find out whether the mortgage has been refiled".

The question you raise has not been the subject of any significant number of court decisions around the country. However there is enough case law under the statutes which served as precursors to Article 9 §403 of the Uniform Commercial Code to establish that the premature refiling of a continuation statement is of no effect. See for example 63 ALR 591 and cases cited therein. *Kratzmer v. Detroit Lumber Co.,* 195 Mich. 570, 161 N.W. 817 (1917).

May 2, 1973

SCHOOLS: School bus — Ch. 285, Code of Iowa, 1973. Departmental rules of Department of Public Instruction prohibit a contractor from collecting a fee from parents of children residing where busing is not mandated by statute. (Nolan to Dunlap, State Representative, 5/2/73) #73-5-2

Honorable Norman P. Dunlap, State Representative: This is written in response to your letter requesting an opinion on the following:

"The Ames Community School District contracts with a private firm for a student bus service under the provisions of Chapter 285, Code of Iowa.

"An Attorney General's opinion is sought to determine the legality of a private firm collecting a fee from parents of students residing within the statutory limitation where busing is not required under the provision of Section 285.1, Code of Iowa. This service would be provided on regularly established bus routes and these public school students would ride with those who are eligible for transportation."

Section 285.1, Code of Iowa, permits a local school board to exercise discretion in providing transportation for resident elementary children attending public school who live less than the distance at which transportation is required by statute and also permits such school boards to provide transportation for all high school students residing inside the corporate limits of any town, village, or city and more than two miles from designated high school. This discretionary power, however, does not extend to an authorization to a private company operating a school bus under contract with a school board. Under the rules of the Department of Public Instruction (§22.15, 1971 Iowa Departmental Rules, Page 690) a contractor "may not arrange with individual families for transportation. The contractor undertakes to transport only those families indicated by the board of education." Consequently, it would not be permissible for the private contractor to collect a fee from the parents of students under the circumstances you present.

May 2, 1973

COURTS: Judicial magistrates — Ch. 1124, Acts of the 64th General Assembly, Section Session. Officers of judicial magistrate and mayor are incompatible. (Nolan to Barbee, Dickinson County Attorney, 5/2/73) #73-5-3

Walter W. Barbee, Dickinson County Attorney: This is written in response to your request for an opinion as to the compatibility of the office of county judicial magistrate and mayor. It appears from your letter that a person presently serving as mayor of one of the communities within your county has been nominated to serve as judicial magistrate and a question is raised as to whether such an individual would be obliged to resign his mayorship in order to accept the position of county judicial magistrate.

In an opinion issued by this office on December 14, 1972, to the Tama County Attorney we stated that Article III of the Constitution of Iowa provides that the powers of government shall be divided into three separate departments, the legislative, the executive and the judicial and that no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others. The Iowa Supreme Court established further guidelines in *State ex rel LeBuhn v. White,* 1965, 257 Iowa 606, 133 N.W.2d 903, which states that:

"The test of incompatibility is whether there is any inconsistency in the functions of the two [offices], 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'."

It is our view that under the new unified court law, Chapter 1124, Acts of the 64th General Assembly, Second Session, the magistrate will be subject to the supervision of the district court and the exercise of such supervisory power by the judicial branch of government would cause an incompatibility to exist between the office of magistrate and mayor. *State ex rel LeBuhn,* supra further holds that where one person takes an office which is incompatible with an office previously held, he, by such act, vacates the first office. Accordingly, should the individual who is now serving as mayor accept the position of county judicial magistrate, he would, on taking the office of magistrate, vacate the office of mayor.

May 2, 1973

CITIES AND TOWNS: Authority of Mayor — §§363.40 and 363A.3(1), Code of Iowa, 1973. Pursuant to Sections 363A.3(1) and 363.40, a mayor may remove city police officers from their duties. (Blumberg to Rodenburg, Pottowattamie County Attorney, 5/2/73) #73-5-4

Lyle A. Rodenburg, Pottawattamie County Attorney: We are in receipt of your opinion request of March 3, 1973, relative to the authority and power of a mayor. You specifically asked:

"Under the provisions of Section 363A.3(1) in a city of 3500 population, under the mayor-council form of government that has not adopted Division IV, (organization of city government) of the Home Rule Law and is not under Civil Service, does the mayor, as chief executive officer, have the authority and the power to remove or fire city police officers?"

Section 363A.3(1) provides: "The mayor shall appoint the following officers: 1. A marshal, and such other police officers, including police matrons as may be provided by ordinance." Section 363.40 provides:

"All persons appointed to office in any city or town may be removed by the officer or body making the appointment, but every such removal shall be by written order, which shall give the reasons therefor and be filed with the city clerk."

In *Scott v. City of Waterloo,* 1920, 190 Iowa 467, 180 N.W. 156, the plaintiff was appointed police matron of the city and served in that capacity until removed by the mayor pursuant to a written order. The Court, referring to section 657 of the 1913 Code, now section 363.40, stated (190 Iowa at 469):

"The authority conferred by Section 657 is broad, and confers a large discretion upon the officer or body making the appointment, to remove the appointee . . . . If it had been the intention of the legislature to limit the power or authority of the appointing officer or body . . . it would, no doubt, have so declared. The power conferred by Section 657 is to remove one appointed . . . . The authority of the mayor, under the foregoing statutes, to remove the police matron from office is clear . . . ."

Your situation is similar.

Accordingly, we are of the opinion that, under the facts you stated, if the mayor has appointed city police officers, he may remove them from office pursuant to section 363.40.

May 2, 1973

CIVIL RIGHTS: Chapter 601A.7(1), 601A.15, Code of Iowa, 1973; 29 U.S.C. §623(F). The Age Discrimination Act prohibits placing an age limit upon entry into law enforcement positions, unless such limit can be demonstrated

to be based upon the nature of the particular position. Chapter 601A.15 however, exempts retirement plans and benefit systems from Age Discrimination Act unless such plan or system is a mere subterfuge for evading the provisions of the Act. (Conlin to Hayes, Exec. Director, Iowa Civil Rights Commission, 5/2/73) #73-5-5

Alvin Hayes, Jr., Executive Director, Iowa Civil Rights Commission: You have requested an opinion from this office concerning the implication of the age discrimination provisions of the Iowa Civil Rights Act for the Department of Public Safety. You have asked specifically if that Department may:

"1. Place a maximum age limit on persons for entry into a retirement system; and

"2. Place a maximum age limit on applications for entry into any law enforcement positions in any area of the state."

It is the opinion of this office that the Iowa Civil Rights Act does permit age limits for entry into retirement systems, but does not permit age limits for entry into law enforcement positions unless the limit is based upon the nature of the particular position. This latter qualification is extremely limited in scope and will be explained below.

Iowa Code Section 601A.7(1) (1973) provides that:

"It shall be an unfair or discriminatory practice for any:
a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, . . . of such applicant or employee, unless based upon the nature of the occupation."

This statute sets out the basic prohibition with regard to age discrimination in employment in this state. However, the Iowa Legislature has seen fit to exempt from this prohibition "any retirement plan or benefit system of any employer unless such plan or system is a mere subterfuge adopted for the purpose of evading the provisions of" the Iowa Civil Rights Act. See Iowa Code Section 601A.15 (1973).

Consequently although age discrimination prohibition is an absolute one in policy, the situation you describe appears to fit clearly within the statutory exception for retirement systems. You have related no facts which would imply that the Department's system is a "mere subterfuge" to evade the Act. An example of such a purpose would be where one of the requirements for employment in the department was immediate entry into the department's retirement system. Thus, any age limitation set for this system would effectively prevent older workers from being accepted for employment at all. This does not appear to be the case in this instance, however, so the department would be fully justified in setting such an age maximum under Iowa law. Under the federal Age Discrimination in Employment Act of 1967, there is also an exception for bona fide retirement plans. See 29 U.S.C. §623(f) (2) (1973).

The second part of your inquiry deals with age maximums for employment in law enforcement positions. This presents a different sort of problem. We must here look to the actual job description of each law enforcement position under the authority of the Department of Public Safety. Our statute (Iowa Code Section 601A.7(1) (1973)) prohibits age discrimination in hiring "unless based upon the nature of the occupation." This latter qualification may be

likened to an exception in the federal Age Discrimination Act. There it is said that where age is a bona fide occupational qualification reasonably necesssry to the normal operation of a particular business, age discrimination is permitted. However, the burden of proof of this exception is on the party relying on it. See 29 U.S.C. §623(f) (1973).

This essentially means that the Department of Public Safety must review the job description for each position under their authority and analyze whether the nature of that particular occupation requires a person under a certain age. Assumptions about the general abilities and physical qualifications of persons over a certain age are not permitted. Thus, if a particular position requires an employee of great agility, the department may not assume, for instance, that persons over 50 lack this kind of agility. Further examples of this "nature of the occupation" exception are extremely difficult to conceive of when faced with, given the prohibition against assumptions and generalizations.

Each applicant must normally be given the opportunity to prove that he or she possesses the qualities necessary for performance of the particular job, regardless of his or her age. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir., 1969); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir., 1969).

In summary then, the department may legally impose maximum age limits for entry into a retirement system, but those limitations will not be permitted for purposes of hiring unless based upon the nature of the particular occupation involved.

May 14, 1973

STATE OFFICERS AND DEPARTMENTS: Departmental Rules — House File 480, Acts of the 65th General Assembly, First Session. The amendments to Chapter 17A proposed in House File 480 are constitutional. (Blumberg to Crabb, State Representative, 5/14/73) #73-5-7

Honorable Frank Crabb, State Representative: We are in receipt of your opinion request of May 9, 1973, regarding the constitutionality of House File 480 of the 65th General Assembly. House File 480 amends sections 17A.7, 17A.8, 17A.11, and repeals section 17A.9, Code of Iowa, 1973. Section 17A.7 is amended by adding a sentence providing that a rule shall not take effect if an objectionable part to it has not been corrected. Section 17A.8 is amended by requiring that the rules review committee shall endorese the rules by stating that no objections to the rules were found. Section 17A.11 is amended by deleting part of a sentence for the proposition that inaction shall not be construed as approval or enactment.

These statutes deal with the procedures for promulgating rules and regulations of state agencies and departments. We can find nothing in any of the amendments in House File 480 that would hinder, abrogate or impair any contitutional guarantee or provision. The amendments are merely changes in the authority and duties of the rules review committee, which changes the Legislature has the authority to make.

Accordingly, we are of the opinion that the amendments to Chapter 17A in House File 480 are not unconstitutional.

May 14, 1973

CITIES AND TOWNS: Salary increases for Elected Officials — §§368A.21 and 420.41, Code of Iowa, 1973. Elected officials of a city cannot increase their salaries during their term of office. (Blumberg to Kiser, State Representative, 5/14/73) #73-5-8

Jean Kiser, State Representative: We are in receipt of your opinion request of May 3, 1973. You ask whether elected officials of a city can increase their salaries during their term of office.

Section 368A.21 of the Code provides in part:

"No member of any city or town council shall, during the time for which he has been elected, be appointed to any municipal office which has been created or the emoluments of which have been increased during the term for which he was elected, *nor shall the emoluments of any city or town officer be changed during the term for which he has been elected.*" (Emphasis added)

See also, *Schanke v. Mendon,* 1958, 250 Iowa 303, 93 N.W. 2d 749, which also holds that the term of office referred to in the statute begins on the second secular day of January following the election and continues for the period of years of the term, all pursuant to Section 363.28 of the Code.

The provisions of Section 368A.21 also are applicable to special charter cities pursuant to Section 420.41 of the Code which provides that the provisions of the City Code are applicable to special charter cities in the absence of any exceptions. We can find no exceptions to Section 368A.21 in Chapter 420. Accordingly, we are of the opinion that elected officials of a city cannot increase their salaries during their term of office.

May 16, 1973

CITIES AND TOWNS: Fiscal year: §§4.7, 4.8, 363.29, Code of Iowa, 1973, Chapter 1020, and §83, Chapter 1088, 64th G.A., Second Session (1972). The fiscal year of cities and towns is the calendar year. Section 83 of Chapter 1088 is a special act which prevails over Chapter 1020, a general act. The words "enacted" and "enactment" as used in §4.8, Code, are not synonymous with passage and include approval by the Governor. (Haesemeyer to Hutchins, State Representative, Nielsen, State Represenative, Bittle, State Representative, and Selden, State Comptroller, 5/16/73) #73-5-9

Honorable Bill Hutchins, Honorable Carl V. Nielsen, Honorable Ed Bittle, Iowa House of Representatives; Mr. Marvin R. Selden, Jr., State Comptroller: By a letter dated May 8, 1973, Representative Hutchins and Representative Nielsen requested an opinion of the Attorney General with respect to the following:

"We, the undersigned members of the Iowa House of Representatives, request an Attorney General's opinion on whether Chapter 1020, Acts of the 64th G.A., or Section 83 of Chapter 1088, Acts of the 64th G.A., prevails after those acts are construed in accordance with Chapter 4.8 of the 1973 Code.

"We are informed that the Governor signed Chapter 1088 of the 64th G.A. after Chapter 1020."

By letters dated May 9, 1973, and May 10, 1973, respectively, Mr. Selden and Representative Bittle requested opinions with respect to the same question.

Chapter 1020, 64th G.A., Second Session (1972) is entitled "An Act to Change the Fiscal Year of Cities and Towns, Counties, and Other Political Subdivisions". It passed the last House of the General Assembly, the House of Representatives, on February 22, 1972, was sent to the Governor on March 8, 1972, and was signed by the Governor on March 9, 1972. As stated in Section 1 thereof, "The purpose of this act is to change the budget year of cities, counties, and all other political subdivisions of the State from a calendar year beginning January 1st and ending December 31st to a fiscal year beginning July 1st and ending the following June 30th." In line with this stated purpose, Section 3 of Chapter 1020 provides in relevant part:

"The fiscal year of cities, counties, and other political subdivisions of the State shall begin July 1st and end the following June 30th commencing July 1, 1975."

Attention must be given also to Section 48 of Chapter 1020 which provides:

"SEC. 48. Section three hundred sixty-three point twenty-nine (363.29), Code 1971, is amended to read as follows:

"363.29. The fiscal year. The fiscal year for all municipal corporations for which taxes are collected through the office of the county treasurer and for all departments, boards, and commissions thereof shall begin on July first each year and shall end on June thirtieth following."

Chapter 1088 also passed by the Second Session of the 64th General Assembly in 1974 is the Home Rule Bill. Section 83 thereof provides in relevant part:

"Except as otherwise provided for special charter cities, a city's fiscal year and tax year is from January 1st through December 31st, inclusive."

Chapter 1088 was passed by the last House of the General Assembly, the House of Representatives, on January 26, 1972, sent to the Governor on March 13, 1972, and signed into law by him on March 16, 1972.

It is evident from the foregoing that the fiscal year for cities prescribed by these two measures are hopelessly in conflict. The Fiscal Year Bill would require all cities, towns, counties, and other political subdivisions beginning July 1, 1975, to adhere to a fiscal year which would begin July 1 of each year and end June 30th of the year following. Section 83 of Chapter 1088 on the other hand would in the case of cities only, establish a fiscal year the same as the calendar year. Section 2(1) of Chapter 1088 provides:

"1. 'City' means a municipal corporation including a town, but not including a county, township, school district, or any special-purpose district or authority. When used in relation to land area, 'city' includes only the area within the city limits."

Thus, in effect, Section 83 of Chapter 1088 would place not only cities but also towns and other municipal corporations on a calendar year basis.

In resolving the conflict between these two statutory provisions both passed by the same session of the General Assembly recourse may be had to certain rules of statutory construction. Sections 4.7 and 4.8, Code of Iowa, 1973, provide respectively:

"4.7 Conflicts between general and special statutes. If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is

irreconcilable, the special or local provision prevails as an exception to the general provision."

"4.8 Irreconcilable statutes. If statutes *enacted* at the same or different sessions of the legislature are irreconcilable, the statute latest in date of *enactment* by the general assembly prevails. If provisions of the same Act are irreconcilable, the provision listed last in the Act prevails." (Emphasis added.)

It is evident from the foregoing that if the conflict which exists is between a general provision and a special or local provision the special or local provision prevails irrespective of which provision was passed first. Hence, if a situation exists to which Section 4.7 is applicable, it is not necessary to refer to Section 4.8 as such provision is then irrelevant. However, where Section 4.8 does come into play, the meaning of the term "enactment" as used in that Section becomes of crucial importance especially in a situation such as that which we have here where the Fiscal Year Bill was passed by the last House of the General Assembly last but signed by the Governor first and the Home Rule Bill was passed by the last House of the General Assembly first but signed by the Governor last. As an aid to ascertaining the meaning of the word "enactment" as used in Section 4.8, we have the benefit of Section 4.1(2) which provides:

"2. Words and phrases. Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning."

There are other statutory aids to construction of statutes which may be of some assistance in resolving the present controversy. For example, Section 4.4 provides in part:

"In enacting a statute, it is presumed that:

* * *

"3. A just and reasonable result is intended.

4. A result feasible of execution is intended."

* * *

Bearing in mind that the rules of statutory construction hereinbefore set forth from Chapter 4 of the Code represent merely a codification of the pre-existing case law, it is appropriate to turn first to the question of whether the general special dichotomy has application to this problem.

In *Georgen v. State Tax Commission*, 165 N.W. 2d 782 (Iowa, 1969) the Iowa Supreme Court quoted with approval the following language from 82 C.J.S. Statute §369:

"For purposes of interpretation, legislative enactments have long been classed as either general or special, and given different effect on other enactments dependent as they are found to fall into one class or the other. Where there is one statute dealing with the subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in the minute way, will

prevail over the general statute, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling; * * * "

The Iowa Court then went on to say:

"We ourselves have held where there is a conflict or ambiguity between specific and general statutes, the provisions of specific statutes control. *City of Vinton v. Engledow,* 258 Iowa 861, 867, 868, 140 N.W. 2d 857, 862, and Citations; *Iowa Mut. Tornado Ins. Assn. v. Fischer,* 245 Iowa 951, 955, 65 N.W. 2d 162, 165. In *Fischer* we said it is a fundamental rule 'That where a general statute, if standing alone, would include the same matter as a special act and thus conflict with it, the special act will be considered an exception to the general statute whether is was passed before or after such general enactment',"

There are numerous other Iowa cases to the same effect and no useful purpose would be served by citing them all. Suffice it to say that they are all collected at 17 Iowa Digest, Statutes §223.4.

In *Chicago, R.I. & P. R. Co.,* 182 N.W. 2d 160 (Iowa, 1970) the Iowa Supreme Court applied the general/special rule to two statutes involved in an effort by the Highway Commission to proceed with condemnation to acquire certain highway rights across certain railroad tracks. In this case the Highway Commission sought to proceed under §306A.10 which outlined a broad authority over "relocation or removal of any utility facility now located in, over, along, or under any highway or street". The railroad relied on what it contended was a specific statute, §478.22 which dealt by its terms with a situation when "a railway track crosses or shall hereafter cross a highway, street, or alley". The Iowa Supreme Court agreed with the railroad noting that §306A.10 although enacted at the same session of the Legislature which adopted an amendment to §478.23 was the more general statute making no reference to railroad crossing problems as was the case with §§478.22 et seq. The Court then went on to say:

"Thus the Legislature at the same session gave broad powers over limited access highway construction and maintenance to the Highway Commission; left the Commerce Commission's authority over railroad crossings intact; but added a new standard to the Commerce Commission's authority. This standard related to the federally aided highways program which is recognized in both statutes.

"We conclude the Legislature intended to preserve in the Commerce Commission the jurisdiction and authority to determine controversies between the railroads on the one hand and highway authorities on the other when the narrow purpose of the controversy deals with *railroad crossings.*

"Both sets of statutes are special in nature. Each refers to specific situations. As between the two sets, §§478.22-.24 are the more specific, dealing as they do only with railroad crossing situations. Sections 306A.10 et seq. deal with all enumerated utility uses located in, over, along or under any highway. Under the familiar rule cited above, the Commerce Commission authority, being the more specific takes precedence over the Highway Commission authority, which is more general in nature." 182 N.W. 2d 160 at 163.

Applying the Court's reasoning in the case discussed above to the situation before us we must conclude that §83 of the Home Rule Bill is the more specific of the two statutes, dealing as it does only with the narrow question of the

fiscal year of cities and towns whereas all of Chapter 1020 is devoted in a comprehensive and general manner to the broader subject of the fiscal years of all political subdivisions including cities and towns. In this case it is immaterial which statute was enacted first. See in addition to cases cited above, *Brightman v. Civil Service Commission of the City of Des Moines,* 171 N.W. 2d 612 (Iowa, 1969).

Another Iowa case which illustrates the application of the general versus special statute rule is *Smith v. Newell,* 1962, 254 Iowa 496, 117 N.W. 2d 883. There the two conflicting statutes were §§337.7 and 341.1 which read as follows:

"337.7 Bailiffs — appointment — duties. The sheriff shall attend upon the district court of his county, and while it remains in session he shall be allowed the assistance of such number of bailiffs as the judge may direct. They shall be appointed by the sheriff and shall be regarded as deputy sheriffs, for whose acts the sheriff shall be responsible.

"341.1 Appointment. Each county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, may, with the approval of the board of supervisors, appoint one or more deputies or assistants, respectively, not holding a county office, for whose acts he shall be responsible. The number of deputies, assistants, and clerks for each office shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board."

Section 337.7 is part of Chapter 337 dealing with sheriffs, whereas Chapter 341 of which §341.1 is a part is entitled "Deputy Officers, Assistants and Clerks." The court had little difficulty in disposing of the question, observing:

"Section 337.7 is a specific statute. Section 341.1 is a general statute pertaining to all county officers and their deputies."

The analogy to the matter we are presented with is obvious. To paraphrase the court's language, §83 is a specific statute. Chapter 1020 is a general statute pertaining to the fiscal years of all political subdivisions.

Having decided as we do that the Home Rule Bill prevails because of the applicability of Section 4.7, it is unnecessary to undertake to determine the applicability of Section 4.8 or the meaning of "enactment". However, since we believe that the correct application of Section 4.8 will sustain and fortify the result we have reached under Section 4.7, it may be useful to undertake the exercise.

First we do not think "enactment" is synonymous with "passage". A bill does not become a law upon completion by the General Assembly of its part in the legislative scheme of things, i.e. passage by both houses. The Governor plays a role in the legislative process and that part is set forth in the Constitution of Iowa, Article III, Section 16:

"Executive approval — veto. SEC. 16. Every bill which shall have passed the General Assembly, shall, before it becomes a law, be presented to the Governor. If he approves, he shall sign it; but if not, he shall return it with his objections, to the house in which it originated, which shall enter the same upon their journal, and proceed to re-consider it; if, after such reconsideration, it again passes both houses, by yeas and nays, by a majority of two thirds of the members of each house, it shall become a law, notwithstanding the Governor's objections. If any bill shall not be returned within three

days after it shall have been presented to him, Sunday excepted, the same shall be a law in like manner as if he had signed it, unless the General Assembly, by adjournment, prevent such return. Any bill submitted to the Governor for his approval during the last three days of a session of the General Assembly, shall be deposited by him in the office of the Secretary of State, within thirty days after the adjournment, with his approval, if approved by him, and with his objections, if he disapproves thereof."

It is too well settled to require citation of authorities that these prescribed gubernatorial duties, notwithstanding the historic and constitutional separation of power, are wholly legislative in nature. In other words, although the Governor is the head of the executive branch of government, in approving or disapproving bills he is exercising legislative rather than executive powers.

In *U.S. v. Fanning,* 1 Morris 459, 462 (Iowa, 1844), the Iowa Supreme Court went so far as to say:

"An act is not 'passed' by the legislature until it is duly *approved* by the governor who, *quoad hoc,* is a part and portion of the legislature."

For our purposes we need not go this far. Suffice it to say that a bill does not become a law until it is approved by the Governor or the constitutionally prescribed time has passed so that it becomes law without his signature. See *Schaffner v. Shaw,* 1921, 191 Iowa 1047, 180 N.W. 853. 1968 OAG 379 at p. 380.

Although we have been unable to find any Iowa cases in which the meaning of the word "enacted" or one of its forms was squarely before the court, there are cases from other jurisdictions directly on point. Thus the Michigan Supreme Court in a case decided in 1956 faced the question squarely and said:

"[2] In construing the statute, words and phrases are accepted in their ordinary sense. See *Hammons v. Franzblau,* 331 Mich. 572, 50 N.W. 2d 161.

"The word 'enactment' is defined by Webster (New International Unabridged) as follows:

'1. * * * the giving of legislative sanction *and executive approval* whereby a bill becomes an act or law.

'2. That which is enacted; a law; decree; statute; prescribed requirement * * *'." (Emphasis added.)

Note that the Michigan court is only doing that which our legislature is instructing us to do in §4.1(2), i.e. "construe words and phrases according to the context and *the approved usage of the language."* See also note entitled *"Date or event contemplated by term 'passage', 'enactment', 'effective date', etc., employed by statute in fixing time of facts or conditions within its operation."* 132 A.L.R. 1048. Also see *Rogers v. Vass,* 6 Clarke 407 (Iowa, 1858) where the court construed "passage" to mean the date the act took effect.

We are aware, of course, that the terms "enact" and "enactment" as used in Section 4.8 is followed in the latter case only by the words "by the general assembly". However, we are not persuaded that this changes anything for as we have seen the words "enact" and "enactment" require the participation of the Governor and are misnomers when used to describe an action which the legislature alone may take in bringing a proposal into law. The legislature, by itself, simply cannot "enact" a law.

We will concede that it can, for the purpose of this opinion, "pass" a bill, although there is respectable authority for the proposition that even this may require the Governor's approval. *U.S. v. Fanning,* supra. *Rogers v. Vass,* supra. *Thompson v. Independent School District,* 1897, 102 Iowa 94, 70 N.W. 1093. Cf, however, 1968 OAG 379 at page 380.

Further support for the proposition that approval by the Governor is what controls can be found in 50 Am. Jur. p. 554 Statutes, §547:

"It has also been held that, where two bills are approved by the governor in inverse order of their passage, *conflicting* provisions therein contained cannot be resolved in favor of that which was last passed, on the theory of repeal by implication."

The case cited by Am. Jur. for this proposition is *State v. Wetz,* 1918, 40 N.D. 299, 168 N.W. 835, 5 A.L.R. 731. As in all cases where a rule such as that enunciated by Section 4.8 is involved, repeal by implication is the doctrine necessarily invoked for plainly if an express repeal is provided there would be no problem at all. In *Wetz* the North Dakota court disposed of the matter in a few words, noting:

"Repeals by implication are not favored, and we are satisfied that the doctrine is not properly invoked in this case. Expecially is this true here, because the two chapters referred to were approved by the Governor in the inverse order of their passage. *One act cannot repeal another by implication until it becomes a law.* (Emphasis added.) 168 N.W. at 838.

As we have previously stated, a measure becomes a law when signed by the Governor. 1968 OAG p. 379.

It is significant, too, to inquire into just what dates the courts consider important in determining which of two measures is the latest in time. *Manilla Community School District v. Halverson,* 1960, 251 Iowa 496, 101 N.W. 2d 705, is an Iowa case tangentially in point. This decision involved a conflict between two acts passed by the 57th General Assembly relating to the reorganization of school districts. This case is significant not because the issue of the latest enacted statute was present but because the only dates the court considered significant enough to mention were the dates of publication and effectiveness of the two acts and also because the court described the following as an "enacting clause":

"This Act being deemed of immediate importance shall be in full force and effect from and after its passage *and publication* in * * *," 101 N.W. 2d at 708.

Thus there is more to enactment than passage.

A Kentucky case, *State Property and Buildings Commission v. Hays,* (Ky., 1961) 346 S.W. 2d 3 involved two conflicting measures, HB274 and HB439, an amendment to KRS56.540(4), both enacted at the same legislature. In its opinion the court recited the fact that HB274 was enrolled on March 15, 1960, and signed by the Governor on March 25, 1960. HB239 was both enrolled and signed by the Governor on March 17, 1960. The court concluded:

"[3-5] In event of irreconcilable conflict between two acts passed at the same session the law last enacted, being the later expression of the legislative will, must prevail.

* * *

"Under these principles we construe the provisions of H.B.274 as an authorized exception to KRS 56.450(4)." 346 S.W. 2d 3, 6.

Since the two measures were enrolled and signed in inverse order, it is evident that the court considered the date of signing by the Governor as controlling. While we are not suggesting that the date of enrollment is the same as the date of passage, the case is significant not only because the date of enrollment was not deemed controlling but because the date of passage by the legislature was not even mentioned.

Accordingly and for the reasons stated, it is our opinion that §83 of Chapter 1083 is a special statute, that Chapter 1020 is a general statute and that therefore such §83 prevails irrespective of the dates of enactment of the two measures. §4.7, Code of Iowa, 1973, and authorities cited herein. Furthermore, we conclude in any event that §83 was enacted last and must be given precedence over Chapter 1020 so far as the fiscal years of cities is concerned. §4.8, Code of Iowa, 1973, and cases and authorities cited herein. Contra *People v. Mattes,* 1947, 396 111.348. 71 N.E. 2d 690.

It may well be that a uniform fiscal year is a desirable thing but that is a matter of policy for the legislature to decide. Fortunately that body is presently in session, will have the benefit of this opinion, and presumably can enact necessary legislation if the members thereof consider it appropriate. In this regard, the present uncertainty surrounding these mutually repugnant acts is likely, notwithstanding our opinion, to result in costly, time consuming, and unnecessary litigation readily avoidable by this General Assembly.

May 16, 1973

DEPARTMENT OF SOCIAL SERVICES — Senate File #82, Acts of the 65th G.A. Effective July 1, 1973, person convicted of crime seventeen years of age will not be eligible for admission to the boy's or girl's training school. (Jacobson to Kennedy, State Senator, 5/16/73) #73-5-10

Honorable Gene V. Kennedy, State Senator: This is to acknowledge receipt of your letter dated March 9, 1973, in which you requested an opinion of the Attorney General regarding the following matter:

"Senate File #82 has been signed by the Governor.

"In that Act is stated, '242.6 Conviction for Crime — When a boy or girl over twelve years of age, and under 17, of sound mind, is found guilty in the district court of any crime, except murder, the court may order the child sent to the state training school for boys or for girls, as the case may be.'

"Suppose the individual is seventeen and found guilty of any crime by the district court, would that seventeen year old, if committed, necessarily be sent to Anamosa or Rockwell City, rather than Eldora or Mitchelville.

"The Act appears defective caused by the terminology 'under seventeen.'

"May I have your opinion in this regard?"

In answer to your question, it should be initially noted that the chapter of the Iowa Code that deals with the care of neglected, dependent, and delinquent children gives the criminal court concurrent jurisdiction with the juvenile court over children less than eighteen years of age. Section 232.62, 1973 Code of Iowa. Once the criminal court obtains jurisdiction over such a person, the matter may be prosecuted to finality in the same manner and with

the same effect as though the person were eighteen years of age or older. O.A.G. Nov. 2, 1965. In other words, a child under eighteen years of age may be charged as an adult, tried as an adult, and sentenced as an adult to the penitentiary or the men's or women's reformatory. The section about which you are concerned (Section 242.6, 1973 Code of Iowa, as amended by S.F. 82, Acts of the 65th G.A.) may be invoked when a child under eighteen years of age is found guilty in the criminal division of the district court of any crime except murder. When this occurs the court *may* order the child sent to the state training school for boys, or for girls, as the case may be, rather than to the penitentiary or the men's or women's reformatory. The word "may" makes this a matter which is within the discretion of the district court. The section is in no way obligatory. Persons seventeen years of age convicted of crime have always faced the possibility of incarceration in the penitentiary or the men's or women's reformatory. The amendement to Section 242.6, which reduces the maximum age for admission to the boy's or girl's training school of those persons convicted of crime, is not in conflict with any of this state's statutory or case law and is, threfore, not defective. Effective July 1, 1973, persons convicted of crime seventeen years of age and older will not be eligible for admission to the boy's or girl's training school.

May 16, 1973

CITIES AND TOWNS: Conflict of Interest — §368A.22, Code of Iowa, 1973. A mere husband and wife relationship does not constitute a conflict of interest where the husband is city clerk and the wife wishes to bid on city property, which bids are competitive, public and open. (Blumberg to Harvey, State Representative, 5/16/73) #73-5-11

Honorable LaVern R. Harvey, State Representative: We are in receipt of your opinion request of May 9, 1973, regarding a conflict of interest problem. You specifically asked:

"Is it a conflict of interest as defined by Iowa Code Section 368A.22 for the wife of a City Clerk to submit a bid for the purchase of a residential lot owned by the City where the City has determined it has no need for the lot and has put it up for sale pursuant to competitive bid?"

Section 368A.22(2) provides that no municipal officer or employee shall have an interest, direct or indirect, in any contract, job, work or services for the municipality. There are ten exceptions to this general rule including contracts made by municipalities of less than three thousand population *upon competitive bidding that is publicly invited and open;* and, contracts with a firm or corporation where the city employee's interest is solely by reason of employment or stock interest less than five percent, if made upon *competitive bidding that is publicly invited and open.* In two previous opinions we have discussed the husband-wife relationship with respect to section 368A.22. In an opinion found in 1966 O.A.G. 38, we held that wife-alderman, who owned no part or had no legal interest in an automobile dealership of which her husband was manager and principal stockholder, which dealership did work for the city upon competitive bids, had no relationship constituting a direct or indirect interest barred by section 368A.22. In a more recent opinion, January 20, 1972, we held that husband-councilman who had no legal interest in a non-profit corporation of which his wife was a director and employee, had no conflict of interest when that non-profit corporation made a competitive bid on city urban renewal property. Copies of both opinions are enclosed.

The reasoning of the prior opinions is applicable here. If the only interest involved is the husband-wife relationship, the rulings of the prior opinions control. However, if the interest is more than that of husband and wife, a different result may ensue. Accordingly, we are of the opinion that a mere husband-wife relationship would not constitute a conflict of interest in your fact situation where the bidding is competitive, public and open.

May 16, 1973

STATE OFFICERS AND DEPARTMENTS: Minimum age requirements for entrance to approved law enforcement training schools, S.F. 82, Acts of the 65th G.A. Effective July 1, 1973, persons eighteen years of age and older will be eligible for entrance to approved law enforcement training schools provided they meet all other requirements set forth by the Director of the Law Enforcement Academy. (Jacobson to Tieden, State Senator, 5/16/73) #73-5-12

The Honorable Dale Tieden, State Senator: This is to acknowledge receipt of your letter dated May 10, 1973, in which you requested the following:

"I would like an Attorney General's opinion as to whether or not the majority right's legislation passed this session has any affect on Chapter 80B.11, subsection 4 of the Code. The reason for my inquiry can be explained in the accompanying letter from a constituent."

The constituent's letter reads in pertinent part as follows:

"I am writing you in reference to the minimum age of 21 for police officers in the state of Iowa. I feel that this minimum age is unfair to persons who, like myself, are of majority age yet not old enough to be police officers.

"I am 19 years old and I will be graduating from Hawkeye Institute of Technology in June 1973 with an Associate's degree in Police Science but I won't be able to get a job as a police officer. I feel that I am qualified and capable of doing a police officer's job if given a chance.

* * *

"Last year I passed the state test for my Private Detective's license and I have held a valid license since Oct. 1972. I feel that if the state will allow a person to be a private investigator at age 18 then it should allow people to enter the field of law enforcement at 19."

The majority rights legislation which you refer to amends Section 80B.11 as follows:

"Section eighty B point eleven (80B.11), subsection (1), Code 1973, is amended to read as follows:

"1. Minimum entrance requirements, minimum qualifications for instructors, course of study, attendance requirements, and equipment and facilities required at approved law enforcement training schools. *Minimum age requirements for entrance to approved law enforcement training schools shall be eighteen years of age."* Senate File 82, Acts of the 65th G.A.

Although Senate File 82 does not specifically amend subsection 4 of Section 80B.11 of the Code, it does, however, provide an answer to your constituent's inquiry. He should be advised that effective July 1, 1973, persons eighteen years of age and older will be eligible for entrance to approved law enforcement training schools provided they meet all other requirements set forth by the Director of the Law Enforcement Academy.

May 17, 1973

CITIES AND TOWNS: Sewer and Solid Waste Disposal Fees — §§368.4, 393.1, 393.3, Chapter 446, Code of Iowa 1973; Section 12, House File 611, Sixty Fifth General Assembly. Statutory liens on property for failure to pay sewer charges or solid waste disposal fees are not unconstitutional. (Blumberg to Harvey, State Representative, 5/17/73) #73-5-13

Honorable LaVern R. Harvey, State Representative: We are in receipt of your opinion request of March 28, 1973, regarding sewer system and solid waste collection and disposal systems. Your question refers to the constitutional authority of a governmental unit to file liens against property due to non-payment of a sewer rental fee by a tenant on that property. Conversations with you have indicated that the same question is asked with reference to solid waste disposal fees. You also cite us to Code sections 368.4, 393.1 and 393.3, and to Section 12, House File 611, Sixty-Fifth General Assembly, which is a proposed amendment to section 165, Chapter 1088, Acts of the 64th General Assembly, and reads:

"All rates or charges for the services of sewer and charges for the services of solid waste collection systems and disposal systems, if not paid when due as provided by ordinance of council, or resolution of trustees, shall constitute a lien upon the premises served by any of these services and shall be certified to the county auditor and collected in the same manner as taxes."

Section 368.4 provides:

"Wherever provision is made in this Code that municipal corporations shall have power to do or cause to be done certain acts and assess the cost thereof against the property, but fails to specify the manner of collection, the clerk shall certify said cost to the county auditor and it shall then be collected with, and in the same manner as, general property taxes."

Section 393.1 gives municipalities the authority to establish rates or rentals for service of sewage systems. Section 393.3 provides that such rates or charges "shall constitute a lien upon the property served by such sanitary utility and if not paid when due as by said ordinance provided shall be collected in the same manner as other taxes."

"Lien" has been defined as a charge, security or encumbrance upon property for payment or satisfaction of a debt or claim. Black's Law Dictionary, 1072 (4th ed. 1967). In other words, it is a method of collection of a debt, claim or payment for the performance of services rendered. Ordinarily, statutes regularly enacted by legislatures will be accorded a strong presumption of constitutionality. *Stanley v. Southwestern Community College Merged Area,* (Iowa, 1971) 184 N.W. 2d 29; *State v. McNeal,* (Iowa, 1969) 167 N.W. 2d 674. We can find nothing unconstitutional about a lien existing for failure to pay a charge for services rendered. The mere fact that a lien exists, in and of itself, does not deprive the property owner of any constitutional guarantee. The fact that the sewer or solid waste bill is in the name of a tenant, who does not make payment, does not alter this result. Constitutional questions arise as to the amounts of the rates (of which we are not concerned), and the sufficiency of notice when an action on the lien, such as foreclosure, is brought. If there has been insufficient notice, then the foreclosure of a lien may be unconstitutional. *Nelson v. New York City,* 1956, 352 U.S. 103, 77 S.Ct. 195, 1 L.Ed. 2d 171. However, your question does not reach this point.

There can be no doubt that the existence of sewers and facilities is a betterment to the property. Such facilities are constructed, regulated, and controlled by municipalities under their police power for the health, safety and welfare of citizens. *State v. Bartos,* 1967, 102 Ariz. 15, 423 P.2d 713. In the case of rented property, the existence of such facilities is reflected in the amount of rent that is paid. In other words, the property owner who rents is benefited by such facilities as reflected by the amount of rent he can receive with facilities when compared to the amount he can receive without such facilities. In the same light, solid waste disposal facilities have the same result. Whether the sewerage or trash is in liquid form (sewer) or solid (solid waste disposal) makes no difference as to the benefit the property and any owner or inhabitants receive.

It must be pointed out that the statutes and proposal involved merely provide, in addition to a lien, that if the charges for the services are not paid when due, they shall be certified to the county auditor and *collected in the same manner as taxes.* There is no indication here of any action to enforce the lien. Payment by the property owner extinguishes the lien. And, if the property owner has paid for something that his tenant was responsible for, a cause of action could still exist against the tenant by the property owner for the amount paid. Mere certification of the amounts due to the county auditor for collection does not inhibit any constitutional guarantee. This can be more readily seen when one realizes that the owner is assessed the amount due with his taxes, and payment at that time extinguishes any lien. In addtion, if payment is not made with the taxes, procedures for a tax sale may be instituted, and, pursuant to Chapter 446 of the Code, provisions for notice and payment of taxes before the sale are set forth. There is ample opportunity for a property owner to require the tenant to pay the charges, or to recover from the tenant for any payments made in satisfaction of the debt.

Accordingly, we are of the opinion that a statutory lien on property for failure to pay sewer charges or solid waste disposal fees is not unconstitutional.

May 17, 1973

CRIMINAL LAW: Driving while driver's license revoked pursuant to §321B.7 — §§321.174, 321.218, 321A.32(2), 321B.7, Code of Iowa, 1973. Section 321.174 is the proper statute under which to charge a person for driving while his driver's license has been revoked pursuant to §321B.7. (Voorhees to Donovan, Office of Muscatine County Attorney, 5/17/73) #73-5-14

Mr. Michael J. Donovan, Office of Muscatine County Attorney: Reference is made to your letter of April 23, 1973, wherein you stated:

"Under 321B.7, if a driver is arrested for O.M.V.U.I. and refuses to submit to a chemical test to determine if he is intoxicated, then his license is automatically revoked. However, nowhere in Chapter 321B did the drafters address themselves to the problem of the punishment that would be imposed on that driver if he was subsequently arrested for driving with his license suspended under 321B.7."

Chapters 321 and 321A each have provisions prohibiting driving while one's driver's license is under suspension or revocation pursuant to the provisions of those chapters.

Section 321.218 provides, in part:

"Any person whose operator's or chauffeur's license, or driving privilege, has been denied, canceled, suspended or revoked *as provided in this chapter,* and who drives any motor vehicle upon the highways of this state while such license or privilege is denied, canceled, suspended, or revoked, is guilty of a misdemeanor and upon conviction shall be punished by imprisonment for not less than two days or more than thirty days . . ." (emphasis added).

Section 321A.32(1) provides:

"1. Any person whose license or registration or nonresident's operating privilege has been suspended, denied or revoked under this chapter or continues to remain suspended or revoked *under this chapter,* and who, during such suspension, denial or revocation, or during such continuing suspension or continuing revocation, drives any motor vehicle upon any highway or knowingly permits any motor vehicle owned by such person to be operated by another upon any highway, except as permitted under this chapter, shall be fined not more than five hundred dollars or imprisoned not exceeding six months, or both." (emphasis added).

As your letter points out, these provisions apply to the respective chapters in which they are contained, and not to Chapter 321B.

The only sanction available against a person who drives while his license is revoked under §321B.7 is §321.174, which provides:

"No person, except those hereinafter expressly exempted shall drive any motor vehicle upon a highway in this state unless such person has a valid license as an operator or chauffeur issued by the department of public safety. No person shall operate a motor vehicle as a chauffeur unless he holds a valid chauffeur's license."

The penalty for this offense is contained in §321.482, which provides, in part:

"It is a misdemeanor for any person to do any act forbidden or to fail to perform any act required by any of the provisions of this chapter unless any such violation is by this chapter or other law of this state declared to be a felony . . .

"Every person convicted of a misdemeanor for a violation of any of the provisions of this chapter for which another penalty is not provided shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days."

Unlike §§321.218 and 321A.32(2), the application of §321.174 is not limited to the chapter in which contained.

The Department of Public Safety has made repeated efforts to have Chapter 321B amended to provide a penalty for driving while under revocation. Again this session a bill to that effect has been proposed, but apparently no action has yet been taken.

May 17, 1973

STATE OFFICERS AND DEPARTMENTS: Highway Commission — Functional Classification and Jurisdiction of Highways — Art. VII, §8, Constitution of Iowa; §312.2. The proposed Functional Classification and Jurisdiction of Highways Bill does not require a change in the distribution of the Road Use Tax Fund. (Schroeder to Curtis, State Senator, 5/17/73) #73-5-15

The Honorable Warren E. Curtis, State Senator: This opinion is in reference to your request of May 3, 1973, regarding the proposed Functional Classification and Jurisdiction of Highways Bill. A copy of this bill is attached. In your request you asked:

". . . [whether] the enactment of the proposed Functional Classification and Jurisdiction of Highways Bill would or would not require a change in the present Road Use Tax Fund distribution."

The proposed bill will transfer a number of miles of roads between jurisdictions but the bill contains no requirement that the formula of distribution for the Road Use Tax Fund be changed. The Iowa Constitution Art. VII, §8, provides that certain revenues shall be used exclusively on highways but §8 contains no requirement that the funds be distributed equitably. §321.2 Code of Iowa, 1973, states the formula for the distribution of the Road Use Tax Fund and, like Art. VII, §8, does not require the equitable distribution of funds.

The present distribution of the Road Use Tax Fund may be inequitable when considering the needs of the various jurisdictions. However, since there is no mandate that the distribution be equitable, the Legislature in its sound discretion may distribute the funds as it desires. The desires of the Legislature are expressed in §321.2 and it is presumed that a just and reasonable result is intended. §4.4 Code of Iowa, 1973.

We therefore conclude that the proposed Functional Classification of Highways Bill does not require a revision of the distribution of the Road Use Tax Fund.

May 18, 1973

STATE OFFICERS AND DEPARTMENTS: Minimum age requirements for qualifications for employment as a law enforcement officer. S.F. 82, Acts of the 65th G.A., effective July 1, 1973, provides that persons eighteen years of age may become qualified for law enforcement positions provided they meet all other requirements set forth by the Director of the Law Enforcement Academy. (Coleman to Tieden, State Senator, 5/18/73) #73-5-16

The Honorable Dale L. Tieden, State Senator: This is to acknowledge receipt of your letter dated May 17, 1973, in which you requested the following:

"I would like an Attorney General's opinion on the question of the age requirement for the employment of an individual who has passed the necessary training requirements to qualify for the position of law enforement officer."

On September 19, 1972, this office issued an opinion (OAG #72-9-12) which related in pertinent part that nineteen year old individuals may not be selected as policemen in Iowa. The rationale of such opinion was based upon Rule 1.1, Rules of the Law Enforcement Academy, Iowa Departmental Rules, which provided:

"In no case shall any person hereafter be recruited, selected, or appointed as a law enforcement officer unless such person:

* * *

"1.1(2) Has reached his or her twenty-first birthday . . . at the time of his or her appointment."

The foregoing language directly reflects the statutory provisions of Chapter 80B, 1971 Code of Iowa, which appear to be controlling. Section 80B.2 reads:

"It is the intent of the legislature in creating the academy . . . to maximize training opportunities for law-enforcement officer, to co-ordinate training and to set standards for the law-enforcement service . . ."

Section 80B.11 provides, in part:

"The director of the academy . . . shall promulgate rules and regulations in accordance with the provisions of this chapter and chapter 17A, giving due consideration to varying factors and special requirements of law-enforcement agencies relative to the following:

"1. Minimum entrance requirements . . ."

Therefore, the Law Enforcement Academy has the authority to set the standards for law enforcement officer in the state.

Senate File 82, Acts of the 65th General Assembly, amends Section 80B.11, subsection (1), Code of Iowa, 1973, to read as follows:

"1. Minimum entrance requirements, minimum qualifications for instructors, course of study, attendance requirements, and equipment and facilities required at approved law enforcement training schools. *Minimum age requirements for entrance to approved law enforcement training schools shall be eighteen years of age.*"

When the Law Enforcement Academy initially promulgated Departmental Rule 1.1(2), the age of majority in Iowa was twenty-one years of age. Subsequent thereto, the age of majority has been lowered to eighteen years, and specifically the minimum age for entrance to the Academy has been lowered pursuant to Senate File 82, Acts of the 65th G.A.

It is our opinion that the legislature intended that upon satisfactory completion of the course of instruction given at the Iowa Law Enforcement Academy, each and every graduate would be qualified for employment or placement as a law enforcement officer in Iowa. It is further observed that other construction of Chapter 80B would precipitate a circumstance where a certified and qualified eighteen year old graduate would be suspended in limbo for a period of three years awaiting his twenty-first birthday. Such circumstance would not only be counter productive but also in contravention of intent of the legislature.

May 22, 1973

COUNTIES: County Attorney. An assistant county attorney is prevented from being employed as legal counsel by a public solid waste agency created under Chapter 28E, Code 1973, since Chapter 28E contemplates that the participating governmental units will provide legal service. (Nolan to Smith, Deputy Clinton County Attorney, 5/22/73) #73-5-17

Lauren Ashley Smith, Deputy Clinton County Attorney: Reference is made to your letter of February 23, 1973, requesting an opinion of this office as to the propriety of your being employed as legal counsel by the Clinton County Solid Waste Agency, which is a legal entity under Chapter 28E of the Code of Iowa and which includes all municipalities in the county and the county itself. As you stated in your letter the county provided the legal services for setting

up the agency through the office of the county attorney acting without special compensation. The board of the agency has now requested that you be retained by the agency as counsel.

While several previous opinions of the Attorney General appear to authorize the county attorney or a member of his staff to be retained by a political subdivision to perform legal services that are not ordinarily contemplated in the duties of county attorney, such opinions have been limited, as far as we can discover, to those matters involving political subdivisions having specific statutory authority to employ legal counsel. 1940 OAG 112 (Drainage Districts, §455.162) 1940 OAG 516 (School Districts, §279.35).

In two opinions dealing with the County Conservation Board, 1958 OAG 51 and 1962 OAG 131, this office advised that the county attorney is required to render to the County Conservation Board such assistance as shall not interfere with his regular employment. The duties of the county attorney are those specified in Code §336.2 which include those set forth in §111A.7.

The latter opinion states:

"While section 336.2(7) requires the county attorney to give advice or his opinion in writing without compensation, we find no requirement that the county attorney draft leases or pay travel expenses or phone tolls out of his own pocket.

"Therefore, in our opinion, you are entitled to compensation from the county conservation board for the work mentioned in your letter [drafting, redrafting and execution of leases and preparation of notices]."

Code §455B.76 provides:

"Every city, town and county of this state shall provide for the establishment and operation of a sanitary disposal project for final disposal of solid waste by its residents not later than the first of July, 1965. Sanitary disposal projects may be established either separately or through co-operative efforts for the joint use of the participating public agencies as provided by law.

"Cities, towns and counties may execute with public and private agencies contracts, leases, or other necessary instruments, purchase land and do all things necessary not prohibited by law for the collection of solid waste, establishment and operation of sanitary disposal projects, and general administration of the same. Any agreement executed with the private agency for the operation of the sanitary disposal project shall provide for the posting of a sufficient surety bond by the private agency conditioned upon the faithful performance of the agreement."

On the other hand, the provisions of §28E.11 appear to contemplate that the legal entity created for the joint exercise of governmental powers shall be advised by the county attorney or the city attorney acting in their official capacity:

"Any public agency entering into an agreement pursuant to this chapter may appropriate funds . . . supply the . . . entity created to operate the joint or co-operative undertaking by providing such *personnel or services* therefor as may be within its legal power to furnish." [emphasis supplied]

We have noted that §28E.13, Code of Iowa, 1973, purports to grant powers to the entity for the joint exercise of governmental powers which are in addition to any specific grant for inter-governmental agreements and contracts. However, we do not find any authorization contained in Chapter 28E for the

entity to retain legal counsel other than that supplied to it under §28E.11. Accordingly, it is the opinion of this office that an assistant county attorney is thus prevented from being employed by a public solid waste agency to serve as its legal counsel.

May 22, 1973

STATE OFFICERS AND DEPARTMENTS: Merit System — Secretary of the Board of Pharmacy Examiners — §§147.98, 19A.3, Code of Iowa, 1973. The Secretary of the Iowa Board Examiners is not to be compensated under the merit system, but is to be compensated under the governor's pay plan for exempt positions, at least so long as the legislature decides not to compensate the secretary under a biennial salary act. (Haskins to Crews, Secretary of the Board of Pharmacy Examiners, 5/22/73) #73-5-18

Mr. Paul H. Crews, State Board of Pharmacy Examiners: You ask whether the secretary of the Iowa Board of Pharmacy Examiners (hereafter referred to as the secretary) is to be compensated under the merit system. It is our opinion that the secretary is not to be compensated under the merit system. Rather we believe that the secretary is to be compensated under the Governor's pay plan for exempt positions, at least so long as the legislature decides not to compensate the secretary under a biennial salary act.

Prior to the Second Session of the 64th General Assembly, the secretary could be compensated only under a biennial salary act. Section 147.98 in the 1971 Code of Iowa reads as follows:

"The pharmacy examiners shall have the right to employ a full-time secreatry, who shall not be a member of the examining board, *at such compensation as may be fixed from time to time in the biennial salary act* and the provisions of section 147.22 providing for a secretary for each examining board shall not apply to the pharmacy examiners." (Emphasis added.)

But in the above session of the legislature, §147.98 was amended to provide for compensating the secretary under Chapter 19A of the Code. See §1053.4, Acts of the 64th General Assembly, First Session (1971). The present §147.98 is in the 1973 Code and provies:

"The pharmacy examiners shall have the right to employ a full-time secretary, who shall not be a member of the examining board, *at such compensation as may be fixed pursuant to chapter 19A* but the provisions of section 147.22 providing for a secretary for each examining board shall not apply to the pharmacy examiners." (Emphasis added.)

Chapter 19A, Code of Iowa, 1973, sets forth the merit system. Section 19A.1, Code of Iowa, 1973, states:

"The general purpose of this chapter is to establish for the state of Iowa a system of personnel administration based on the merit principles and scientific methods governing the appointment, promotion, welfare, transfer, layoff, removal and discipline of its civil employees, and other incidents of state employment. All appointments and promotions to positions in the state service shall be made solely on the basis of merit and fitness, to be ascertained by competitive examinations, except as hereinafter specified."

However, certain exceptions to the coverage of the merit system exist. The merit system does not apply to one principal assistant of appointments made by the Governor. Section 19A.3, Code of Iowa, 1973, states in relevant part:

"The merit system shall apply to all employees of the state and to all positions in the state government now existing or hereafter established except the following:

* * *

"14. *All appointments which are by law made by the governor or executive council;* one stenographer or secretary for each; *one principal assistant* or deputy *for each;* and all administrative assistants or deputies employed by the director of the Iowa development commission." (Emphasis added.)

The secretary is clearly a "principal assistant" under the above section. The Iowa Board of Pharmacy Examiners is appointed by the Governor. Section 147.12, Code of Iowa, 1973, states:

"For the purpose of giving examinations to applicants for licenses to practice the profession for which a license is required by this title, the governor shall appoint a board of examiners for each of said professions."

Section 147.13, Code of Iowa, 1973, states:

"The examining boards provided in section 147.12 shall be designated as follows: For medicine and surgery, and osteopathy, and osteopathic medicine and surgery, medical examiners; for podiatry, podiatry examiners; for chiropractic, chiropractic examiners; for physical therapists, physical therapy examiners; for nursing, board of nursing, for dentistry and dental hygiene, dental examiners; for optometry, optometry examiners; for cosmetology, cosmetology examiners; for barbering, barber examiners; for *pharmacy, pharmacy examiners;* for funeral directing and embalming, funeral director and embalmer examiners." (Emphasis added.)

From an analysis of the above section, it is our opinion that the secretary is exempt from and is not under the merit system. However, Chapter 19A still provides a mode of compensating the secretary. Section 19A.9, Code of Iowa, 1973, provides for the Governor's pay plan for positions exempt from the merit system. Section 19A.9 states in relevant part:

"The merit employment commission shall adopt and may amend rules for the administration and implementation of this chapter in accordance with chapter 17A. The director shall prepare and submit proposed rules to the commission. The rules shall provide:

* * *

"2. For a pay plan within the purview of an appropriation made by the general assembly and not otherwise provided by law for all employees in the merit system, after consultation with appointing authorities and after a public hearing held by the commission. Such pay plan shall become effective only after it has been approved by the executive council after submission from the commission.

Review of the pay plan for revisions shall be made in the same manner at the discretion of the director, but not less than annually. Each employee shall be paid at one of the rates set forth in the pay plan for the class of position in which employed and, unless otherwise designated by the commission, shall begin employment at the first step of the established range for his class. *Unless otherwise established by law, the governor, with the approval of the executive*

council, shall establish a pay plan for all exempt positions in the executive branch of government except for employees of the governor, board of regents, the state educational radio and television facility board, the superintendent of public instruction and members of the professional staff of the department of public instruction, appointed under the provisions of section 257.24, who possesss a current, valid teacher's certificate or who are assigned to vocational activities or programs, the commission for the blind, members of the Iowa highway safety patrol and other peace officers, as defined in section 97A.1 employed by the department of public safety, and officers and enlisted men of the armed services under state jurisdiction." (Emphasis added.)

It will be noted that the secretary is not mentioned in the above section as a position excepted from the Governor's pay plan. Accordingly, it is our opinion that the secretary is to be compensated under the Governor's pay plan for exempt positions. Of course, the secretary is to be so compensated only so long as the legislature decides not to compensate the secretary under a biennial salary act.

May 24, 1973

SCHOOLS: Nepotism — A school secretary is not a "person teaching in public schools" for purposes of §71.1, Code of Iowa, 1973, so as to be excluded from the nepotism statute. A person is considered to have the same relationship by affinity to her brother-in-law as her husband has to his brother. (Nolan to Lamborn, State Senator, 5/24/73) #73-5-19

Honorable Clifton C. Lamborn, State Senator: This letter is written in response to your request for an opinion on the question of whether "nepotism" is a ground for terminating the contract of a public school secretary whose husband's brother (her brother-in-law) is a member of the school board of the district where she is employed. The woman received notice that her contract is being terminated under the provisions of §279.13 of the 1973 Code of Iowa. In your letter you state:

"Assuming that the school board is terminating this woman's employment based on nepotism as set forth in Chapter 71 of the 1973 Code of Iowa, my question is, 'does this woman's employment situation come within the employment situation prohibited under this Chapter?'"

Section 71.1, Code of Iowa, 1973, provides:

"Employments prohibited. It shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of the state or by virtue of the ordinance of any city or town in the state, to appoint as deputy, clerk, or helper in said office or position to be paid from the public funds, any person related by consanguinity of affinity, within the third degree, to the person elected, appointed, or making said appointment, unless such appointment shall first be approved by the officer, board, council or commission whose duty it is to approve the bond of the principal; provided this provision shall not apply in cases where such person appointed received compensation at the rate of six hundred dollars per year or less, nor shall it apply to persons teaching in public schools."

Under §4.1(24) pertaining to construction of statutes the degree of consanguinity and affinity are to be computed according to civil law.

Although the employees of a school district have been treated as "teachers" for many purposes (sick leave, payroll deductions, etc.) it cannot be said that the secretary of the school is "teaching" in public schools. Consequently the

exemption provided in the last line of §71.1 would not apply to such a person. Accordingly this inquiry then will be limited solely to a determination of whether or not proscribed affinity exists in this situation.

Affinity is the connection existing in consequence of marriage between each of married persons and the kindred of the other. The degrees of affinity are computed in the same way as those consanguinity or kindred. A husband is related by affinity to all blood relatives of his wife and the wife is related by affinity to all blood relatives of the husband. Words and Phrases Vol. 2A Permanent Addition page 351. Affinity is the tie which arises from marriage between the husband and the blood relations of the wife and between the wife and the blood relations of the husband. *Farmers Loan and Trust Co. v. Iowa Water Co.* 1897 Iowa 80 Fed. 467, 468. The rule of computing degrees of affinity is that the relations of the husband stand in the same degree of affinity to the wife in which they are related to the husband by consanguinity. *Chinn v. State* 26 NE 986, 47 Ohio State 575. Thus, the secretary in question would be considered to have the same relationship by affinity to her brother-in-law as her husband has to his brother. And would unless otherwise exempted from the provisions of §71.1 be precluded from lawfully receiving any compensation from the public money by §71.2 of the Code. However, inasmuch as the secretary of the school is generally covered by a bond approved by the school board, the employment of the person is not necessarily prohibited by the law of Iowa.

May 24, 1973

BANKS — Bank Holding Companies. §§524.1801 - 524.1807, Code of Iowa, 1973. An individual does not come within the definition of a Bank Holding Company (524.1801), however, other provisions of §§524.1801 through 524.1807 do apply to individuals. (Nolan to Scott, State Senator, 5/24/73) #73-5-20

Honorable Kenneth D. Scott, State Senator: You have requested an opinion interpreting §§524.1801 through 524.1807, Code of Iowa, 1973. Specifically, you wish to know whether or not these sections pertaining to bank holding companies are applicable to individual shareholders of a corporation which would be designated as a bank holding company when none of the shareholders own 25% or more of the shares of such corporation.

Section 524.1801 defines bank holding companies as follows:

"As used in this section and sections 524.1802 through 524.1907, 'Bank Holding Company' means any corporation, business trust, voting trust, association, partnership, joint venture, or similar organization, other than an individual, which directly or indirectly owns or controls twenty-five percent or more of the voting share of each of two or more banks or of a company which is a bank holding company by virtue of this section, or which controls in any manner the election of a majority of the directors of each of two or more banks, or for the benefit of whose shareholders or members twenty-five percent or more of the voting shares of each of two or more banks or of a company which is a bank holding company by virtue of this section is held by trustees. However, no company shall be a bank holding company solely by virtue of its ownership or control of shares:

"1. In a fiduciary capacity arising in the ordinary course of business.

"2. Acquired by it in connection with its underwriting of bank shares and held only for such period of time as will permit sale of the shares upon a reasonable basis.

"3. Acquired and held in the ordinary course of securing or collecting a debt previously contracted in good faith."

Under this section individual stockholders owning less than 25% of the shares of a bank holding company would be excluded from the limitations imposed by this section of the Code.

However, where it appears that a combination of individual shareholders of a holding company result in such holding company "directly or indirectly" acquiring ownership or control of more than 25% of the voting shares of a bank so as to have in the aggregate more than 8% of the total deposits of all banks of this state, such acquisition by the holding company would be prohibited under §524.1802. Similarly, under §524.1804 where a bank holding company proposes to acquire ownership or control of more than 25% of the voting shares of a bank, *directly or indirectly,* such holding company is required to submit its proposals to the Superintendent of Banking for such investigation and evaluation as he deems necessary and appropriate. Further, under §524.1806 an individual who is a director or an officer of a bank holding company or of a bank which is owned or controlled by a bank holding company shall also be deemed to be a director or an officer or both, as the case may be, of each bank owned or controlled by the bank holding company and subject to the statutory limitations imposed on directors under the Iowa Banking Act.

Further note should be made of the provisions of §524.1807 which state in pertinent part:

". . . Any individual who willfully participates in a violation of any of the provisions of sections 524.1801 through 524.1806 shall be guilty of a misdemeanor and, upon conviction thereof shall be subject to imprisonment in the county jail for a period not exceeding one year or a fine not exceeding one thousand dollars, or both."

Accordingly, to the extent indicated by the statutes set out above the provisions of the Bank Holding Company Act do apply to individuals.

May 24, 1973

CITIES AND TOWNS: Garbage Collection — §§368.24 and 394.5, Code of Iowa, 1973. A city may make its garbage collection service mandatory upon all owners or occupants of property in a city, and, if so, may assess upon all a reasonable fee for such service. However, if a city's collection service is not mandatory, the city may not assess an owner or occupant of property who does not use the city service. (Blumberg to Stromer, State Representative, 5/24/73) #73-5-21

Delwyn Stromer, State Representative: We are in receipt of your opinion request of May 7, 1973, concerning a garbage collection ordinance. You ask whether residents of a city have to accept a city's garbage collection service, and, if not, whether they would still have to pay for it. The ordinance in question states that the city "may provide for mandatory collection of garbage and refuse and may pay therefor through taxation or may assess the costs thereof to the owner or occupant of each [residence or business establishment] . . . ." The ordinance also provides for the method of collection in that it can be done by the city or by another through a contract with the city; that all garbage shall be collected twice each week; that a sanitary landfill may be established by the city; that the fees for collection of refuse shall be established by ordinance, and

that either the town clerk or the party with whom the city has contracted is authorized to collect said fees; and that in the case of garbage and rubbish, the city or the contractor shall collect the fees.

Section 368.24 of the Code provides:

"[Cities] shall have power to provide for the collection and disposal of garbage, refuse and other solid waste . . .

"In addition to the foregoing powers, cities and towns may impose a schedule of fees for the collection of refuse, garbage and other solid waste . . . or may contract with one or more private collectors for the collection of garbage, refuse and other solid waste within the city or town in lieu of accomplishing the same by means of city or town trucks and personnel."

Section 394.5 provides in part that cities and towns may by ordinance provide a schedule of fees to be charged for the use of and services and facilities rendered by a sanitary disposal project or for the collection and disposal of garbage. Ordinances for garbage collection, along with sanitary disposal plants and sewer facilities are based upon the police powers of a city for the health, safety and welfare of its citizens. *State v. Bartos,* 1967, 102 Ariz. 15, 423 P.2d 713; *Strub v. Deerfield,* 1960, 19 Ill. 2d 401, 167 N.E.2d 178; Annot., 83 A.L.R.2d 799.

There can be no doubt that a city may engage in garbage collection as a service for its citizens, or contract for it. *Supra.* In conjection with this, it has been held that the grant of an exclusive license or the reservation to the municipality itself of the exclusive right to remove garbage and rubbish by city employees is not unconstitutional. Annot., 83 A.L.R.2d 802. A municipality may collect garbage and prohibit any other persons from engaging in that business under its police or general power to provide for the health of its inhabitants and to prevent and abate nuisances. 7 E. McQuillin, *Municipal Corporations* §24.250 and cases cited therein. In *Cassidy v. City of Bowling Green,* 1963, 368 S.W. 2d 318 (C.A. Ky.), the Kentucky Court of Appeals was faced with the question of whether the city could require the citizens to use the garbage disposal service which included collection and a landfill operation. It was held (368 S.W.2d at 319-320):

"The evidence is convincing (if any were needed) that exclusive control of garbage disposal in Bowling Green by the City is an essential health measure in the public interest. The right of regulation is clearly within the police power of the City. It was shown that the health and welfare of the city residents would be preserved and promoted by prohibiting private garbage disposal and requiring those owning or occupying real property to use the municipal system.

"Garbage disposal falls within the same class as sewage disposal. It was long ago established that a city may properly forbid the use of private facilities and compel its inhabitants to use the public system. *Nourse v. City of Russellville,* 257 Ky. 525, 78 S.W.2d 761."

See also, *Spokane v. Carlson,* 1968, 73 Wash.2d 76, 436 P.2d 454, which held that a private carrier of industrial and trade waste did not have the right to operate his vehicle in violation of an ordinance reserving to the city the exclusive right to collect garbage and refuse. It therefore appears, that a city may require that its property owners and occupiers use the city's garbage collection service.

The next question is whether a city may assess a garbage collection fee against property owners and occupiers who do not use the city's garbage collection service where such service is not mandatory. In *Thompson v. Green,* 1943, 28 Ohio Ops. 99, the plaintiff sought an injunction to enjoin the collection of charges for the collection of garbage and rubbish in the city. The court found that a city may by ordinance set up a garbage collection service and reasonable fees therefor. It then held that such fees are for services rendered and therefore are not taxes. The court then concluded that because garbage collection by the city was not mandatory, and since the fees were only for services rendered, the city could not charge said fees to someone who did not use the city service, because it would be a violation of due process. See also, *Colley v. Village of Englewood,* 1947, 71 N.E.2d 524, which cited with approval, to *Thompson.*

There are other cases which appear to hold otherwise. In *City of Breckenridge v. Cozart,* 1972, 478 S.W.2d 162 (C.C.A. Tex.), the issue was whether the city could discontinue water service for failure to pay that part of the water bill for collection of garbage. The court found that garbage collection was similar to other sanitary services, and that even though the individual disposed of his own garbage instead of using the city service, his water could be discontinued for failure to pay the garbage collection fee. The court based its opinion on *Cassidy v. City of Bowling Green,* supra. In *Cassidy,* the same question was at issue, and the court held that water service could be discontinued for failure to pay the garbage collection fee. However, the decision was couched in terms of mandatory collection when the court held (368 S.W.2d at 320): "Since the City may require those owning or occupying property to accept its services, it may likewise require them to share the expense thereof by the payment of reasonable fees." We find this reasoning to be sound when the city is the only one collecting garbage. However, these opinions do not touch upon the issue of assessment for garbage collection by the city when such collection is not mandatory. The *Thompson* case handles that issue.

Accordingly, we are of the opinion that a city may make its garbage collection mandatory upon all property owners or occupants of a city, and if so, it may assess upon all a reasonable fee for such service. However, if the city's collection service is not mandatory, the city may not assess an owner or occupant of property who does not use the city service. It should be pointed out that this opinion only concerns the collection of garbage and does not refer to a city charging for the use of a garbage disposal system such as a sanitary landfill. In addition, it should be noted that a city may not enforce collection of a garbage collection fee for a private garbage collector by assessing the property of the person owing the fee. 1968 O.A.G. 958.

May 25, 1973

CONSTITUTIONAL LAW: Residency Requirement for Professional boxing or wrestling license — §727A.4, Code of Iowa, 1973; H.F. 268. Legislature may require one year residency before a person, group, club, association or corporation is eligible to apply for a license to promote professional boxing or wrestling matches. (Beamer to Woods, State Representative, 5/25/73) #73-5-22

Honorable Jack E. Woods, State Representative: This is in response to your letter requesting an opinion as to the constitutionality of an amendment to §727A.4, Code of Iowa, 1973. Specifically, you have asked whether a residency

requirement in order to obtain a professional boxing or wrestling license is constitutional.

The amendment to §727A.4 is set forth in House File 268 and states:

". . . except that no person shall be *issued a license unless he has been a resident of this state for at least one year immediately preceding the date of application* nor shall any group, club, association or corporation be issued a license unless it has been incorporated under the laws of this state and has a *membership of at least ten persons who have been residents of this state for at least one year immediately preceding the date of application.*" (Emphasis added)

The subject of your opinion request is the durational residence requirement in House File 268. The Supreme Court has recently given a great deal of consideration to residency requirements. In *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600, the Court declared a one year residency requirement for eligibility for welfare to be unconstitutional. In *Dunn v. Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274, the Supreme Court struck down the Tennessee one year residency for eligibility to vote. In *Dunn* as in *Shapiro* the Court found that any classification which in effect penalizes the exercise of a fundamental right, unless shown to be essential to promote a compelling governmental interest, is unconstitutional. Therefore, with this background, it must be assumed that residency requirements are suspects in the eyes of a court.

The constitutional question raised in your opinion request is whether the Equal Protection Clause of the Fourteenth Amendment permits a state to require a year's residency before a license to promote professional wrestling or boxing may be issued. In deciding this issue three things must be considered: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. *Williams v. Rhodes,* 393 U.S. 23, 30, 89 S.Ct. 5, 21 L.Ed.2d 24, 31. In the present case we must look to the benefit being withheld by the individual, corporation, etc., that doesn't meet the residency requirement, namely the opportunity to get a license. This benefit is weighed against the basis for the classification which is to regulate professional boxing and wrestling matches. As we have noted, the Supreme Court has held that there must be a clear showing that the burden imposed by the classification is necessary to protect a compelling and substantial governmental interest. *Oregon v. Mitchell,* 400 U.S. 112, 238, 91 S.Ct. 260, 27 L.Ed.2d 272, 346.

Police powers of the states, permitted by the Constitution of the United States, have long been recognized as necessary for the public's health, safety and welfare. *Berman v. Parker,* 284 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27. It must be remembered that police powers are broad and comprehensive. They have been defined as very high powers, and the laws enacted for the purpose of regulation may be impolitic, harsh and oppressive without being unconstitutional. Security of the social order, life and health of the citizen and beneficial use of property are dependent on the police power. In other words, it is the very foundation upon which our social system is based. See 16 C.J.S., *Constitutional Law* §175.

It is obvious that the licensing of professional boxing and wrestling matches is a function derived from the police power of this state. Prize fighting and wrestling matches are proper subjects of control, and are not only subject to regulation, but may be prohibited altogether. The state can show substantial

and compelling reasons for imposing a durational residence requirement before issuing a license in this area. For instance, a residency requirement would provide the State Commissioner of Athletics an opportunity to check the background of an individual or group applying for a license. Here then, the interest of the state in regulating professional boxing and wrestling matches is clearly recognizable under the state's constitutional police power. The matter in issue does not deal with fundamental rights as in the *Dunn* case. The right to obtain a license is a statutory right. It is in the province of the legislature to set the standards for the granting of such license.

In summary, the durational residency requirement in House File 268 is constitutional. It is a valid exercise of legislative power.

May 30, 1973

CONSTITUTIONAL LAW: Right of suffrage — closed primary. Article II, §1, Constitution of Iowa. Closed primaries are not unconstitutional. A primary election is not an election within the meaning of the law but a mere nominating procedure for political parties. (Haesemeyer to Mendenhall, State Representative, 5/30/73) #73-5-23

Honorable John C. Mendenhall, State Representative: Reference is made to your request for an opinion of the Attorney General with respect to the following:

"I would appreciate an opinion from your office on the constitutionality of Iowa's 'closed primary' based on Article 2, 'right of suffrage', Iowa Constitution."

The Constitution of the State of Iowa, Article II, §1, as amended 1970, sets out the basic right of suffrage:

"Every citizen of the United States of the age of twenty-one years, who shall have been a resident of this state for such period of time as shall be provided by law and of the county in which he claims his vote for such period of time as shall be provided by law, shall be entitled to vote at all elections which are now or hereafter may be authorized by law. The General Assembly may provide by law for different periods of residence in order to vote in various elections. The required periods of residence shall not exceed six months in this state and sixty days in the county."

It is our opinion that the foregoing language does not prohibit closed primaries, nor do closed primaries violate the constitutional right of suffrage established therein. The general rule is as follows:

"Although voters have the constitutional right to vote as individuals at general elections so long as they meet the reasonable procedural requirements embodied in the election laws, they have no right, unless the statutes provide for an open primary, to vote in the primary of any particular political party unless they are members of that political party as reasonably defined by the legislature or by party rules." 25 Am. Jur. 2d 854 (1966).

Specifically, the Iowa Supreme Court has elaborated on your question as follows:

"A primary election is not an election within the meaning of the Constitution; nor is it such within any meaning known to the common law. It is purely a legislative creation that involves neither life, liberty, property, nor franchise. It is enacted solely for the benefit of orderly procedure in the administration of political parties respectively, whereby each may select candidates for office to

be submitted to the consideration of all the electors at the general election. In its creation the Legislature was subjected to no constitutional inhibition, nor are its imperfections, if any, subject to attack on constitutional grounds." *State ex rel, Hatfield v. Carrington,* 194 Iowa 785, 190 NW 390, 391 (1922).

Since a closed primary is, in reality, a nominating procedure rather than a true election, its establishment by the legislature does not conflict with the right of suffrage guaranteed by the Iowa Consitution.

The Supreme Court of the United States has recognized, in dicta, the validity of closed primaries. In *Ray v. Blair,* 343 U.S. 214, 96 L.Ed. 894, 72 S.Ct. 654 (1952), the Supreme Court upheld the constitutionality of a state requirement that all candidates for presidential elector must, prior to their election, pledge their support to the party's national nominees. In so holding the Court noted,

"Similar pledges, of course, are frequently exacted of voters in the primaries. See, e.g. *State ex rel Adair v. Drexel,* 74 Neb. 776, 105 NW 174; *Morrow v. Wipf,* 22 S.D. 146, 115 NW 1121; *Ladd v. Holmes,* 40 Or. 167, 66 P. 714, 91 Am. St. Rep. 457." 343 U.S. 214, 222.

In each of these cases cited by the Supreme Court of the United States, the state courts upheld the constitutionality of a requirement that an elector must be affiliated with a political party in order to vote in a primary election. In view of the language of the Supreme Court of the United States and the Supreme Court of Iowa, it is our opinion that Iowa's closed primaries, established by Chapter 43, Code of Iowa, 1973, are constitutional.

You have expressed concern over the large number of independent voters in this state who, by choice, are excluded from voting in the primaries of the political parties. However, these independents are in no way disenfranchised of their voting rights at general elections. Furthermore, they are provided with alternate methods of nominating their own candidates for the general elections. See Chapter 44, "Nominations by Nonparty Political Organizations", and Chapter 45, "Nominations by Petition", Code of Iowa, 1973.

May 30, 1973

CITIES AND TOWNS: Policeman and fireman retirement systems. Chapter 411, Code of Iowa, 1973. Section 411.6(11) is merely an optional method of receiving pension benefits which has nothing to do with 411.6(10) which involves the withdrawal of all accumulated contributions upon the termination of employment. A party does not withdraw the full amount of his accumulated contributions by utilizing subsection 11 — he merely chooses one of two methods of receiving pension benefits but, neither of these methods under subsection 11 involve the withdrawal of funds as under subsection 10 of §411.6. The surviving spouse and children of a member who terminates employment after 15 years of service and dies before reaching retirement age, are not entitled to the survivor benefits under §411.6(13). The survivors are, however, entitled to the amount of the deceased's members accumulated contributions plus any interest earned thereon. (Haesemeyer to Connors, State Representative, 5/30/73) #73-5-24

The Honorable John H. Connors, House of Representatives: This opinion is in reference to your February 12, 1973, request concerning policeman and fireman retirement systems as provided for in Chapter 411, Code of Iowa, 1973.

The first question you raise covers an interpretation of §411.6(1) (c), in which you stated:

"Your opinion is requested with respect to the meaning of Section 411.6, subparagraph 1.c. (Code 1973) with regard to the availability of the optional allowance provisions of subparagraph 11 of said Section 411.6 to a fireman or policeman entitled to benefits under said subparagraph 1.c. and with regard to the entitlement of the surviving spouse or surviving children of a member who terminated his service after 15 years or more of service and would have been entitled to retirement benefits under said subparagraph 1.c. had he lived to reach retirement age of 55, but who died prior to reaching such age.

"With respect to the application of the optional allowance, it has come to my attention that certain cities and towns in the State of Iowa have interpreted subparagraph 1.c., which reads in pertinent part as follows:

'The allowance shall not be available to a member who has chosen to withdraw his accumulated contributions as provided in subsection 10 of this section.'

"as making a member, otherwise entitled to benefits under subparagraph 1.c., as not entitled to such benefits upon selecting the optional allowance provisions of subparagraph 11 of Section 411.6.

"It is the undersigned's belief that such interpretation is in error as it appears that a fair interpretation of the language above quoted is to cover the situation where a member who terminates his employment prior to retirement, but after 15 or more years of service and who elects prior to reaching retirement age to withdraw his accumulated contributions, he is then not entitled upon reaching retirement age to retirement benefits. Subsection 11 describes an optional method of receiving retirement benefits, in that a member upon reaching retirement age may elect to receive such payments throughout life or he may elect to receive the actuarial equivalent in a lesser monthly allowance payable throughout life together with an immediate cash payment of his accumulated contributions. The optional allowance election can in no way increase the actuarial equivalent of the amount of money the member will be entitled to receive as benefits under Chapter 411."

It is the opinion of this office that your interpretation of §411.6(1) (c) is correct. Subsection 11 of §411.6 is merely as the section title indicates, an "optional" method of receiving the pension benefits. Subsection 11 has nothing to do with subsection 10, which involves the withdrawal of all accumulated contributions upon the termination of employment. A party does not withdraw the full amount of his accumulated contributions by utilizing subsection 11 — he merely chooses one of two methods of receiving pension benefits but, neither of these methods under subsection 11 involve the withdrawal of funds as under subsection 10 of §411.6. Subsection 11 was constructed by the Legislature to provide a variety of payment plans of entitled pensioners, not the quick drainage of the accumulated contributions as provided by subsection 10 of §411.6 of the 1973 Code of Iowa.

Your second question deals with §411.6(13). You stated:

"Under Section 411.6(1) (a), a member with 15 or more years of service before termination is entitled to receive an allowance under subparagraph 2 of Section 411.6 upon his reaching the retirement age of 55 and receiving a pension, his survivors will be entitled to the benefits of subparagraph 13 upon his death. If, however, he dies before reaching the age of 55 and before becoming entitled to receive retirement benefits under subparagraph 2 of Section 411.6

would his surviving spouse and children be entitled to survivors benefits under subparagraph 13 as the terminated member was not receiving a retirement allowance at the time of his death even though he would have been entitled to such allowance had he lived to reach the age of 55?"

First of all, we assume that you meant "1.c." instead of "1.a." in your request, because of your reference to the 15 year period under 1.c. of §411.6.

Secondly, it is the opinion of this office that the surviving spouse and children of a member who terminates employment after 15 years of service and dies before reaching retirement age, are not entitled to the survivor benefits under §411.6(13).

Section 411.6(c) states:

"c. Any member in service who has been a member of the retirement system fifteen or more years and whose employment is terminated prior to his retirement, other than by death or disability, shall upon attaining retirement age, receive a service retirement allowance of fifteen twenty-seconds of the retirement allowance he would receive at retirement if his employment had not been terminated, and an additional one twenty-second of such retirement allowance for each additional year of service not exceeding twenty-two years of service. The amount of the retirement allowance shall be based on the average final compensation at the time of termination of employment. The allowance shall not be available to a member who has chosen to withdraw his accumulated contributions as provided in subsection 10 of this section."

There are basically three requirements under this section: (1) work 15 or more years, (2) attain the age of 55, and (3) don't withdraw your accumulated contributions under §411.6(10). If a party dies before reaching the age of 55, he is not entitled to the benefits provided in §411.6(c).

Section 411.6(13) provides:

"13. Pension to spouse and children of deceased pensioned member. In the event of the death of any member receiving a retirement allowance under the provisions of subsections 2, 4, or 6 of this section there shall be paid a pension:

"a. To the spouse to continue so long as said partner remains unmarried, equal to one-half the amount received by such deceased beneficiary, but in no instance less than seventy-five dollars per month, and in addition thereto the sum of twenty dollars per month for each child under eighteen years of age; or

"b. In the event of the death of the spouse either prior or subsequent to the death of the member, to the guardian of each surviving child under eighteen years of age, in the sum of twenty dollars per month for the support of such child."

For the survivors to qualify under this section, it appears that the member must have been *receiving* a retirement allowance. If a member under §411.6(c) dies before reaching age 55 *he is not* receiving a retirement allowance and therefore his survivors are not entitled to the benefits listed in §411.6(13). This seemingly leaves the member's survivors without coverage under §411.6(13).

It would logically follow that the survivors are, however, entitled to the amount of the deceased's members accumulated contributions plus any interest earned thereon. This is not specifically provided for in Chapter 411, but it would be wholly inequitable and inconsistent to allow one member to withdraw all of his contributions upon termination under §411.6(10) and then

turn around and not pay out the accumulated contributions to the family of a member who had decided to keep his contributions in the fund hoping to reap his retirement benefits at age 55 under §411.6(c) but had died prior to reaching that age. In other words, a member or his family is entitled to the member's accumulated contributions whether withdrawn immediately after termination of employment or upon the member's death before reaching age 55 under §411.6(c). Also supporting this position are Sections 411.3(2) and 411.8(d) of the Code.

June 4, 1973

BRIDGES - ALLEYS: CITIES, TOWNS, COUNTIES, RESPONSIBILITY FOR: Meaning of terms: Cities and towns are responsible for bridges within their limits, Section 381.1, Code of Iowa 1973. Towns *may* be responsible for bridges within their limits, Section 381.2. Counties *may* assist certain cities or towns with bridge problems, Section 309.9(3). Counties may not levy, against property within cities and towns which control their own bridge levies, for secondary road construction and maintenance purposes the tax of eleven and one-eighth (11-1/8) mills provided under Section 309.7(1), Code of Iowa 1973; alley of city or town not same as highway, Section 312.2. (Schroeder to Kemming, Bremer County Attorney, 6/4/73) #73-6-1

Mr. Richard L. Kemming, Bremer County Attorney: This is in response to your recent letter in which you asked a number of questions regarding the relative responsibilities of cities, towns and counties for the bridges lying within their boundaries and about the meaning of the term "alley".

Your questions were:

I. Is it the responsibility of cities and towns to construct, maintain and determine the size of all bridges and culverts within their corporate limits? If not, what is the legal responsibility of a Board of Supervisors to construct, maintain and inspect bridges and culverts over 36 inches in diameter on extensions of secondary roads within the corporate limits of cities and towns? Further, what is the legal responsibility of the Board to construct, maintain and inspect such bridges and culverts within corporate limits on other than those streets which are extensions of secondary roads?

II. Pursuant to the provisions of Section 309.9(3), if the Board elects to construct and maintain bridges and culverts in cities of less than 8,000 population, may the Board levy for secondary road construction purposes the taxable property in such cities?

III. For purposes of administering the provisions of Section 309.3 and the other hereinabove cited references, is an alley of a city or town the same as a highway?

In regard to question number I. Section 381.1 of the Code of Iowa 1973 awards to or imposes upon cities the "care, supervision, and control of all public bridges, culverts . . . , within their corporate limits; * * *." Section 381.2 gives the towns the right to assume by ordinance the authority and control over the responsibility for those things that are assigned to cities by Section 381.1.

The Supreme Court of the State of Iowa, in the case of *Smith vs. City of Algona*, 1942, 232 Iowa, 362, 5NW2d 625, rejected the contention that a

primary highway extension was a part of the primary road system of the state. The court said:

"under the theory of appellee, the maintenance of the streets of the appellee designated as the route of 169, would be under the divided supervision, care, and maintenance of the City and Commission, which must necessarily result in conflict and confusion. It is clear to us that it was to avoid such divided responsibility and to leave it on the city, where it is placed by Section 5945, that the legislature, in all of the legislation since the Federal Aid Act of 1916, has never, expressly or impliedly, repealed Section 5945, and has never taken the control of its streets from a city, even though it has given permissive authority to the Commission to aid in the construction or maintenance of primary road extensions through the city."

This and other reasoning applied in the Smith case, applies, in our opinion, to secondary road extensions as well as to primary. On the basis of ths and of the two above quoted Sections of the Code of Iowa 1973, it is our opinion that the answer to the first question stated is in the affirmative with regard to cities. With regard to towns it is affirmative if a town has enacted an ordinance assuming those prerogatives which Section 381.2 empowers it to do.

Although we have said that cities are, and towns may, be responsible for certain bridges and culverts, etc., this primary responsibility may be transferred, avoided, or shared by operation of certain other statutes. For example, 309.3 states that:

"the secondary bridge system of a county shall embrace all bridges and culverts on all public highways within the county except on primary roads and on highways within cities which control their own bridge levies, except that culverts which are 36 inches or less in diameter shall be constructed and maintained by the city or town in which they are located."

It will be noted that the first exception stated above excludes from the secondary bridge system those bridges and culverts within the county which are on primary roads and on highways within *cities* which control their own bridge levies, thus leaving within the secondary bridge system those bridges and culverts on secondary roads and on highways within *towns*. The second exception imposes responsibility for culverts 36 inches or less in diameter, on both cities and towns.

Section 309.9(3) gives to the county Boards of Supervisors the option of expending secondary road fund monies, for, among other things, "payment of all or part of the cost of construction and maintenance of bridges in cities and towns having a population of 8,000 or less * * *." It will be noted that in the above quotation from Section 309.9 the statute merely refers to "construction and maintenance of bridges in cities and towns . . ." making no reference to whether or not those bridges are located along extensions of primary or secondary highways. Consequently it is our opinion that the Board of Supervisors in the exercise of their option are not limited to assisting cities and towns in building and maintaining bridges on extensions of secondary highways but may assist in the construction and maintenance (including inspection) of any bridge on any highway in "cities and towns having a population of 8,000 or less . . . ."

With regard to your question II:

"Pursuant to provisions of Section 309.9(3), if the Board elects to construct and maintain bridges and culverts in cities of less than 8,000 population, may

the Board levy for secondary road construction purposes the taxable property in such cities?"

Section 309.7(1) states:

"a tax of not to exceed eleven and one-eighth (11-1/8) mills on the dollar of all taxable property in the county except on property within cities and towns which control their own bridge levies * * *."

In view of this and the Attorney General's opinion dated August 12, 1959, from Lyman to Anderson, Howard County Attorney, which says that cities and towns now control their own bridge levies, it is our opinion that a county is effectively prevented from levying directly on the property within any such city or town. However, since 309.9(3) gives the Board of Supervisors the option of paying "all or part of the cost", it would seem that any objections which might be raised because of inability to levy against property in a city or town could be resolved by agreeing with the city or town that the town would impose the levy, as it is empowered to do under Chapter 381 of the Code of Iowa 1973, and thus provide the monies which the county is prohibited from obtaining by levy against property in such city or town.

Your question III, "for purposes of administering the provisions of Section 309.3 and the other hereinabove cited references, is an alley of a city or town the same as a highway?", is answered in the negative. Section 312.2 specifically forbids cities or towns the use of road use tax funds for alleys.

June 5, 1973

STATUTORY CONSTRUCTION: Concurrent resolutions — Ch. 263A, Code of Iowa, 1973, and Senate Concurrent Resolution 12, 65th G.A. A concurrent resolution merely expresses the disposition of each house of the Legislature as of the time it is considered by that house, therefore it becomes effective upon final disposition by the last house giving consideration to it. (Nolan to Richey, Exec. Secretary, Board of Regents, 6/5/73) #73-6-5

Mr. R. Wayne Richey, Executive Secretary, State Board off Regents: This is written in reply to your request for an official opinion of the Attorney General as to the effective dates of concurrent resolutions of the Legislature. According to your letter the question was raised by Chapman and Cutler concerning Senate Concurrent Resolution 12 authorizing the Board of Regents to issue $10 million of hospital revenue bonds under the provisions of Chapter 263A Code of Iowa, 1973.

Senate Concurrent Resolution 12 was adopted by the Senate by a vote of 42 to 8 March 6, 1973, and by the House by a vote of 68 to 4 on May 21, 1973. A motion to reconsider the House vote was defeated by the House on May 24, 1973.

Under the concurrent resolution whereby the General Assembly authorized the Regents to issue bonds for the construction of educational facilities pursuant to Section 262A.4 Code of Iowa, the approval of the Governor was also required before the legislative authorization was effective. *Farrell v. State Board of Regents,* Iowa 1970, 179 NW 2d 533. However, the provisions of Chapter 263A do not require approval by the Governor. Accordingly, Senate Concurrent Resolution 12 became effective upon final disposition by the second house of the Legislature giving consideration to it. Unlike the enactment of a bill into law which becomes effective when enrolled and signed by the Governor on July 1 of the year in which enacted unless a different date is

specified or publication as an emergency measure specified, a concurrent resolution merely expresses the disposition of each house of the Legislature giving it consideration as of the time the matter is before that particular house.

June 5, 1973

CONSTITUTIONAL LAW: Effective date of acts of the General Assembly: Art. III, §26, Constitution of Iowa, §3.7, Code of Iowa, 1973. It is not unconstitutional for the 65th General Assembly in 1973 to pass a bill which will not become effective until July 1, 1975. (Haesemeyer to Mendenhall, State Representative, 6/5/73) #73-6-2

Honorable John C. Mendenhall, State Representative: In contemplation of amending House File 315 by adding: "Sec. 4. The effective date of this Act shall be July 1, 1975," you have asked whether it is constitutional to project that far into the future. Section 3.7, Code of Iowa, 1973, provides:

"Acts effective July 1 or August 15. All Acts and resolutions of a public nature passed at regular sessions of the general assembly shall take effect on the first day of July following their passage, *unless some specified time is provided in the Act,* or they have sooner taken effect by publication. All Acts and resolutions of a public nature which are passed prior to July 1 at a regular session of the general assembly and which are approved by the governor on or after such July 1, shall take effect on August 15 next after his approval. However, this section shall not apply to Acts provided for in Section 3.12, *Acts which specify when they take effect,* or Acts which take effect by publication." (Emphasis added)

The Code of Iowa, 1973, allows the legislature to designate the effective date of an Act, and this provision is not restricted by our state constitution. The relevant constitutional language provides:

"Time laws to take effect. No law of the General Assembly, passed at a regular session of a public nature, shall take effect until the first day of July next after "the passage thereof. Laws passed at a special session, shall take effect ninety days after the adjournment of the General Assembly by which they were passed. If the General Assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the State. As amended Nov. 8, 1966." Constitution of the State of Iowa, Art. III, §26.

This section of the constitution has been interpreted by our office as follows:

"Nothing in that section of Iowa's constitution, as recently amended, prevents the legislature from making a law effective at a date *later* than July 1 next after passage. It provides only a minimum, not a maximum, time limitation before the bill can take effect without publication." 1968 OAG 379, at 381.

Thus, the Iowa constitution does not place a maximum time limit on the legislature's statutory right to specify the effective date of an Act.

We note, in passing, that the legislature has occasionally established future effective dates for its legislation. For example, the Iowa Home Rule Bill, passed in *1972,* does not become effective in its entirety until *July 1, 1974.* (H.F. 574, Ch. 1088, §9, 64th G.A., 2nd Session). The time lapse between passage and effective date is somewhat over two years. This is approximately equal to the time lapse established by your proposed amendment.

Your proposed amendment does not conflict with constitutional standards due to its effective date, but if any doubt as to its legitimacy should arise, it is supported by a strong presumption of validity for legislative acts. In 1969 the Iowa Supreme Court stated,

"In *Carlton v. Grimes,* 237 Iowa 912, 943, 23 N.W. 2d 883, 899, we reiterated that legislative authority is vested in the general assembly and then quoted with approval from *Carroll v. City of Cedar Falls,* 221 Iowa 277, 280, 261 N.W. 652, 654, as follows: "The legislature in this state, therefore, has power to enact any kind of any legislation it sees fit, provided it is not clearly and plainly prohibited by the State or Federal Constitution. * * * It is also the well-settled rule that any doubt of the legislature's power to adopt an act will be resolved in favor of its constitutionality'." *Frost v. State,* 172 N.W. 2d 575, 584 (Iowa 1969).

We find that the proposed amendment is supported by a strong presumption of validity, and, as previously stated, it comports with constitutional standards. Thus, it is very doubtful that any challenge the amendment's validity will be successful on the grounds that the amendment delays the effective date of H.F. 315 until July 1, 1975. Of course, it is understood that nothing in this opinion is intended to determine the validity of sections one, two and three of H.F. 315.

Your proposed amendment provides that H.F. 315 would not become effective until after the 66th General Assembly had convened. Legislative acts must not violate the long-established rule that "one general assembly cannot bind a future one." (*Frost v. State,* 172 N.W. 2d 575, 583, Iowa 1969). This rule applies to an act which prohibits subsequent legislatures from interfering with the provisions of the particular act. However, such is not the case here, since your amendment does not abridge the power of a subsequent legislature to rule on the same subject matter. (For further discussion, see *Talbott v. Independent School District,* 230 Iowa 949, 299 N.W. 556, 565-566, 1941.)

Lastly, when establishing the effective date for an act, the legislature must comply with the general rule that "all men have a right to know with certainty when a law takes effect." 50 Am. Jur. 512, "Statutes," §488. Your proposed amendment establishes in no uncertain terms that H.F. 315 shall become effective July 1, 1975.

For all of the foregoing reasons, we conclude that your proposed amendment comports with statutory and constitutional standards and is a valid exercise of legislative power.

June 6, 1973

STATUTES: Constitutional Law — Art. III, §31 Constitution of Iowa, Appropriation to office of Governor for youth employment program serves a public purpose and does not require two-thirds vote of each house. (Nolan to Small, State Representative, 6/6/73) #73-6-3

Honorable Arthur Small, State Representative: This is written in response to your request for an opinion on the constitutionality of House File 767 as passed by the House on May 21, 1973, by a vote of 68 to 24; and then passed by the Iowa Senate on May 29, 1973, by a vote of 29 to 18. The bill as amended appropriates to the office of Governor the sum of $1,336,000 for the employment of young persons to work on the improvement of railroad branch lines designated by the Iowa Commerce Commission and $64,000 for employment of young persons for the purposes of improving and maintaining state parks.

In your letter you state that the constitutionality of the bill is questioned specifically in light of Article III Section 31 of the Constitution of the State of Iowa which provides:

"No extra compensation shall be made to any officer, public agent or contractor after the service shall have been rendered, or the contract entered into; nor, shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, and 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 is my opinion that the bill is not susceptible to challenge on the ground that a two-thirds vote was not received in accordance with the provisions of Article III Section 31 of the Iowa Constitution inasmuch as it clearly appears from the title of the bill and from the purposes designated that the proposed legislation serves a legitimate public purpose. The Legislature has broad discretion as to the determination of what constitutes a public purpose. *Dickinson v. Porter,* 1949, 240 Iowa 393, 35 N.W.2d 66, appeal dismissed 70 S.Ct. 88, 338 U.S. 843, 94 L.Ed. 1371. It is well settled that all presumptions are in favor of the constitutionality of the statute and it will not be held invalid unless it is clear, palpable and without doubt that such decision is required.

In the proposed bill an appropriation is made to a state office. Even so, it has been deemed that appropriations made to a private school of osteopathy and surgery was an appropriation for a public purpose not requiring a two-thirds vote under Article III Section 31 (Op. Atty. Gen. to Harbor, October 18, 1971); and appropriations to the state dairy association and the beef cattle, swine producers and sheep producers associations have also been determined to be appropriations for a public purpose not requiring two-thirds vote under this section of the Constitution. (Op. Atty. Gen. May 10, 1967)

Accordingly, it is the view of this office that House File 767, 65th General Assembly is not in violation of Article III Section 31 of the Constitution of Iowa.

June 6, 1973

CITIES AND TOWNS: Policeman and fireman retirement systems. Chapter 411, Code of Iowa, 1973. §411.1(25). Compensation as defined in Chapter 411 does not include fringe benefits but is merely based upon the retired or deceased member's position on the salary scale within his rank at the time of his retirement or death. (Beamer to Scott, State Senator, 6/6/73) #73-6-4

Honorable Kenneth Scott, State Senator: This opinion is in reference to your request of April 4, 1973, regarding Chapter 411 of the Code of Iowa. Your letter stated:

"Specifically I am requesting an interpretation by your office of Chapter 411.1(25), which is as follows:

"'25. "Pension compensation" shall mean the member's average final compensation adjusted in the ratio of the earnable compensation payable on each July 1 to an active member having the same or equivalent rank or position as was held by the retired or deceased member at the time of retirement or death to the earnable compensation of such member at his retirement or death.'

"Based on this provision, it appears that the amount of pension a retired member receives is based on the earnable compensation payable to active members on July 1 of each year. It has been brought to my attention that instead of increasing the salary of the active members, they are given fringe benefits in the form of clothing allowances, increases in insurance and hospital coverage, and the like.

"My questions are these: Does the compensation as used in Section 411.1(25) include fringe benefits? If the term does include fringe benefits, should not the retired members or beneficiaries of deceased members receive a corresponding increase in their pension based on the value of any increased fringe benefits received by the active members?"

It is the opinion of this office that "compensation" as defined in Chapter 411 does not include fringe benefits. Our conclusion is based upon specific provisions in Chapter 411 itself. Section 411.1(25) that you refer to in your request is merely one of a number of definitions prefacing Chapter 411. You will note that this section refers to a July 1 date for adjusting the amount of pension compensation for a retired member. The pension adjustment is outlined in §411.6(14); that section states:

"14. Annual readjustment of pensions. Pensions payable under this section shall be adjusted as follows:

"a. As of the first of July of each year, the monthly pensions authorized in this section payable to each retired member and to each beneficiary, except children, of a deceased member shall be recomputed. The formula authorized in this section which was used to compute the retired member's or beneficiary's pension at the time of retirement or death, including all amendments to the formula which may be adopted subsequent to the member's retirement or death, shall be used in the recomputation except the pension compensation shall be used in lieu of the average final compensation which the retired or deceased member was receiving at the time of retirement or death. The adjusted monthly pension shall be the amount payable at the member's retirement or death adjusted by one-half of the difference between the recomputed pension and the amount payable at the member's retirement or death. At no time shall the monthly pension or payment to the beneficiary be less than the amount which was paid at the time of the member's retirement or death.

"b. As of the first of July of each year, the monthly pension payable to each surviving child in accordance with subsections 8, 9, and 13 of this section shall be adjusted to equal six percent of the monthly salary payable on such July 1 to an active member having the rank of first-class fireman, in the case of a child of a deceased member of the fire department, or of a first-class patrolman, in the case of a child of a deceased member of the police department. If the monthly pension so computed is less than the amounts provided in subsections 8, 9, and 13 of this section, the amounts provided for in said subsections shall be payable.

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

"d. The adjustment of pensions required by this subsection shall recognize the retired or deceased member's position on the salary scale within his rank at the time of his retirement or death. In the event that the rank or position held

by the retired or deceased member at the time of retirement or death is subsequently abolished, adjustments in the pensions of the member or of the member's spouse or children shall be computed by the board of trustees as though such rank or position had not been abolished and salary increases had been granted to such rank or position on the same basis as increases granted to other ranks and positions in the department.

"e. A retired member who became eligible for benefits under the provisions of subsection 1 of this section but who did not serve twenty-two years and did not attain the age of fifty-five years prior to his termination of employment shall not be eligible for the annual readjustment of pensions provided for by this subsection."

Specifically, subpart (d) of this section refers to adjusting the pension according to the ". . . retired or deceased member's position on the salary scale within his rank at the time of his retirement or death". The salary scale referred to in this subpart is strictly a monetary listing of payments to the various ranks of personnel; it does not include benefit programs associated with the ranks. Therefore, it would seem that the legislature, when drafting this chapter of the code, intended to limit the adjustment level to one based upon the salary scale of the different ranks and no other basis.

You will also note that §411.1(25) mentions the phrase "average final compensation"; fortunately, this is defined at §411.1(16) — that section states:

"16. 'Average final compensation' shall mean the average earnable compensation of the member during the five years of service *he earned his highest salary* as a policeman or fireman, or if he has had less than five years of such service, then the average earnable compensation of his entire period of service." (Emphasis ours)

Again, the legislative intent for the basis of the member's pension is clearly indicated. An attempt to include fringe benefits and for that matter other items encompassed in the word "compensation", contravenes express legislative intent contained in Chapter 411.

June 7, 1973

STATE OFFICERS AND DEPARTMENTS: State Historical Society: loan of artifacts sec. 565.5, Code of Iowa, 1973. The Board of Curators of the State Historical Society has the authority to approve the temporary loan of some artifacts to the Amana Heritage Society. (Haesemeyer to Harstad, Director, Iowa State Historical Society, 6/7/73) #73-6-10

Mr. Peter T. Harstad, Director, State Historical Society of Iowa: On behalf of the Board of Curators of the State Historical Society you have requested an opinion of the Attorney General on whether it is within the powers of the Curators of the State Historical Society to approve the temporary loan to the Amana Heritage Society of some aboriginal artifacts, donated to the Society by Dr. Charles Noe.

In our opinion, such a loan is within the powers of the Board of Curators. Section 565.5 of the 1973 Code of Iowa states that,

"Gifts, devises, or bequests of property, real or personal, made to any state institution for purposes not inconsistent with the objects of such institution, may be accepted by its governing board, and such board may exercise such powers with reference to the management, sale, disposition, investment, or

control of property so given, devised, or bequeathed, as may be deemed essential to its preservation and the purposes for which the gift, devise, or bequest was made."

It is to be observed that the governing boards are given broad powers with respect to the management and control of property and this would include the power to make loans of the type you describe.

June 18, 1973

COUNTIES AND COUNTY OFFICERS — PAROLES — §§252.31, 252.34, 252.35, Code of Iowa, 1973; Chapter 247, Code of Iowa, 1973. The county is liable for the care and maintenance furnished a person on bench parole at the county home. The fact that the parolee was paroled to the Iowa Bureau of Adult Corrections does not shift the costs of care and maintenance to the State of Iowa. (Munsinger to TeKippe, Chickasaw County Attorney, 6/18/73) #73-6-6

Mr. Richard P. TeKippe, Chickasaw County Attorney: In your recent letter of April 4, 1973, you have requested an Opinion of the Attorney General relating to whether Chickasaw County or the State of Iowa is liable for the care and maintenance furnished a person on Bench Parole at the Cedar County Home, Cedar County, Iowa.

In your letter you state that Fred Albers plead guilty to the lesser included offense of Manslaughter and was sentenced to not more than eight years at the Iowa State Penitentiary, Fort Madison, Iowa. Pursuant to agreement by all parties and by Order of Court, the sentence was suspended and Defendant was placed on Parole to the Bureau of Adult Corrections during "good behavior". Also, the Bureau of Adjult Corrections was given the responsibility to place Defendant in "some suitable custodial setting where his activities and associations may be circumscribed and where he may receive appropriate treatment". The Bureau of Adult Corrections subsequently determined that Defendant should be placed in the Cedar County Home. You further state that Chickasaw County feels that Mr. Albers is a ward of the State and that his expenses should be borne by the State of Iowa. The Bureau of Adult Corrections, on the other hand, contends that since Defendant was never physically confined to one of the State Institutions he is not a ward of the State, and that Chickasaw County must exclusively pay all Defendant's costs of care at the Cedar County Home.

Based upon the foregoing facts you ask: What is the status of Fred Albers insofar as who is responsible for the costs of his care and maintenance?

This office has addressed itself to similar situations in previous Opinions of the Attorney General. In 1936 OAG 411 and 1968 OAG 545, we held that the County, not the State, nor Board of Parole, would be liable for the expenses of parolees who were being temporarily detained in county jails for parole violations and were transferred to hospitals for emergency treatment.

We stated in 1936 OAG 411, at page 413, as follows:

"In view of the above statutes and the cited cases, we are of the opinion that it is the duty of the Dubuque County Board to pay the expenses incurred in the matter at hand, and *it is immaterial that the patient was under the jurisdiction of the Board of Parole.* To hold otherwise would be to place a burden upon the Board of Parole which is not contemplated or provided for by statute. . . ." (Emphasis supplied)

The factual situation posed by you differs from that present in the aforecited opinions primarily in the fact that Mr. Albers is confined in a County Home rather than a County jail, but the reasoning therein appears to be applicable to the instant matter.

Chapter 247, Code of Iowa, 1973, deals with the granting of paroles and probation. Neither this chapter, nor any other Chapter of the Iowa Code, provides authority for the State or the Parole Board to assume responsibility for payment of expenses of a parolee. Indeed, there is no fund out of which the Board of Parole could make such payments. The argument that Mr. Albers is a ward of the State, is unconvincing. All parolees are wards of the State of Iowa. However, it is clear that neither the State, nor the Parole Board, is required to pay for the private housing or other such expenses for a person on parole. It is equally clear that the State, nor the Parole Board, is required to pay the expenses of a parolee housed in a County Home.

The General Assembly of the State of Iowa has deemed it advisable that the County bear the expenses for those persons confined in County Homes. Sections 252.31, 252.34, 252.35, Code of Iowa, 1973. Since you indicate Mr. Albers is not being kept in a State institution, but in a County Home, the County would be the agency designated by the Legislature to assume the costs of his care and maintenance.

Therefore, in view of the above-cited authorities, Chickasaw County would be liable for the costs of the care and maintenance of Mr. Albers in the Cedar County Home, Cedar County, Iowa.

June 18, 1973

MOTOR VEHICLES: Motor Vehicle Registration — §321.18(7), Code of Iowa, 1973. The term "school bus" as used in §321.18(7) must be construed according to its ordinary meaning. Buses used to transport pupils to and from such things as Sunday school, business college, trade school, or Bible college are not "school buses" within the meaning of §321.18(7), and are not exempted from the vehicle registration requirement. (Voorhees to Sellers, Commissioner of Public Safety, 6/18/73) #73-6-7

Mr. Michael M. Sellers, Commissioner, Department of Public Safety: This letter is in response to your request for an opinion on the meaning of "school bus" in §321.18(7), Code of Iowa, 1973. Specifically, you asked:

"Does the word 'school' as used in Chapter 321.18(7) of the Code include the following:

"1. A Sunday School, where pupils are transported to a church or other location for the purpose of religious instructions or education?

"2. A pre school attended by pupils who are not in an elementary school because they are usually not yet of the minimum age?

"3. A school for the handicapped, where they are taught certain basic skills or are rehabilitated?

"4. A trade school, either public or private?

"5. A business school, either public or private?

"6. A Bible college?

"7. A college or university, either public or private?"

Section 321.18 provides that all motor vehicles are subject to the registration requirements of Chapter 321 except:

* * *

"7. Any school bus in this state used exclusively for the transportation of pupils to and from school or a school function. Upon application the department shall, without charge, issue a registration certificate and shall also issue registration plates which shall have imprinted thereon the words "Private School Bus" and a distinguishing number assigned to the applicant. Such plates shall be attached to the front and rear of each bus exempt from registration under this subsection."

It is a well established rule of law that the courts will give statutory words their commonly understood meaning. *Becker v. Board of Education of Benton County,* 138 N.W.2d 909, 258 Iowa 277 (1965); *Consolidated Freightways Corporation of Delaware v. Nicholas,* 137 N.W.2d 900, 258 Iowa 115 (1965); *Sioux Associates, Inc. v. Iowa Liquor Control Commission,* 132 N.W.2d 421, 257 Iowa 308 (1965); *In re Trust of Highland Perpetual Maintenance Soc.,* 117 N.W.2d 57, 254 Iowa 164 (1962). It is also well established that in interpreting a statute, the courts look to the object to be accomplished, evils sought to be remedied, or purpose to be subserved and place on it a reasonable or liberal construction, whichever will best effect its purpose rather than one which will defeat it. *Crow v. Shaeffer,* 199 N.W.2d 45 (Iowa 1972); *State ex rel. Turner v. Koscot Interplanetary, Inc.,* 191 N.W.2d 624 (Iowa 1971); *Chicago & N.W. Ry. Co. v. City of Osage,* 176 N.W.2d 788 (Iowa 1970); *Krueger v. Fulton,* 169 N.W.2d 875 (1969); *State v. Holt,* 156 N.W.2d 884 (1968); *State v. Charlson,* 154 N.W.2d 829 (1967); *Severson v. Sueppel,* 152 N.W.2d 281 (1967).

The term "school bus" must be construed according to its ordinary meaning. Such things as Sunday schools, business colleges, trade schools, or Bible colleges, are not ordinarily regarded as "schools" in the sense that ordinary elementary schools, high schools, or colleges are. We do not believe that an institution can, by simply designating itself a "school," be exempted from the vehicle registration requirements. The mere use of the term "school," in a very broad sense, is not controlling. Such a construction would create a very broad exemption to the vehicle registration laws which we do not believe the legislature intended. Accordingly, it is our opinion that bona fide pre-schools, schools for the handicapped, colleges, and universities qualify under §321.18(7), but Sunday schools, trade schools, business schools, and Bible colleges do not.

Your letter also asked:

"Does the department have a statutory duty to issue 'Private School Bus' plates, in the following fact situations, when such bus is used within the provisions of Chapter 321.18(7) of the Code.

"1. When a school bus is owned by a person who leases said school bus to a public or private school, for the purpose of transporting pupils?

"2. When a school bus is owned by a person who contracts with a public or private school to transport pupils?

"3. When a school bus is owned by an urban transit company or system and is used exclusively to transport pupils?"

Section 321.18(7) requires that a bus must be used "exclusively" for the transportation of pupils in order to qualify as a "school bus." There is no reference to the ownership of the bus, and accordingly we do not believe that this is a factor in determining whether a bus can qualify as a "school bus." The examples you cited would qualify if these buses were used exclusively for the transportation of pupils.

June 18, 1973

LIQUOR AND BEER: Beer permits and liquor licenses for Sunday sales — Senate File 144, 65th G.A., First Session (1973). One engaged in the sale of alcoholic beverages on Sunday must have obtained the approval of local authorities pursuant to guidelines established by the Department of Beer and Liquor Control. Under the provisions of this bill local option is authorized to the local authorities, with recourse to administrative and judicial appeal procedures under §123.32, Code of Iowa, 1973, when the authority's action has been arbitrary, capricious, or unreasonable. The enforcement mechanism and penalty provisions under Chapter 123 are applicable to Senate File 144. (Turner to Taylor, State Senator, 6/18/73) #73-6-8

The Honorable Ray Taylor, State Senator: This is to acknowledge receipt of your letter dated June 13, 1973, in which you requested the following:

"I am writing to ask for your opinion in regard to Senate File 144.

"1. Are the provisions adequate in the bill to determine whether or not 50% of the establishment's income is from goods and services other than alcoholic beverages?

"2. Are the provisions for local option valid in that there is no criterion set out to make a determination on the permit application?

"3. Are the enforcement procedures adequately detailed as to who shall be the enforcing agency and as to what the penalties should be?"

Senate File 144 is an amendment to Chapter 123, Code of 1973, and must be read in *pari materia* and construed together therewith.

We believe the 50% goods and services other than alcoholic beverages requirement of the bill is adequate, but this question is more properly a consideration of the legislature than the attorney general. The Department of Beer and Liquor Control has power to prescribe the procedure which an applicant must follow in order to show compliance with the law so that he may obtain a Sunday permit. See page 1, line 22, S.F. 144 as amended:

"The department shall prescribe the nature and character of the evidence which shall be required of the applicant under this subsection."

Chapter 123 authorizes the department to adopt rules and regulations. §123.21. The matter of the department's determination of whether the establishment is doing 60% of its business in products other than alcoholic beverages is for the local authority to determine under department guidelines as to the "nature and character of the evidence" and, as long as such determination is not arbitrary, capricious, or an abuse of its discretion, the local authority's determination will ordinarily be deemed adequate.

As to your question regarding local option, a new section of Senate File 144 as amended does, indeed, authorize local option by local authorities with reference to Sunday selling:

"Holders of liquor control licenses and beer permits may sell alcoholic beverages or beer on Sunday pursuant to sections one (1) through three (3) of this Act only if the governing body of the city or town in which the premises covered by the license or permit are located, or the board of supervisors if the premises so covered are not located in a city or town, *specifically approves authority to sell on Sunday in the area subject to its jurisdiction.*" (Emphasis added)

But having once approved any one beer or liquor license on Sunday in the area of the local authority's jurisdiction, the Sunday option has been exercised in favor of Sunday sales and the local authorities may not arbitrarily or capriciously discriminate as to whom will be issued a Sunday license and whom will not.

This is not to say, however, that the local issuing authority must necessarily issue a Sunday license to any permittee licensed during the week if one or more Sunday licenses have been issued. There may exist reasons for denying a liquor control licensee or retail beer permittee a license on Sunday, which is not arbitrary, capricious, or without reasonable cause. §123.32(2), Code of Iowa, 1973. In fact, it will be presumed that denial of such a Sunday license is not arbitrary, capricious or without reasonable cause, although the local authority may not refuse out of a desire to impose a limit upon the number of such Sunday licenses once it has exercised its option in favor of Sunday licenses. *In the Matter of The Class "C" Beer & Liquor Control License of Robert J. Eves, et al,* two cases, Appeals No. 72-8 and 72-9, 1972, Department Hearing Board of the Iowa Beer and Liquor Control Department. In that appeal it was held that §123.32(2) was not a local option provision because such a construction would necessarily have rendered futile and meaningless the appeal provisions of §123.32(4) and the Hearing Board did not believe the legislature intended to render it impotent in the same Act which created it. Rather, it was held that §123.32(4) placed the burden upon the applicant to rebut a presumption that the local authority's determination not to issue a license was not arbitrary, capricious, or without reasonable cause.

Thus, the new provision of Senate File 144, as amended by the House and quoted above, now provides a local option which may be exercised by the local authority and this option must be exercised in favor of Sunday sales in the area subject to its jurisdiction before there can be any Sunday sales. But once so exercised, a limitation on the number of Sunday licenses is not sufficient reason to deny licenses to other qualified liquor control licensees or beer permittees. And any denial, once the option has been exercised in favor of Sunday sales, would be subject to review of the Department Hearing Board of the Iowa Beer and Liquor Control Department and the courts, as provided in §123.32(4) and (5).

In answer to your third question, because the new bill would become part and parcel of Chapter 123, the enforcement mechanisms of that Chapter and of the department would apply. Whether these controls are now adequate is again a question for the legislature rather than the attorney general. But the penalties provided are applicable.

Because we anticipate there will be a large number of applicants for Sunday licenses if this bill passes, we suggest that the Department of Beer and Liquor Control should immediately adopt guidelines by which the local authority can determine whether an applicant does at least 50% of its business in other than alcoholic beverages. No license can be granted until that determination has been made, notwithstanding the exercise of the option by the local authorities in favor of Sunday sales.

June 21, 1973

LIQUOR AND BEER: Sunday Sales; Hours; §123.49, Code of Iowa, 1973; S.F. 144, 65th G.A., 1st Session. S.F. 144 provides liquor and beer licensees additional privileges for Sunday sales supplementing those now existing and imposes no new limitations on privileges now granted by Chapter 123 of the Code. Under S.F. 144, if and when it takes effect, existing licensees and permittees may legally sell until 2:00 A.M. on Sundays without an additional license fee and without regard to the local option provisions which are applicable only to Sunday licensees and permittees. A liquor licensee or permittee granted a Sunday license privilege may sell until 2:00 A.M. Sunday as well as from noon to 10:00 P.M. (Turner to Plymat, State Senator, 6/21/73) #73-6-9

The Honorable William N. Plymat, State Senator: Yesterday, and by another letter today, you have requested an opinion of the attorney general as to the hours, on Sunday, a liquor licensee or beer permittee may sell alcoholic beverages or beer under the provisions of Senate File 144, Acts of the 65th G.A., First Session, now awaiting approval by the Governor, if issued an additional Sunday sales license thereunder.

Section 2 of the Act amends §123.49(2)(b), Code of Iowa, 1973, to extend the hours on which a present liquor licensee or beer permittee may now sell on Sunday, from 1:00 A.M. until 2:00 A.M., and then goes on to add for such a licensee or permittee who is granted an additional permit for Sunday sales, the words:

"however, a holder of a liquor control license or class 'B' beer permit granted the privilege of selling alcoholic liquor or beer on Sunday may sell or dispense such liquor or beer *between the hours of noon and 10:00 P.M. on Sunday.*" (Emphasis added)

You urge a logical and strict construction that Sunday starts at 12:01 A.M. and that thus if a licensee or permittee is given an additional Sunday license authorizing him to sell liquor or beer between the hours of noon and 10:00 P.M. on Sunday the foregoing words proscribe his former right to sell until 1:00 A.M., and after July 1, until 2:00 A.M.

In other words, I understand your question to suggest that Iowa businesses and clubs whose gross receipts from the sale of goods and services other than beer and liquor, but who have heretofore had liquor or beer licenses, are now confronted with a dilemma if they desire to serve their patrons liquor or beer between the hours of noon and 10:00 P.M. on Sunday: that they must in return for this new privilege, under the statute, refrain at midnight Saturday from selling until 2:00 A.M. on Sunday as other licensees and permittees who do not seek a Sunday license may do. Expressio unius est exclusio alterius.

In fact, it appears that you further suggest that existing liquor licensees and beer permittees who do not seek additional Sunday licenses are also proscribed by this Act from selling at all on Sunday (after midnight on Saturday) unless the local authority opts for Sunday sales. If you are in fact urging that the new Act imposes this additional proscription against *present* licensees and permittees, your construction renders meaningless and superfluous the first words of §2(b) applicable to present licensees and permittees and which extend for them the hours of sale from 1:00 A.M. until 2:00 A.M. on Sunday. Of course, that provision of the new Act applies to present licensees or permittees, whether or not their gross receipts are greater than 50% from the sale

of goods and services other than alcoholic liquor or beer. A construction which renders words or provisions of a statute superfluous is of course always avoided by the courts.

The new subsection set forth in §1 of S.F. 144 includes the words "subject to the provisions of 123.49, etc." and clearly suggests that the new Act is applicable only to those licensees who would get an additional permit for Sunday. And the amendment for local option which you point out was added by the House and which you say says that Sunday sales can be permitted only if city councils or boards of supervisors affirmatively approve, applies only "pursuant to sections one (1) through three (3) of this Act" and not to Chapter 123 now in existence. "Pursuant to sections one (1) and three (3)" of the House amendment are a limitation upon the local option requirement which, coupled with the words "subject to the provisions of 123.49" in Section 1 indicate that everything in this bill was intended as an addition to rather than a limitation upon, existing privileges. And, for whatever it is worth, I am informed that no legislator ever suggested otherwise in the debate on this bill.

Thus, construing again the provision added to §2(b) of the new Act, I conclude that it must mean:

"however, a holder of a liquor control license or class 'B' beer permit granted the privilege of selling alcoholic liquor or beer on Sunday may /also/ sell or dispense such liquor or beer between the hours of noon and 10:00 P.M. on Sunday." (The word "also" is added by my construction.)

My construction is bolstered by the fact that the additional privilege will cost the licensee or permittee an additional 20% of the regular fee prescribed in order to obtain this new privilege, and which will be noted on the current license. Construction of any statute must be reasonable, sensible and fairly made with the view of carrying out the obvious intention of the legislature enacting it, and a construction resulting in unreasonable and absurd consequences is to be avoided. *Isaacson v. Iowa State Tax Commission,* 1971 Iowa, 183 N.W.2d 693. Absurdities and incongruities will be avoided by the courts. *State v. Steenboek,* 1970 Iowa, 182 N.W.2d 377. The court must look to the object to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be subserved, and place it on a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. *State v. Robinson,* 1969 Iowa, 165 N.W.2d 802.

It is true that the language of the statute could be more clear and that your construction, as to additional licensees and permittees, is possible. But my construction is equally possible and far more probably reflects the legislative intent when the words are not clear and the Act is open for construction. I cannot believe that the legislature intended to take business away from the present existing 3,748 Iowa liquor licensees, 1,729 class "B" beer permittees, and 1,792 class "C" beer permittees, a total of 7,269 legal licensees, whose one year licenses expire and are renewed at varying times of the year, and all of whom have substantial investments in what they consider a legal business, without specifically saying so in very clear terms. Nor can I conceive that the legislature intended to confront those existing licensees and permittees seeking the privilege of additional Sunday sales between the hours of noon and 10:00 P.M., for an additional 20% license fee, with the choice of giving up their right to such sales from midnight Saturday until 2:00 A.M. Sunday. Not a single

legislator suggested this could be the consequence of the bill and no mention of it has been made, to my knowledge, in any newspaper prior to your question.

July 2, 1973

COUNTY & COUNTY OFFICERS: Real Estate Transfers — Description of land furnished — §471.20, Code of Iowa, 1973. County Auditor must accept deed describing original tract less description of highway as legal description when land may be accurately located by a competent surveyor. (Schroeder to Allbee, Franklin County Attorney, 7/2/73) #73-7-1

Mr. Richard A. Allbee, Franklin County Attorney: Your request by letter of June 7, 1973, forwards the request of Mr. Wayne M. Little, Franklin County Auditor, in regard to the following:

"What should we do when people present us with deeds that are parts of land left over on either side of I-35? They give no legal description other than all that land north and west or south and east of the Interste[sic]. That is most indefinite as far as our books are concerned."

In your reply to Mr. Little of June 6, 1973, you advise him:

"It is my opinion at this time that you accept no deeds which set forth legal descriptions, as you have described in your letter of June 4, 1973."

Additionally you appear to be concerned whether the county can compel the Highway Commission to provide some other form of description under Section 471.20 of the Code of Iowa, 1973.

Initially, insofar as the descriptions of land acquired by the Highway Commission is concerned, it is my understanding that all land acquired by deed is accurately described by a centerline description in most cases and occasionally by a metes and bounds description. Such deeds are accompanied for recording by a plat prepared by a registered land surveyor. Land acquired by condemnation is also similarly described and accompanied by a plat which may or may not be certified to by a registered land surveyor. Condemnation proceedings are recorded pursuant to Section 472.38 of the Code. Although the Commission is attempting to convert to a total metes and bounds system of descriptions, it still is using in many instances the centerline descriptions.

The centerline description is discussed by Marshall in *Iowa Title Opinions and Standards,* published 1963, at 2.2(B). At page 58, Marshall states:

"The general rule as announced by all of the authorities is that a description in a deed is valid if the tract described may be located by a competent surveyor."

As Marshall has noted, because a tract necessary for a highway often does not run in a straight line but has many curves and angles, it is very difficult to describe the remainder not taken for the highway. The Iowa practice has been to describe the remainder by giving as one of the boundaries, the official designation of the highways, "as, e.g., 'That part of the SE ¼ of Section 11, lying North and East of U.S. Highway No. 75,' (said highway being particularly described in Warranty Deed or Condemnation proceedings, recorded, etc.)." Such descriptions originally using centerline descriptions are legal descriptions and have been widely used in describing county roads, railroad rights of way and similar conveyances, and are such as the land can be accurately located by a competent surveyor.

It should be noted, however, that Section 471.20 does provide that the centerline description to be "compatible with the existing abstract description" must contain reference points which are, "a part of and tied to the abstract description." Since the short form of describing the remainder set out above ordinarily will not contain the entire centerline description, reference to the book and page of the deed or condemnation proceedings in a subsequent transfer of the remainder should be made to clearly identify the complete legal description which is compatible with the abstract description. That is not to say that such a reference is necessary to enable a competent surveyor to locate the tract, or that it is not a legal description. Insofar as the legal sufficiency of any description of any particular tract is concerned, that is a matter for the individual private or public party involved to determine in each case, and their attorneys in respect to examination of the abstract or opinion of title.

Under the circumstances set forth above, it appears that it would be inappropriate for a County Recorder to refuse to record such a deed containing a legal centerline description utilized by the Highway Commission, or a subsequent transfer of a remainder making reference to the highway, for that reason alone. There is no statutory authority for the Auditor or Recorder refusing to accept deeds which set forth legal descriptions and require or compel the Highway Commission to only use a metes and bounds description of either the taking for the highway or the remainder. For the Recorder to refuse such a deed would violate the duty for timely endorsement and indexing under Section 558.55 of the Code.

In view of the foregoing, it is difficult to understand what other problems this type of description may have caused in Franklin County. This office has not been advised of any difficulties in any other counties, except in regard to taxes on remaining lands after portions of the original tract have been conveyed or condemned by the State. (See 1970 O.A.G. 766 and 1963 O.A.G. 422, cited therein.) In order to protect the lien for taxes, Iowa State Highway Commission contracts provide that the Seller will pay all liens and assessments against the property including all taxes assessed and payable at the time of delivery of the Warranty Deed or delivery of possession, whichever is later. Taxes which are not payable on the latter of the said dates are void and unenforceable even though levied; because title, once having passed to the State, no lien (which is only 'in rem') can attach against the State. The same rule applies in condemnation as of the date condemned. The lien, once having attached prior to condemnation, is enforceable against the award. It is the practice of the Highway Commission to name and include the county in all condemnation proceedings.

The aforementioned treatment in respect to taxes does require that the remaining portion of the property be revalued and taxes assessed only upon the remaining area. The remaining taxable area is usually determinable from the description in the deed or condemnation proceedings and/or plat. Any problem in ascertaining the same should be referred directly to the Highway Commission for clarification and additional appropriate action if necessary.

In any event, it is doubtful whether any county authority has standing to raise Section 471.20 to compel the Highway Commission to furnish a description of either the land acquired by the State, or the part remaining, insofar as it does not qualify as the owner of the land. Even if such an action could be maintained, it would appear that a legal description of the land, less the

centerline description of the road, would be sufficient and a metes and bounds description could be compelled.

If this has been the source of some misunderstanding or difficulty between the Commission and the County, it is hoped that this opinion will clarify the situation and that any further disputes can be amicably resolved. I find no reason to question the legality of such descriptions which have been so widely used in the Iowa practice, and which may be furnished to any owner by the Commission pursuant to Section 471.20, regardless of whether that was the particular source of such description or not. I assume, without deciding that had the demand for such a description been made upon the Commission by the owner that the Commission would have been compelled to provide a similar description, pursuant to Section 471.20 of the Code.

July 2, 1973

MOTOR VEHICLES: Inspection — §§321.45(2)(c); 321.238(12), (18); 554.2106(1); 554.2401(2), Code of Iowa, 1973. For the purposes of the vehicle inspection statute, title passes when a sale is consummated. The general law of sales is controlling, and not §321.45. (Voorhees to Price, Assistant Black Hawk County Attorney, 7/2/73) #73-7-2

Mr. David J. Price, Assistant Black Hawk County Attorney: This will acknowledge your letter of March 13, 1973, wherein you asked for an opinion on the following question:

"Is it necessary that the 'title' be transferred before a 'sale' is consummated under both the Vehicle Inspection law and the Vehicle Registration laws of the State of Iowa?"

It should first be noted that the Iowa statute which provides that no right, title, claim, or interest is to be recognized in any vehicle except by virtue of a certificate of title is not controlling. That statute — §321.45, Code of Iowa, 1973, — contains several exceptions, including §321.45(2)(c), which provides:

"No person shall acquire any right, title, claim or interest in or to any vehicle subject to registration under this chapter from the owner thereof except by virtue of a certificate of title issued or assigned to him for such vehicle or by virtue of a manufacturer's or importer's certificate delivered to him for such vehicle; nor shall any waiver or estoppel operate in favor of any person claiming title to or interest in any vehicle against a person having possession of the certificate of title or manufacturer's or importer's certificate for such vehicle for a valuable consideration except in case of:

* * *

"c. A dispute between a buyer and the selling dealer who has failed to deliver or procure the certificate of title as promised, or . . . ."

The Iowa Supreme Court has interpreted this provision several times, each time holding that the failure of the parties to comply with the statute requiring transfer of the certificate of title does not invalidate a sale. Accordingly, §321.45 will not establish the point at which "title" passes between buyer and seller. *Garuba v. Yorkshire Ins. Co.*, 237 Iowa 579, 9 N.W.2d 817 (1943); *Union Bank & Trust Co. v. Willy*, 237 Iowa 1250, 24 N.W.2d 796 (1946); *Kirk v. Madsen*, 240 Iowa 532, 36 N.W.2d 757 (1949).

It is therefore necessary to look to other authority. Several U.C.C. provisions are applicable.

Section 554.2106(1), Code of Iowa, 1973, defines sale:

". . . a 'sale' consists in the passing of title from the seller to the buyer for a price (section 554.2401) . . . ."

Section 554.2401(2), Code of Iowa, 1973, provides the general rule regarding passing of title:

"Unless otherwise explicitly agreed *title passes to the buyer at the time and place of which the seller completes his performance with reference to the physical delivery of the goods,* despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; . . . ." (emphasis added).

It must be noted that the terms "title" as used in the various U.C.C. provisions and "certificate of title" as used in Chapter 321 are not interchangeable. The latter refers to the document required by §321.45 and not to the legal title itself.

The vehicle inspection statute basically provides that a vehicle must be inspected whenever sold or otherwise transferred:

"Every motor vehicle subject to registration under the laws of this state, except motor vehicles registered under section 321.115, *when first registered in this state or when sold at retail within or without this state, or otherwise transferred,* except transfers by operation of law as set out in section 321.47, shall be inspected at an authorized inspection station unless there is affixed to the motor vehicle a valid certificate of inspection which was issued for such motor vehicle not more than sixty days prior to the date on which such vehicle was sold . . . ." Section 321.238(12), Code of Iowa, 1973. (emphasis added).

"A person shall not *sell or transfer* any motor vehicle, other than transfers to a dealer licensed under chapter 322, and other than transfers by operation of law as set out in section 321.47 unless there is a valid official certificate of inspection affixed to such vehicle at the time of sale . . . ." Section 321.238(18), Code of Iowa, 1973. (emphasis added).

It is our opinion that, for the purposes of the motor vehicle inspection statute, the general law of sales is controlling. "Title" passes when the sale is consummated, and not when the "certificate of title" is issued or assigned. Accordingly, a vehicle must be inspected at the time of "sale" as established by §554.2401.

July 2, 1973

COURTS: Judicial magistrate holding political party office. Article V, Constitution of Iowa as amended, 1962. A county chairman or other official of a political party is not prohibited from holding the office of judicial magistrate while continuing to serve as a political party official. (Haesemeyer to Hultman, 7/2/73) #73-7-4

Honorable Calvin O. Hultman, State Senator: This is in reply to your request for an Attorney General's opinion as to "whether or not the Constitution of the State of Iowa, pursuant to the 1962 Amendment to Article V, prohibits a county chairman or other official of a political party to hold the position of judicial magistrate while serving as an official of a political party.".

In our opinion, Article V, as amended in 1962, does not prohibit a political party official from becoming a judicial magistrate. The 1962 Amendments referred only to Supreme Court and District Court judges in removing their

selection from the electoral process. Both the amendments and Article V say nothing about the inferior courts, including judicial magistrates, except that they may be established by the General Assembly.

It is an established doctrine that the legislature has the power to establish the basic qualifications for an office where they have not been prescribed by the Constitution. As you noted, the only requirements set by the legislature for the position of judicial magistrate are in §602.52 of the Iowa Code:

"A judicial magistrate shall be an elector of the county of appointment, shall be less than seventy-two years of age, and shall cease to hold office upon attaining that age."

Unless a county chairman or other political party official holds another office which would be incompatible with that of judicial magistrate, he may be appointed judicial magistrate after meeting the requirements established in §602.52.

July 10, 1973

CITIES AND TOWNS: Fiscal year; Chapter 1020, and §83, Chapter 1088 and §3, 64th G.A., Second Session (1972). All cities and towns on a calendar year basis on July 1, 1972, must file an eighteen month budget even though they will remain on a calendar year in 1975. (Beamer to Selden, 7/10/73) #73-7-3

Mr. Marvin R. Selden, Jr., State Comptroller: This letter is written in response to your request for an opinion involving Chapter 1088, Acts of the 64th G.A., Second Session, an act relating to home rule for cities, and Chapter 1020, Acts of the 64th G.A., Second Session, an act to change the fiscal year of political subdivisions. The specific question presented by your letter is as follows:

"You have previously ruled that a conflict exists between Section 83 of Chapter 1088, Acts of the Sixty-Fourth General Assembly, second session, and Chapter 1020, Acts of the Sixty-Fourth General Assembly, second session. The question has arisen as to whether Home Rule cities as well as cities not on Home Rule are required to file an eighteen month budget for the extended fiscal year."

The conflict you mention was resolved in the recent opinion of this office in which we held that Section 83 of Chapter 1088 prevails over Chapter 1020 so that cities remain on a calendar year while other political subdivisions are on a July 1 to June 30 fiscal year. See opinion of Haesemeyer to Hutchins, May 16, 1973.

Section 83 of Chapter 1088 provides in relevant part:

"Except as otherwise provided for special charter cities, a city's fiscal year and tax year is from Jan. 1st through Dec. 31st, inclusive."

The question presented in your request is whether Section 83 prevails over Chapter 1020 in such a manner as to eliminate the requirements for home rule and non-home rule cities to file an extended fiscal year or eighteen month budget.

In answer to your question we consider Section 3 of Chapter 1020 to be controlling. It provides in relevant part as follows:

"The provision relating to the budget for the extended fiscal year shall apply to only those cities and towns, counties, and other political subdivisions which are on the effective date of this Act operating on a calendar year budget. If any cities and towns, counties, or other political subdivisions are operating on a budget for a fiscal year commencing on July 1st, and ending on the following June thirtieth, the extended fiscal year budget shall not apply."

Chapter 1020 was passed by the 64th G.A., Second Session (1972) and effective July 1, 1972. Article III, Section 26, Constitution of Iowa, as amended by the people of Iowa on November 8, 1966. Although Section 1 of Chapter 1020 does contain some later dates for the implementation of some of the sections, the act was passed by the 64th G.A., signed by the Governor on March 9, 1972, and became effective on July 1, 1972.

Under the plain language of Section 3, Chapter 1020, home rule cities as well as cities which have not adopted home rule are required to file an eighteen month budget, provided such cities were on a calendar year budget on July 1, 1972. When construing statutes the courts and other bodies must give words their ordinary and plain meaning unless the context shows a contrary intent, *Glidden Rural Elec. Co-op. v. Iowa Employment Sec. Commission,* 1945, 263 Iowa 910, 20 N.W.2d 435; *Consolidated Freightways Corp. of Del. v. Nicholas,* 1965, 258 Iowa 115, 137 N.W.2d 900; *Beeker v. Board of Ed. of Benton County,* 1965, 258 Iowa 277, 138 N.W.2d 909.

Although it derogates from the strict logic of the proposition that the extended fiscal year budget is intended as a transition to a fiscal year budget for cities, when in fact home rule cities will remain on a calendar year, this result is compelled by the clear and express language of Section 3, Chapter 1020. Section 3 specifically and unequivocally requires that the provisions relating to budgets for the extended fiscal year shall apply to all political subdivisions operating on a calendar year basis as of July 1, 1972. It is a universal point of law that when a statute is plain and unambiguous, there is no occasion to resort to rules of construction or interpretation. *State v. Valeu,* 1965, 257 Iowa 867, 134 N.W.2d 911, *Kruck v. Needles,* 144 N.W.2d 296 (Iowa 1966).

The uncertainties surrounding Chapters 1020 and 1088 which were brought to the attention of the legislature in our earlier opinion of May 16, 1973, remain.

July 10, 1973

STATE OFFICERS AND DEPARTMENTS: State law library, retention of old municipal codes. The state law library need not retain old municipal codes and the board of trustees may order their transfer to the archives. (Haesemeyer to Desmond, 7/10/73) #73-7-5

Mrs. Frances Desmond, Law Librarian, Iowa State Law Library: This opinion is in reference to your request dated April 2, 1973, regarding the retention of early municipal codes. Your letter stated:

"This letter is to request an opinon with respect to 366.7, 5c (d), of the Code of Iowa. This section, enacted in 1951, relates to municipal codes, and provides that '. . . a copy of such municipal code shall be furnished to the Iowa State Law Library, . . .' by the cities and towns of Iowa.

"The resultant accumulation of ordinances over the years is adding to a space problem that already is acute. Many towns adopt the Uniform Building Code, and other standard ordinances, so that we have many duplicate volumes of these arriving each year. We also have some municipal codes that pre-date the enactment by many years.

"Requests are for current ordinances, but if a rare request should come for an old ordinance, probably it could be obtained from the city's clerk. In view of the aforesaid, will you give us an opinion on the following questions:

"1) Is it necessary for the Law Library to retain early municipal codes in addition to the current ones?

"2) If the above is not necessary, may we destroy them? Or should we offer them to the city of origin?"

In our opinion the board of trustees of the Iowa state law library has the authority to transfer such municipal ordinances to the Iowa state department of history and archives. Said authority is derived from Code §§303.3(1); 303.3(10); 303.5(2); and 303.10 (1973). Section 303.3(10) in outlining the duties of the board of trustees states:

"303.3 Powers and duties of the board. The board of trustees shall:

"1. Make and enforce rules for the keeping of the records and for the management and care of the property of the Iowa state department of history and archieves, the Iowa state law library, and the Iowa state medical library.

"10. It may develop and adopt plans to provide more adequate library service for all residents of the state."

Under §303.5(2) the state law librarian has the authority to:

"2. Organize as an integral part of the Iowa state law library a legislative reference bureau in which he shall provide the reports of the various officers and boards of this state, and as far as may be, of the other states, and such other material, periodicals, or books as will furnish the fullest information practicable upon all matters pertaining to current or proposed legislation and to legislative and administrative problems, prepare and submit digests of such information and material upon the request of any legislative committee, member of the general assembly, or head of any department of state government."

Code §303.10 states:

"303.10 Records delivered — classified list — disposal of useless documents. The several state, executive, and administrative departments, officers or offices, councils, boards, bureaus, and commissioners, are hereby authorized and directed to transfer and deliver to the Iowa state department of history and archives such of the public archives as are designated in section 303.9, and take the curator's receipt therefor. Before transferring such archives, the office of present custody shall file with the curator a classified list of the same made in such detail as the curator shall prescribe. If the curator, on receipt of such a list, and after consultation with the chief executive of the office filing the same or with a representative designated by such executive, shall find that certain classifications of the archives listed are not of sufficient historical, legal, or administrative value to justify permanent preservation, he shall file a list thereof with the board of trustees with such recommendations for their disposal as he shall see fit to make.

"The curator shall not be required to preserve permanently vouchers, claims, canceled or redeemed state warrants, or duplicate warrant registers,

respectively, of the state comptroller and the treasurer of state but is hereby empowered, after microfilming, to destroy by burning or shredding any such warrants, having no historical value, that have been in his custody for a period of three years and likewise to destroy by burning or shredding any vouchers, claims and duplicate warrant registers which have been in his custody for a period of three years. A properly authenticated reproduction of any such microfilmed record shall be admissible in evidence in any court in this state."

These code sections, along with fairly liberal interpretations of the Board of trustees' powers and duties in other attorney general's opinions, enable the board controlling the law library to make decisions necessary for the expedient operation of the library. In an attorney general's opinion dated August 31, 1972, regarding the disposition of useless material in the possession of the traveling library, this office held that the code sections concerning that library, ". . . contemplates that the board will provide guidelines not only for the 'keeping of the records' and the 'care of property' of ISTL (Iowa State Traveling Library), but, impliedly, for the disposition of said property as well."

By maintaining the muncipal codes in the archives under §303.10, the codes are still available to those visiting the Capitol Complex but this releases some badly needed space and reduces the weight upon the already burdened shelves in the law library. This office has been advised that most of the towns have maintained adequate copies of their older codes and are therefore not in need of the volumes presently kept in the law library.

Removal of the old municipal codes to the archives should be carried out by the board of trustees of the law library under their authority in §303.3 and within the requirements of §303.9 and §303.10 concerning the archives.

July 11, 1973

CRIMINAL LAW: O.M.V.U.I. — §§321.281, 321B.16, Code of Iowa, 1973. The courts may order a person convicted of O.M.V.U.I. to attend a drinking driver's school and that his license by indefinitely revoked in lieu of any punishment imposed by §321.281. This provision may also be applied to non-residents. (Voorhees to Casjens, Lyon County Attorney, 7/11/73) #73-7-6

Mr. David J. Casjens, Lyon County Attorney: This letter is in response to your request for an opinion on the following question:

"Does this statute [§321B.16], in the case of a first offender, give the Court the authority to impose a fine for a lesser amount than that specified in Section 321.281 or in fact to impose no fine at all in cases where the offender is ordered to attend the instruction course?

"I am also wondering whether the provisions concerning the instruction course will be applicable to non-residents, specifically persons from Minnesota and South Dakota."

Section 321B.16, Code of Iowa, 1973, provides:

"After the conviction of a person for operating a motor vehicle while under the influence of an alcoholic beverage, the court in addition to its power to commit the defendant for treatment of alcoholism under section 321.281, *may in lieu of,* or prior to or after the imposition of punishment for a first offense or prior to or after the imposition of punishment for any subsequent offense, order the defendant, at his own expense, to enroll, attend and successfully complete a course for drinking drivers. A copy of the order shall be forwarded to the department of public safety." (emphasis added).

It seems quite clear from the plain language of this provision that the court does have the authority to order the person convicted of O.M.V.U.I. to attend the drinking driver's school and that his license be indefinitely revoked in lieu of any punishment imposed by §321.281. There is nothing in the statute itself that would prevent the application of this provision to non-residents. The Department of Public Safety does in fact allow non-residents to attend these courses.

The enforcement of any driver's license revocation of a non-resident will, of course, depend on the foreign licensing authority. The Department of Public Safety informed me that most states reciprocate in some way on license revocations for O.M.V.U.I. However, the revocation period imposed by the foreign state varies, and the fact that the motorist is attending the drinking driver's school may or may not be considered in determining the extent of the revocation.

July 11, 1973

STATE OFFICERS AND DEPARTMENTS: Beer and Liquor Control Department; Force and effect of departmental rules. Iowa Beer and Liquor Control Department Departmental Rule 2.7 (123). Where municipal ordinance is squarely in conflict with state departmental rule, the departmental rule must prevail. (Jacobson to Barbee, Dickinson County Attorney, 7/11/73) #73-7-7

Mr. Walter W. Barbee, Dickinson County Attorney: This is to acknowledge receipt of your letter dated June 22, 1973, in which you requested an opinion from this office regarding Arnolds Park, Iowa, Ordinance No. 533, Section 8(m), which provides as follows:

"No licensee, his agent or employee, nor any permittee, his agent or employee shall dispense alcoholic liquor or beer in such a manner as to permit the consumption of the same outside of the building on the premises in which the same was sold, except that beer in unopened containers may be sold for consumption off the premises of the building in which the same was sold, but shall not be consumed on the premises of the permittee except inside the building where the same was sold."

You specifically ask whether this municipal ordinance supercedes the Iowa Beer and Liquor Control Department, Departmental Rule 2.7 (123) which permits the outdoor service of alcoholic liquor and beer at tables immediately adjacent to the indoor premises.

Municipal ordinances, of course, are enacted by municipal corporations, which derive their power from the state legislature. Their power may be exercised only as the legislature may direct. *Pape v. Westerdale,* 254 Iowa 1356, 121 N.W.2d 159 (1963). The legislature has specifically allowed municipal corporations to enact certain kinds of ordinances. Section 366.1 of the Iowa Code gives municipal corporations the power:

"to make and publish, from time to time, ordinances not inconsistent with the laws of the state . . . as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order and convenience of such corporation and the inhabitants thereof . . ."

This Code Section makes it abundantly clear that municipal corporations cannot make and publish ordinances that are inconsistent with state laws. If a

municipal corporation, in spite of this prohibition, makes and publishes an ordinance that squarely conflicts with the laws of the state, the state law prevails. *Towns v. Sioux City,* 214 Iowa 76, 241 N.W. 658, 661 (1932).

In the instant case we have a municipal ordinance that is inconsistent with a state departmental rule. This departmental rule was authorized and directed by Section 123.21, of the Code of Iowa and was promulgated in accordance with Chapter 17A. It has uniform force and effect throughout the state and, therefore, has the force and effect of state law. *Wagner v. Northeast Farm Service Co.,* 177 N.W.2d 1 (Iowa, 1970).

It is our opinion that where a municipal ordinance is squarely in conflict with a state departmental rule that has the force and effect of law, the state departmental rule must prevail. Accordingly, Departmental Rule 2.7 (123), supercedes Arnolds Park Ordinance No. 533, Section 8(m) and renders that ordinance null and void.

July 11, 1973

INSURANCE: Governmental casualty coverage. §23.18, Code of Iowa, 1973. Governmental subdivisions are not required to let bids for fire and casualty insurance although it may be recognized as a good business practice to do so. (Nolan to Senator Palmer, 7/11/73) #73-7-8

Honorable William D. Palmer, State Senator: This is written in reply to your request for an opinion as to whether the purchase of fire and casualty insurance by governmental subdivisions, schools, counties, cities and state agencies is subject to the provisions of law that require bidding on purchases in excess of specific dollar amounts.

The statutory provisions which you refer is §23.18, Code of Iowa, 1973. This section provides:

"Bids required — procedure. When the estimated total cost of construction, erection, demolition, alteration or repair of any public improvement exceeds five thousand dollars, the municipality shall advertise for bids on the proposed improvement by two publications in a newspaper published in the county in which the work is to be done, the first of which shall be not less than fifteen days prior to the date set for receiving bids, and shall let the work to the lowest responsible bidder submitted a sealed proposal; provided, however, if in the judgment of the municipality bids received be not acceptable, all bids may be rejected and new bids requested. All bids must be accompanied, in a separate envelope, by a deposit of money or certified check in an amount to be named in the advertisement for bids as security that the bidder will enter into a contract for the doing of the work. The municipality shall fix said bid security in an amount equal to at least five percent, but not more than ten percent of the estimated total cost of the work. The checks or deposits of money of the unsuccessful bidders shall be returned as soon as the successful bidder is determined, and the check or deposit of money of the successful bidder shall be returned upon execution of the contract documents. This section shall not apply to the construction, erection, demolition, alteration or repair of any public improvement when the contracting procedure for the doing of the work is provided for in another provision of law."

Counties (§332.3(11)) and school districts (§279.25) are specifically authorized by statute to insure buildings against loss. From the section cited and set out above you will not that there is no requirement that contracts other than those for public improvements be let by public bidding. However, this office has recommended that governing bodies of muncipalities obtain bids on

purchases as a matter of public policy, even when there is no statutory requirement that they do so in order to avoid purchasing procedures which might be questionable as capricious, arbitrary or fraudulent.

July 11, 1973

STATE OFFICERS AND DEPARTMENTS: Labor Commission — §88A.17, Code of Iowa, 1971. The words ". . . a piece of machinery or equipment which is so defective as to cause imminent danger to life, health, or safety . . ." apply to failure to provide any equipment, and empower the Labor Commission to act under the provisions of §88A.17. (Voorhees to Addy, Commissioner of Labor, 7/11/73) #73-7-9

Mr. Jerry L. Addy, Commissioner of Labor: This letter is in response to your request for an opinion as to whether failure to provide certain safety equipment gives the Labor Commission power to act under §88A.17, Code of Iowa, 1971. Your letter pointed out that this section has been repealed, but that there are matters pending involving this section that arose before its repeal.

Section 88A.17 empowers the Commissioner of Labor to summarily order that a piece of machinery or equipment not be used under the following circumstances:

"When the labor commissioner or his inspector shall discover or have reason to believe that any provision of the employment safety laws or any rule is being violated by a piece of machinery or equipment which is so defective as to cause imminent danger to life, health, or safety, this section shall apply rather than section 88A.15."

The question is thus whether the words ". . . a piece of machinery or equipment which is so defective as to cause imminent danger to life, health, or safety, . . ." applies to failure to provide any equipment.

It is a well established rule of statutory construction that the courts look to the object to be accomplished, evils sought to be remedied, or purpose to be subserved and place on it a reasonable or liberal construction, whichever will best effect its purpose, rather than one which will defeat it. *Crow v. Shaeffer,* 199 N.W.2d 45 (Iowa 1972); *State ex rel. Turner v. Koscot Interplanetary, Inc.,* 191 N.W.2d 624 (Iowa 1971); *Chicago & N.W. Ry. Co. v. City of Osage,* 176 N.W.2d 788 (Iowa 1970); *Krueger v. Fulton,* 169 N.W.2d 875 (1969); *State v. Holt,* 156 N.W.2d 884 (1968); *State v. Charlson,* 154 N.W.2d 829 (1967); *Severson v. Sueppel,* 152 N.W.2d 281 (1967).

The obvious purpose of this provision is to allow the Labor Commission to act quickly to prevent injury where there is an imminently dangerous situation. To construe the words ". . . a piece of machinery or equipment which is so defective as to cause imminent danger to life, health, or safety, . . ." as not including failure to provide any equipment would allow the most flagrant disregard for life, health, and safety to escape the Commission's enforcement powers under §88A.17. We believe that such a construction would tend to defeat rather than effect the purpose of this section. Accordingly, we are of the opinion that failure to provide any equipment that results in imminent danger to life, health, or safety empowers the Commission to act under §88A.17.

July 12, 1973

STATE OFFICES AND DEPARTMENTS — The National Railroad Passenger Corportion (Amtrak) may not sell alcoholic beverages within the State of Iowa without first obtaining an Iowa Class "D" Liquor Control License. (Jacobson to Gallagher, Director, Iowa Beer & Liquor Control Department, 7/12/73) #73-7-10

Mr. Rolland A. Gallagher, Director, Iowa Beer & Liquor Control Department: This is to acknowledge receipt of a letter in which you requested an opinion of the Attorney General regarding the following:

"Enclosed May 8th letter has been received from Amtrak. I am particularly interested in the third paragraph indicating Section 306(c) of the Rail Passenger Service Act exempts Amtrak from seeking a liquor license from the State of Iowa.

"I would like to know if we can permit them to sell liquor on their trains in Iowa without a license, and if it is not necessary for them to obtain a license, can we legally accept a payment of state sales tax and excise tax as they suggest in paragraph four."

The question of whether Amtrak must follow state liquor laws was considered recently by two Federal District Courts. The Federal District Court for the Western District of Oklahoma in the case of *National Railroad Passenger Corporation v. Harris et al.*, 354 F. Supp. 887 (1972) held that since there was only token enforcement of Oklahoma's "open saloon" law prohibiting liquor by the drink, enforcement against Amtrak would be discriminatory. It was the court's opinion that the language of the state law was contradictory, deceptive, and of questionable constitutionality. The court held that the State of Oklahoma could not enforce its liquor laws against Amtrak because Amtrak uses federally regulated vehicles in the interstate transportation of passengers, and the enforcement of these laws would be a burden on interstate commerce.

The same issue was considered by a three judge Federal Court in Kansas in the recent case of *National Railroad Passenger Corporation v. Vern Miller, et al.* (D. C. Kansas, filed May 17, 1973). The Kansas court's opinion was in direct opposition to that of the Oklahoma court. The Kansas court determined that the laws of Kansas, as enacted and applied to Amtrak, cast no undue burden on interstate commerce. The court reiterated what was said in *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324 (1964) that by reason of the Twenty-first Amendment a state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. The use of liquor aboard Amtrak trains was not a mere incident of transportation to another state, but was such delivery and use within the state as was contemplated by the Twenty-first Amendment. The court held that Amtrak was not a federal instrumentality and the enforcement of the state liquor control laws would not impair its efficiency in transporting passengers from place to place. The legislative enactment of the Kansas Legislature was clearly a valid exercise of its police powers.

It is the opinion of this office that the decision of the Kansas court is the more carefully researched opinion and we believe it correctly states the law in this area. Amtrak is not a government agency or establishment but is a private

corporation operated for profit. The Act under which Amtrak was incorporated provides. 45 U.S.C. §541. It is subject to the laws of the state in which it is located in respect to its affairs if such laws do not interfere with the purpose of its creation, tend to impair or destroy its efficiency as a federal agency, conflict with the paramount laws of the United States, or discriminate against it. *National Railroad Passenger Corporation v. Vern Miller et al.*, 1d. The word "services" in §306(c) of the Rail Passenger Service Act which provides as follows:

"The Corporation shall not be subject to any state or other law pertaining to the transportation of passengers by railroad as it relates to rates, routes, or services: . . . ."

will not be construed to include the serving of intoxicating liquor within the boundaries of this state. The Iowa liquor laws are applicable to Amtrak and it may not sell alcoholic beverages within the state without obtaining a Class "D" Liquor Control License and paying the taxes on the beverages sold as required by state law. In the case of a rail common carrier the tax would be 15 per cent of the price established by the department of all alcoholic beverages sold to the public on the licensed carrier. Section 123.96, 1973 Code of Iowa.

July 17, 1973

CITIES AND TOWNS: Authority of Mayor — §§368A.2, 368A.17, 420.31, 420.40 and 420.41, Code of Iowa, 1973. A mayor may properly require that violations of city ordinances be enforced, in addition to and along with any violations of state law. A mayor may not order enforcement of city ordinances to the exclusion of state laws. (Blumberg to Cusack, State Representative, 7/17/73) #73-7-11

Honorable Gregory D. Cusack, State Representative: We are in receipt of your opinion request of March 22, 1973, regarding the authority of a mayor. Your situation concerns a series of incidents in Davenport, a special charter city. It appears that the members of the police department decided at a meeting to write only state charges on traffic violations (which were also covered by city ordinances) for one month. Thereafter, the mayor issued a memo stating: "When issuing a Summons for Traffic Violations and when it is covered by a State Law or City Ordinance, the Ordinance shall have preference over the State Law." Your question is whether the mayor could legally set forth such a requirement. The above statement of facts was taken from information supplied to us with your opinion request.

Pursuant to Chapter 420, Code of Iowa, special charter cities shall have all of the powers and privileges of cities of like population having the mayor-council form of government. Section 420.40. In addition, other code sections applicable to cities and towns are applicable to special charter cities unless otherwise excepted. Section 420.41. Such cities also have broad power to adopt ordinances to implement the powers and duties of Chapter 420. Section 420.31. Section 368A.2(1), which is applicable to special charter cities, provides that the mayor shall have the powers conferred upon sheriffs to supress disorders. The mayor shall be the Chief executive officer and shall "enforce *all* regulations and ordinances . . . ." (Emphasis added) Section 368A.17 provides that the chief of police "shall diligently enforce *all* laws, ordinances, and regulations . . . ." (Emphasis added)

Article XI, section 3 of the special charter of the city provides that the mayor "shall at all times be active and vigilant in enforcing the laws and ordinances for the government of the City . . . ." Section 1 of Ordinance No. 7 of the City provides that the mayor shall be the chief executive officer of the city and "shall take care that the criminal laws of the State and the Ordinances of the City are duly respected, observed and enforced within the City Limits." Section 3, Ordinance No. 45 provides that the duty of the Chief of Police is to cause the public peace to be preserved, "and to see that *all* of the laws and ordinances are enforced . . . ." (Emphasis added) Section 2 of that Ordinance states that the Mayor shall be at the head of the police department, superintend and direct the police generally, "and from time to time give such directions as he may deem proper and necessary for the preservation of the peace and good order and the enforcing of the laws and ordinances of said City . . . ."

From the language of the mayor's memo, we cannot ascertain whether the Mayor was telling the police department to write up all violations, especially those involving city ordinances, or to just write up violations of city ordinances. The mayor, pursuant to the Code of Iowa and the Charter and ordinances of the city, has the power and affirmative duty to enforce all violations of state and city laws. More specifically, section 2, Ordinance No. 45, gives the mayor the power to give directions to the police department for the enforcement of city ordinances. If the mayor, by the memo, is merely giving directions to the police department to enforce *all* violations of state law and city ordinances, then we find nothing wrong with the mayor's action. However, it must be pointed out that because the mayor has the power to see that all state laws and city ordinances are enforced (Section 1, Ordinance No. 7), she may *not* require that only city ordinances be enforced to the exclusion of state laws. Such an action would be an abuse of her powers and discretion.

We can look to the actions of the police department in the same light. Although police officers must, of necessity, have some discretion when writing summonses for state or city violations, we can find no discretion broad enough to permit an entire police department to disregard the enforcement of city ordinances for any period of time. The code and the city ordinances both provide that the chief of police, and necessarily the police department, shall enforce *all* state laws and city ordinances. An action similar to the one taken by the police department in question is an abuse of whatever discretion a police department has.

Accordingly, we are of the opinion that a mayor may properly require that violations of city ordinances are to be enforced in addition to and along with any violations of a state law. A mayor may not order enforcement of city ordinances to the exclusion of state laws.

July 18, 1973

STATE OFFICERS AND DEPARTMENTS: Iowa Commission for the Blind, municipal licenses and payment of inspection fees not required. §368.6(1) and Chapter 601B and 601C, Code of Iowa, 1973. The Iowa Commission for the Blind may not be required to obtain a municipal restaurant license, vending machine license or pay inspection fees or obtain business permits for food service facilities operated by it. (Haesemeyer to Jernigan, 7/18/73) #73-7-12

Mr. Kenneth Jernigan, Director, Iowa Commission for the Blind: I am writing in reply to your letter of June 18, 1973, in which you request an opinion of the Attorney General and state:

"The Iowa Commission for the Blind has operated a vending stand snack bar-cafeteria program for the training and rehabilitation of blind persons for more than thirty years. In 1969 the Legislature strengthened and expanded this program by the adoption of Chapter 93C of the Code of Iowa, 1971. The Commission now operates vending stand snack bars or cafeterias in a number of public buildings throughout the State as well as in private facilities. The Commission has secured sales tax permits for the business enterprises it operates as a part of this program.

"I am requesting an opinion dealing with whether the Commission may be required to pay licenses or other taxes levied by counties or municipalities such as a restaurant license, a vending machine license, or some type of inspection fee or business permit.

"The attached letter of May 31, 1973, from Mr. G. W. Rieke, City of Ames, Iowa, seeks to license and tax the cafeteria and adjacent machines operated by the Iowa Commission for the Blind at the Iowa State Highway Commission complex in Ames."

Section 368.6(1), Code of Iowa, 1973, provides in relevant part:

"They [cities and towns] shall have power to regulate and license:

1. Hotels. Hotels, restaurants, and eating houses.

* * *"

Whereas as stated in 53 CJS page 558, Licenses, section 29b,:

". . . the statute imposing license fees does not apply to state public agencies, unless the intention so to do is clearly expressed."

Absent explicit inclusion of government agencies in the words of this licensing statute, it cannot be read to cover such agencies. And it is our opinion that food services established under Chapter 601C, Code of Iowa, 1973, are public agencies of this state. Chapter 601B creates the Iowa Commission for the Blind and confers broad powers upon it with respect to aiding and assisting the blind. Chapter 601C authorizes the Commission for the Blind to establish food service facilities in various public buildings and requires governmental agencies to attempt in good faith to reach an agreement with the Commission for the Blind to operate food services before undertaking to have anyone else operate such food services.

In *Leckliter v. City of Des Mointes,* (1930) 211 Iowa 251, 231 N.W. 58, 62, the Iowa Supreme Court took the following position, quoting extensively from an opinion of the California Supreme Court:

"'In general, acts of the Legislature are meant to regulate and direct the acts and rights of citizens: and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act'."

The California case relied upon is *Balthasar v. Pacific Electric Ry. Co.,* 1921, 187 Cal. 302, 202 P. 37. It contains an exhaustive discussion on the general

rule, adopted by the Iowa Supreme Court in *Leckliter* that statutes cannot apply to the government or its agencies unless so stated in express terms. Thus, in answer to your question, it is our opinion that the Iowa Commission for the Blind may not be required to obtain a restaurant license, vending machine license or pay inspection fees or obtain business permits.

July 18, 1973

CITIES AND TOWNS: Municipal Dock Commission — §384.2, Code of Iowa, 1973. A member of a municipal dock commission, pursuant to chapter 384, must have been a resident of the municipality for at least five consecutive years immediately prior to his or her appointment. (Blumberg to Shafer, Allamakee County Attorney, 7/18/73) #73-7-13

Mr. John W. Shafer, Allamakee County Attorney: We are in receipt of your opinion request of July 6, 1973, regarding the residency of a Municipal Dock Commission Member. You ask whether the requirement of five year residency in §384.2 of the Code means five consecutive years prior to appointment.

Section 384.2 provides that "the council of the municipality shall appoint as members of the dock board three commissioners of public docks, who have been residents of the municipality in which they are appointed for a period of not less than five years. . . ." A reading of other Code sections regarding commissions and trustees for municipal projects shows that the majority only require residency in the municipality — no term of years is required. See e.g. §§372.2, 373.1, 377.2, 378.5 and 379.6. The difference between the other Code sections and §384.2 is striking. The Legislature obviously intended that dock commissioners be residents of the municipality for a considerable length of time. Such an intent is meaningless if the required five years are not consecutive and immediately prior to the appointment. Anyone who spent at least five years of their childhood in that community would qualify, even though they had not lived there for the past twenty years. We do not believe this to be the Legislative intent.

Accordingly, we are of the opinion that a member of a municipal dock commission, pursuant to Chapter 384 must have been a resident of that municipality for at least five consecutive years immediately prior to his or her appointment.

July 24, 1973

GENERAL ASSEMBLY: Membership on the legislative council. §2.49, Code of Iowa, 1973, as amended by §1 Senate File 476, Acts, 65th G.A., First Session (1973). Insofar as possible at least two members of the legislative council from each house must be reappointed from the prior legislative council. (Haesemeyer to Schaben, State Senator, 7/24/73) #73-7-14

The Honorable James F. Schaben, State Senator: Reference is made to your letter of July 3, 1973, in which you state:

"I would ask from your office an immediate opinion concerning the reappointment of two members of the Legislative Council, as provided for in Senate File 476 as passed by the first session of the 65th General Assembly.

"My question is: Out of the five appointments made by the president of the Senate, is it not necessary that two of those appointed have served, insofar as possible, in the previous Legislative Council? And, if this is the case, has the President of the Senate complied with the provisions of S.F. 476?"

Section 2.49, Code of Iowa, 1973, as amended by Section 1, Senate File 476, Acts, 65th G.A., First Session (1973) provides:

"2.49 LEGISLATIVE COUNCIL CREATED. There is hereby created a continuing legislative council of twenty members which shall be entitled the legislative council. The council shall be composed of the president pro tempore of the senate, the speaker of the house of representatives, the majority and minority floor leaders of the senate, the chairman of the senate committee on appropriations, the minority party ranking member of the senate committee on appropriations, five members of the senate appointed by the president of the senate, the majority and minority floor leaders of the house of representatives, the chairman of the house committee on appropriations, the minority party ranking member of the house committee on appropriations, and five members of the house of representatives appointed by the speaker of the house of representatives. The lieutenant governor shall be an ex officio nonvoting member of the council. Of the five members appointed by the president of the senate and speaker of the house, three from each house shall be appointed from the majority party and two from each house shall be appointed from the minority party. Members shall be appointed prior to the adjournment of the first regular session of each general assembly and shall serve for two-year terms ending upon the convening of the following general assembly or when their successors are appointed. Vacancies on the council, including vacancies which occur when a member of the council ceases to be a member of the general assembly, shall be filled by the president of the senate and the speaker of the house respectively. *Insofar as possible, upon appointment of members of the council during each regular session of the general assembly, at least two members of the council from each house shall be reappointed.* The council shall hold regular meetings at a time and place fixed by the council and shall meet at any other time and place as the council may deem necessary." (Emphasis added.)

The answer to your question depends upon the meaning to be attributed to the words "insofar as possible" in the underlined portion of the statute set forth above. While it has been suggested that these words give the lieutenant governor complete flexibility in the appointment of members of the council even to the extent of not being required to appoint members of the prior council, we do not think that any fair reading of the statute can support this position. While we have been unable to find any cases in Iowa or elsewhere interpreting the expression "insofar as possible" we think that common sense requires that it be construed to include only such situations as where by reason of failure of re-election, death, resignation or similar circumstance there simply are not any members of the prior council available for reappointment.

The senate members of the legislative council appointed in 1973 are as follows:

Lieutenant Governor Arthur A. Neu, ex officio
Senator Vernon H. Kyhl, President Pro Tempore
Senator Clifton C. Lamborn, Senate Majority Leader
Senator James F. Schaben, Senate Minority Leader
Senator Lucas J. DeKoster, Senate Appropriations Committee Chairman
Senator Eugene M. Hill, Senate Ranking Minority Member of Appropriations Committee
Senator James E. Briles
Senator Willard R. Hansen
Senator Roger J. Shaff
Senator Karl Nolin
Senator Earl M. Willits

The senate members of the prior legislative council were:

Lieutenant Governor Roger W. Jepsen, ex officio
Senator Vernon H. Kyhl, President Pro Tempore
Senator Clifton C. Lamborn, Senate Majority Leader
Senator Lee H. Gaudineer, Jr., Senate Minority Leader
Senator James E. Briles
Senator S. J. Brownlee
Senator Eugene M. Hill
Senator Arthur A. Neu
Senator William D. Palmer

It is to be observed that of the five senate members of the legislative council appointed by the lieutenant governor in 1973, only Senator Briles was a member of the previous legislative council. Thus, it is our opinion that the Senate membership of the legislative council as presently constituted is not in compliance with §2.49, as amended.

July 27, 1973

CONSTITUTIONAL LAW: Mandatory Retirement Policies — §§97B.45 97B.46, Code of Iowa, 1973; H.F. 206 and H.F. 287, 65th G.A., First Session. House File 206, allowing public employers to devise retirement policies for employees covered by IPERS, is constitutional. Public employers may make exceptions to these policies that are reasonable and non-discriminatory. (Blumberg to Anderson, State Senator, 7/27/73) #73-7-15

Honorable Leonard C. Andersen, State Senator: We are in receipt of your opinion request of May 16, 1973, regarding mandatory retirement policies for employees on IPERS. You specifically asked:

"1. Under H.F. 206 . . . can a public employer begin to make exceptions to a program that prescribes retirement at the age of 65 without completely invalidating that program and again find himself subject to Sections 97B.45 and 97B.46? . . . How much weight will be given the legislative intent in construing the exceptions under Sections 97B.45 and 97B.46 when an employer starts making exceptions to allow a person to continue to work by mutual agreement? Will the procedures outlined for exceptions under Sections 97B.45 and 97B.46 bind the employer in light of the fact that H.F. 206 does not speak of any exceptions?

2. Is H.F. 206 constitutionally sound, i.e., does it pass 'equal protection' guarantees of the 14th Amendment to the U.S. Constitution?"

Section 97B.45 of the 1973 Code provided:

"A member's normal retirement date shall be the first of the month coinciding with or next following his sixty-fifth (65) birthday. A member may retire after his normal retirement date by submitting a written notice to the Commission setting forth the date the retirement is to become effective, provided that such date shall be after his last day of service and no more than thirty (30) days prior to the filling of such notice. A member shall retire after his seventieth (70) birthday except as otherwise provided in section ninety-seven B point forty-six (97B.46 of the Code.)"

This section stood for the proposition that an employee's normal retirement date was the sixty-fifth birthday. But, an employee may have retired after the normal retirement date by filing notice, provided said date of retirement was

after the last day of service. And, if said notice was filed after the last day of service, it must have been filed within thirty days following said last day. In other words, an employee may have retired at any time between the sixty-fifth and seventieth birthdays as long as notice was properly filed. However, one was required to retire at age seventy unless the employer made an exception pursuant to section 97B.46. O.A.G. (Davis) January 8, 1973, #73-1-9.

House File 206 was passed by the Legislature and became law on March 23, 1973, after the above opinion was issued. House File 206 provides:

"Section 1. Chapter ninety-seven B (97B), Code 1973, is amended by adding the following new section:

NEW SECTION. The provisions of section ninety-seven B point forty-five (97B.45) of the Code shall not be construed to render invalid any provisions of a policy established by an employer which prescribes retirement at an age not less than sixty-five years."

This new section appears to provide that an employer may now adopt a policy which prescribes retirement between the ages of sixty-five and seventy. Although it may seem to have conflicted with section 97B.45, this new section is actually special in nature whereas section 97B.45 was general. Thus, the new section because it is special in nature, controlled. *Liberty Consolidated School District v. Shindler,* 1955, 246 Iowa 1060, 1064, 70 N.W.2d 544, 547; section 4.7, Code of Iowa.

We should deal first with your second question as to the constitutionality of H.F. 206. Again, H.F. 206 merely gives the employer the option to set forth a policy prescribing retirement at an age not below sixty-five. It does not set forth any mandatory retirement age. There is one major case in this area, *Kingston v. McLaughlin,* .....F. Supp. ..... (D.Mass. 1972), stay denied 93 S.Ct. 889. There, the constitutionality of an amendment to the Massachusetts' constitution which prescribed mandatory retirement at age seventy for state judges was at issue. It was alleged that the mandatory retirement "policy" was an unconstitutional impairment of the obligation of contracts; that it would deprive the judges of property without due process or just compensation; and, the Supremacy Clause would be violated if the amendment was applied to them. The court held that because an employee normally has no vested right to his or her employment, there is normally no inchoate right to choose when to retire. Tenure in employment which is not directly guaranteed cannot be indirectly guaranteed by the recognition of such an inchoate right. Unless specifically provided, such a right is not within the contract of employment. Thus, the court held that the mandatory retirement at age seventy was not unconstitutional.

It must be reaffirmed that the Act in question does not prescribe for mandatory retirement at any age. It only gives the employer the option of setting forth a mandatory retirement policy. If the existence of mandatory retirement at a specified age is not, per se, unconstitutional, *Kingston,* supra, then the existence of a statute which merely permits such policies is not unconstitutional. Moreover, a statute is presumed to be constitutional. *Stanley v. Southwestern Community College Merged Area,* 184 N.W.2d 29 (Iowa 1971).

In response to your first question, we cannot give you a definite answer. H.F. 206 does not prescribe the type of policy to be implemented. That, obviously, is left to the employer. An employer may devise any retirement policy

and exceptions to that policy provided they are reasonable, non-discriminatory and do not affect those under sixty-five. There is nothing in H.F. 206 which would invalidate a policy if an exception to that policy is made. Section 97B.45 prescribed mandatory retirement at age seventy which was not changed by H.F. 206. Similarly, H.F. 206 does not alter the ability of the employer to keep an employee beyond the age of seventy.

Since the passage of H.F. 206, the Legislature passed H.F. 287, which took effect July 1, 1973. Section 7 of that Act Amended §97B.45 by striking that section and adding a new one which reads:

"Sec. 7. Section ninety-seven B point forty-five (97B.45), Code, 1973, is amended by striking the section and inserting in lieu thereof the following:

97B.45 RETIREMENT AGE AT SIXTY-FIVE. A member's normal retirement date shall be the first of the month coinciding with or next following his sixty-fifth birthday. A member may retire after his sixty-fifth birthday except as otherwise provided in section ninety-seven B point forty-six (97B.46) of the Code. A member retiring after his normal retirement date, as provided in section ninety-seven B point forty-six (97B.46) of the Code, shall submit a written notice to the commission setting forth the date the retirement is to become effective, provided that such date shall be after this last day of service and not before the first day of the sixth calendar month preceding the month in which the notice is filed, except that credit for service shall cease after the normal retirement date. Notwithstanding the provisions of this section and section ninety-seven B joint forty-six (97B.46) of the Code, an employer may adopt policies which prescribe retirement at an age not less than sixty-five years."

Section 8 amended 97B.46 by substituting "sixty-five" for "seventy." Thus, the new 97B.46, read in conjunction with the new 97B.45, now sets mandatory retirement at sixty-five instead of seventy unless the employer decides otherwise.

The last sentence of §7 reiterates what was stated in H.F. 206. It must be noted that H.F. 206 amended Chapter 97B by adding a new section, whereas H.F. 287, §7 amended §97B.45. The affect of all of this is that during the period of March 23, 1973 to July 1, 1973, H.F. 206 controlled, and that H.F. 287 controls from July 1, 1973. This means that during March 23, 1973 to July 1, 1973, a public employer could adopt a policy for an employees retirement at age 65 to 70, and in the absence of such a policy the employee could not be required to retire until age 70. Under H.F. 287, an employer may still adopt a retirement policy for age 65 or over, however, the employee can be required to retire at 65 without such a policy. This means that the policy, originally established to require retirement below the mandatory retirement age (H.F. 206), has now become a policy to permit employment after the mandatory retirement age (H.F. 287).

Accordingly, we are of the opinion that H.F. 206 is constitutional. Public employers, between March 23, 1973, and July 1, 1973, could prescribe mandatory retirement between the ages of 65 and 70. Without such a policy, a public employee could not be required to retire until age 70. Now, a public employer may adopt a policy permitting employees to work beyond the mandatory retirement age of 65. The policy may contain exceptions if they are reasonable and non-discriminatory.

July 27, 1973

MERIT SYSTEM: Mandatory Retirement Policies, I.P.E.R.S. §§4.5, 97B.45, Code of Iowa, 1973; H.F. 206, H.F. 387, §§7, 8, Acts of 65th G.A., First Session. H.F. 206, Acts of 65th G.A., First Session, allows public employers to establish whatever retirement policies, based on age, which they so choose for employees covered by I.P.E.R.S. and between the ages of 65 and 70. (Haesemeyer to Keating, 7/27/73) #73-7-16

W. L. Keating, Director Iowa Merit Employment: Reference is made to your request for an opinion of the Attorney General with respect to the following:

"The Iowa Merit Employment Department has recently been presented with questions, by employees and employers, relative to the meaning of the recently passed House File 206. Our interest in the proper interpretation is because of appeals to the Iowa Merit Employment Commission under Section 11.4 of the merit rules (providing for no appeal from retirement under provisions of the Iowa Code).

On its face, House File 206 seems to say that if an employer has established, or does establish, a retirement policy providing for retirement at or over the age 65, the option given the employee under 97B.45 Code 1973, is rescinded. However, there are areas of dispute, or differences which have arisen:

1. Does the retirement policy have to be uniform and apply to all persons within the employer's jurisdiction?

2. If not, can an employer establish a retirement age which affects everyone covered and is mandatory and automatic, unless the employer chooses to make an exception and extend, from year to year as is now provided at age 70 for individual employees?

3. Or, can an employer establish a retirement policy for certain classes, or groups of employees and allow others to remain subject to 97B.45 and have the option to retire or not prior to age 70?

H.F. 206, which became effective by publication on March 23, 1973, provides:

"Section 1. Chapter ninety-seven B (97B) Code of Iowa, 1973, is amended by adding the following new section:

New Section. The provisions of section ninety-seven B point forty-five (97B.45) of the Code shall not be construed to render invalid any provisions of a policy established by an employer which prescribes retirement at an age not less than sixty-five years.

Section 2. This Act, being deemed of immediate importance, shall take effect and be in force from and after its publication in the Ogden Reporter, a newspaper published in Ogden, Iowa, and in the Mitchellville Index, a newspaper published in Mitchellville, Iowa.

It is our opinion that this act allows a public employer to device any type of retirement policy, for employees between ages 65 and 70, which he so chooses. The sole restriction on this legislative grant is that the employees so retired must be at least 65 years of age. Beyond this however, we find no restrictions in the broad language of H.F. 206, which language acknowledges that there may now be "provisions of a *policy established by an employer* which prescribe retirement at an age not less than sixtyfive years." We conclude that a public employer is free to establish whatever plan he chooses to effectuate the retirement of his employees who are between the ages of 65 and 70. We draw our

conclusion not only from the wording of the statute, but from two other sources as well. First, H.F. 206, when presented to the legislature, was accompanied by an "Explanation" which stated:

"This bill is designed to overcome a question as to the legality and enforcement of a public employees retirement policy at age 65, which issue has been raised in Iowa Attorney General Opinion rendered January 8, 1973.

"As this ruling pertains to all public school boards in Iowa who generally have had and practiced a retirement policy at age 65, and since all public school boards are governed by contract procedures and datelines of late March and early April each year as prescribed in §279.13 of the Code it is imperative that this correction be implemented by enactment of this bill promptly so as to become effective not later than March 30, 1973."

The Attorney General's opinion referred to in the above "Explanation" stated that "a school teacher covered by IPERS cannot be required to retire until he reaches the age of 70." OAG #73-1-9. H.F. 206 intended to — and did — overturn the foregoing opinion of the Attorney General. Furthermore, H.F. 206 not only applies to school employees, but to all public employees covered by IPERS.

It should be noted that OAG #73-1-9 correctly stated the law in Iowa until H.F. 206 became law on March 23, 1973. In other words, prior to March 23, 1973, no public employer could require an employee covered by IPERS to retire before age 70. This situation has been changed by H.F. 206, but that act is only prospective and does not apply to any situations occurring prior to its enactment. (Note, §4.5 Code of Iowa, 1973: "A statute is presumed to be prospective in its operation unless expressly made retrospective.") Thus, it is our opinion that, prior to March 23, 1973, no public employer could force mandatory retirement on an employee between the ages of 65 and 70; and, after March 23, 1973, a public employer is empowered by the broad language of H.F. 206 to impose mandatory retirement on employees between the ages of 65 and 70. In so doing a public employer may apply any policy he so chooses since he has been broadly delegated that power, and we find no legislative restrictions thereon.

Second, we are mindful of new legislation which became law on July 1, 1973. H.F. 287, §7, amends §97B.45, Code of Iowa, 1973, by striking the section and substituting a new one. (Note that H.F. 206 does not amend §97B.45; rather, it amends Chapter 97B by adding a new section. Thus, H.F. 206 is neither overriden nor struck down by the subsequent enactment of H.F. 287, §7, which replaces §97B.45). H.F. 287, §7, provides:

"Sec. 7. Section ninety-seven B point forty-five (97B.45), Code, 1973, is amended by striking the section and inserting in lieu thereof the following:

97B.45 RETIREMENT AGE AT SIXTY-FIVE. A member's normal retirement date shall be the first of the month coinciding with or next following his sixty-fifth birthday. A member may retire after this sixty-fifth birthday except as otherwise provided in section ninety-seven B point forty-six (97B.46) of the Code. A member retiring after his normal retirement date, as provided in section ninety-seven B point forty-six (97B.46) of the Code, shall submit a written notice to the commission setting forth the date the retirement is to become effective, provided that such date shall be after his last day of service and not before the first day of the sixth calendar month preceding the month in which the notice is filed, except that credit for service shall cease after the

normal retirement date. Notwithstanding the provisions of this section and section ninety-seven B point forty-six (97B.46) of the Code, an employer may adopt policies which prescribe retirement at an age not less than sixty-five years."

The last sentence of this act, expressly states what H.F. 206 implies: that public employers *"may adopt policies* which prescribe retirement at an age not less than sixty-five years." It is our opinion that the clear position of the legislature in H.F. 289, §7, may be imputed to its act, H.F. 206. By the legislature's subsequent clarification in H.F. 287, §7, we are confident of the legislature's intent to allow employers to establish retirement policies under the broad language of H.F. 206.

Therefore, in direct answer to your questions: no, a retirement policy need not be uniform and apply to all persons within the employer's jurisdiction; thus, an employer may establish a retirement age which affects everyone covered and is mandatory and automatic, or the employer's retirement policy may cover only certain classes, or groups, of employees while allowing others to remain subject to §97B.45 and have the option to retire prior to age 70. This option was eliminated on July 1, 1973, by H.F. 287 §§7 and 8, establishing mandatory retirement at age 65; but this opinion is only intended to state the law from March 23, 1973, to July 1, 1973. Certain public employees have already been retired during this period pursuant to H.F. 206, and this opinion should resolve any questions they have regarding the validity of their retirement.

July 30, 1973

LIQUOR AND BEER: Location of state liquor stores within cities and incorporated towns. Sections 123.20(2) and 123.23, Code of Iowa, 1973, require that the director may only establish and maintain state liquor stores within the limits of a city or incorporated town. (Jacobson to Gallagher, Director, Iowa Beer and Liquor Control Department, 7/30/73) #73-7-17

Mr. Rolland A. Gallagher, Director, Iowa Beer & Liquor Control Department: This is to acknowledge receipt of your letter in which you requested an opinion of this office as follows:

"In your opinion then must all state liquor stores be inside of the corporate limits of a city?"

The sections of the Iowa Code which are applicable to your question are 123.20(2) and 123.23 and they are as follows:

"123.20 *Powers.* The director in executing departmental functions, shall have the following duties and powers:

* * *

"2. To establish, maintain, or discontinue state liquor stores and *to determine the cities and towns in which such stores shall be located.* However, no liquor store shall be established within three hundred feet of any public or private educational institution, except that local authorities may by ordinance reduce such minimum distance." (Emphasis added.)

* * *

"123.23 *State Liquor Stores.* The department shall establish and maintain *in any city or incorporated town* which the director may deem advisable, a state liquor store or stores for storage and sale of alcoholic liquor in accordance

with the provisions of this Act. The department may from time to time, as determined by the director, fix the prices of different classes, varieties, or brands of alcoholic liquors to be sold." (Emphasis added).

In each of the above quoted Code sections the words "to determine the cities and towns in which such stores shall be located" and "in any city or incorporated town" are used with reference to where state liquor stores can be established or maintained. The general rule is that in the construction of statutes words and phrases shall be construed according to the context and the approved usage of the language.

The word "in" when construed according to its approved usage means inclusion within. When applied to the statutes in question this would mean that the director may only establish and maintain state liquor stores within the limits of a city or incorporated town.

July 30, 1973

STATE OFFICERS AND DEPARTMENTS: Beer and Liquor Control Department; §123.466 Code of Iowa, 1973; Iowa Beer & Liquor Control Commission is not prohibited from issuing licenses or permits to private schools as long as there would be no possession or consumption of liquor or beer during school-related functions. (Jacobson to Gallagher, 7/30/73) #73-7-18

Mr. Rolland A. Gallagher, Director, Iowa Beer & Liquor Control Department: You have requested an Attorney General's opinion with reference to the authority of your Department to issue a liquor license or beer permit to a private school under §123.46, 1973 Code of Iowa. Specifically, your question is as follows:

"Section 46 of Chapter 123, Code of Iowa, reads as follows:

Sec. 46. Comsumption in public places — intoxication. It is unlawful for any person to use or consume alcoholic liquors or beer upon the public streets or highways, or alcoholic liquors in any public place, except premises covered by a liquor control license, or to possess or consume alcoholic liquors or beer on any public school property or while attending any public or private school related functions, and no person shall be intoxicated nor simulate intoxication in a public place. As used in this section 'school' means a school or that portion thereof, which provides teaching for any grade from kindergarten through grade twelve. Any person violating any provisions of this section shall be fined not to exceed one hundred dollars or sentenced not to exceed thirty days in the county jail.

"You will note line 8 uses the term 'public school' and line 9 uses the term 'public or private school'.

"We wonder if this was in error and both of them should say 'private school' as we are referring to a parochial school in our requesting an opinion. At a recent meeting which our License Department attended for the Iowa Finance Officers, several cities asked whether or not a combination been and liquor license or retail beer permit could be issued to a parochial school. I believe the reason for this question is that in many cities the parochial school or high school is located on the same grounds as the church or parish hall, which are oftentimes used for wedding receptions, etc."

In answer to your question, we are of the opinion that there was no error and that the statute was written as the legislature intended. Section 123.46 is entitled *Consumption in Public Place — intoxication.* All the prohibitions

therein, with one exception, are against the use, consumption or possession of alcoholic liquors in public places.

Although a public school is a public place, a private school is not. *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 512; 89 S.Ct. 733, 739; 21 L.Ed, 2d 731, 741 (1969); *Reed v. Hollywood Professional School,* 338 P.2d 633, 636; 169 C.A.2d 887 (1959). A parochial school is defined as a private school. 78 C.J.S., Schools and School Districts, §1, p. 607. The one exception in the statute involving a private place states that no person shall possess or consume alcoholic liquors or beer "while attending any public or private school related function." We believe that the purpose of this language was to protect school children, whether on public or private property, without unduly restricting the use of private property at other times. Therefore, this statute would not prohibit the Iowa Beer & Liquor Control Commission from issuing licenses or permits to a private school as long as there would be no possession or consumption of liquor or beer during school-related functions.

July 30, 1973

BEER AND LIQUOR: Definition of an "Educational institution"; §123.20(2); Beer and Liquor Control Commission. An "educational institution" consists not only of the buildings, but of all the grounds which are necessary for the full scope of educational instruction. School buildings, libraries and classroom space in rented buildings are, therefore, "educational institutions." (Jacobson to Gallagher, Director, Iowa Beer & Liquor Control Commission, 7/30/73) #73-7-19

Mr. Rolland A. Gallagher, Director, Iowa Beer and Liquor Control Commission: This is to acknowledge receipt of your letter in which you requested an opinion from this office regarding the following matter:

"We have recently encountered a problem which requires some legal clarification. Section 123.20(2) states in part:

"'However, no liquor store shall be established within three hundred feet of any public or private educational institution . . . .'

"Obviously any school building is an educational institution; but what about libraries, private buildings, in which class room space is rented, or churches which hold Sunday school classes. Should these also be considered as educational institutions?"

You are, of course, correct in stating that a school building is an educational institution. An educational institution has been defined as a school, college or university with students, faculty, and an established curriculum. *American College Testing Program, Inc. v. Forst,* 182 N.W.2d 826 (Iowa 1970). The courts of Iowa have also broadened the concept of an educational institution to include libraries. *Webster City v. Wright County,* 144 Iowa 502, 123 N.W. 193 (1909).

An educational institution consists, not only of the buildings, but of all the grounds which are necessary for the accomplishment of the full scope of educational instruction. A modern educational institution embraces those things which experience has taught us are essential to the mental, moral, and physical development of the pupils. It is not the modern conception of an educational institution that it be erected on a lot merely large enough to contain the school building. *Commissioner of District of Columbia v. Shannon &*

Luchs Const. Co., 17 F.2d 219 (D.C. Cir. 1927). Thus, any classroom space, wherever located and whether owned or rented, is also an educational institution.

An educational institution is not an institution which furnishes some education, as an incidental adjunct to its main purpose. *In re Estate of Goetz,* 8 Ohio Misc. 143, 218 N.E.2d 483 (1966). A Sunday school class is merely incidental to the primary purpose of the church and is, therefore, not an educational institution.

It should also be noted that Section 123.20(2) applies to only the original establishment of a liquor store. No violation of this Section would result if, after a liquor store was established, an educational institution then establishes itself within three hundred feet of that liquor store.

July 30, 1973

COUNTIES AND COUNTY OFFICERS: Multi-county regional planning commission. Chapter 28E and 473A, Code of Iowa, 1973. A county regional planning commission formed under Chapter 473A may join a multi-county regional planning commission under Chapter 28E. (Haesemeyer to Johnson, 7/30/73) #73-7-20

Mr. Ray N. Johnson, Deputy Director, Division of Municipal Affairs, Office for Planning and Programming: Reference is made to your request for an opinion of the Attorney General with respect to the following:

"The Division of Municipal Affairs of the State Office for Planning and Programming solicits your opinion regarding Chapter 473A, and Chapter 28E, State Code of Iowa. The creation of multi-jurisdictional regional planning commissions throughout the State of Iowa is of vital concern to this office. In line with recent federal efforts, The Division of Municipal Affairs is giving priority to multi-county regional planning commissions rather than single county regional planning commissions in its 701 program of Federal financial assistance for planning. It would facilitate this office's effort to consolidate these single county commissions into multi-county planning commissions if Chapters 473A and 28E, State Code of Iowa were clarified.

"To illustrate the problem area, the Jasper County Regional Planning Commission, formed under Chapter 473A, is attempting to get HUD certification as an areawide planning organization. There are currently two alternative courses of action available. First, the planning commission may reorganize its representation, adopt a work program that will meet HUD criteria, and apply for certification to HUD. Jasper County also has the option of joining the Central Iowa Regional Planning Commission (CIRPC). CIRPC is a multi-county regional planning commission formed under 473A. Having joined CIRPC, Jasper County would come under the umbrella of CIRPC's certification as a HUD Areawide Planning Organization. The procedure for joining CIRPC currently involves the signing of articles of agreement between the county and each community, and CIRPC. Jasper County has proposed an alternative to this procedure to which this office requests your opinion. The proposed alternative involves the Jasper County Regional Planning Commission becoming a member of CIRPC as the representative of Jasper County. In this way, Jasper County's inclusion into CIRPC would be facilitated and there would be sufficient guarantee that the Jasper County Regional Planning Commission would continue to function, since it would be the representative of the entire county on the CIRPC commission.

Question: May a single county regional planning commission formed under Chapter 473A or 28E become a member of a multi-county regional planning commission formed under Chapter 473A or 28E."

We answer your question in the affirmative. The laws of Iowa clearly provide for the arrangement suggested by Jasper County. While Chapter 473A, Code of Iowa, 1971, provides for the creation of area planning commissions such as Jasper County Regional Planning Commission (JCRPC), it is not a basis for the joinder of JCRPC with Central Iowa Regional Planning Commission (CIRPC). Rather, in making our determination we rely upon Chapter 28E, Code of Iowa, 1971, which states in relevant part:

"28E.1 Purpose. The purpose of this chapter is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to co-operate in other ways of mutual advantage. This chapter shall be liberally construed to that end."

"28E.2 Definitions. For the purposes of this chapter, the term 'public agency' shall mean any political subdivision of this state; any agency of the state government or of the United States; and any political subdivision of another state. * * *"

Since JCRPC was formed by Jasper County and cities therein pursuant to Chapter 473A, Code of Iowa, 1971, it is the legal arm of the governing bodies of certain political subdivisions of the state. As such, JCRPC is manifestly a public agency as defined in Section 28E.2, supra. It may join CIRPC pursuant to Sections 28E.3 and 28E.4 which provide in part:

"28E.3 Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privilege or authority, and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or agreement."

"28E.4 Agreement with other agencies. Any public agency of this state may enter into an agreement with one or more public or private agencies for joint or co-operative action pursuant to the provisions of this chapter . . . ."

In becoming a member of the multi-regional planning commission, JCRPC will not pre-empt the existing rights of its cities and communities to conduct their own planning operations. Section 473A.7, Code of Iowa, 1971, provides:

"473A.7 Construction of provisions. Northing in this chapter shall be construed to remove or limit the powers of the co-operating cities, towns, counties, school districts, benefited water districts, benefited fire districts, sanitary districts, or similar districts as provided by state law. All legislative power with respect to zoning and other planning legislation shall remain with the governing body of the co-operative cities, towns, and counties. Each participating city, town or county may continue to have its own planning commission or board but may under the joint agreement and in the interest of economy and efficiency and in the interest of uniform standards and procedures, request metropolitan or regional planning commission to assume duties and functions of local planning agencies in whole or in part. The metropolitan or regional planning commission shall have the duty and function of promoting public interest and understanding of the economic and social necessity for long-term co-ordinated planning for the metropolitan or regional area, but its official recommendations shall be made to the governing

bodies of the co-operating cities, towns, counties, school districts, benefited water districts, benefited fire districts, sanitary districts, or similar districts."

The arrangement whereby JCRPC may join CIRPC is a representative of Jasper County is endorsed by the federal legislation which has provided guidance for the recent planning efforts in Iowa. Section 701(c), Chapter 649, 68 Stat. 690, states:

"The Secretary [of HUD] is authorized, in areas embracing several municipalities or other political subdivisions, to encourage planning on a unified regional, district, or metropolitan basis and to provide technical assistance for such planning and the solution of problems relating thereto."

Jasper County's proposal enhances planning on a more unified, regional basis, as contemplated by the above federal statute. Of course, whether, or to what extent, Jasper County will receive HUD funds through this new arrangement is not a concern of our office. We state only that it is clearly permissible for JCRPC to represent Jasper County on CIRPC by agreement pursuant to all the provisions and requirements set forth in Chapter 28E.

July 30, 1973

HIGHWAYS: Speed limits on Primary Road Extensions §§321.285(5), 321.290 and 321.293, Code of Iowa, 1973. State Highway Commission has the authority and jurisdiction to set speed limits on primary road extensions. (Schroeder to Senator Tieden, 7/30/73) #73-7-21

The Honorable Dale L. Tieden, State Senator, Ninth District: In your letter, dated July 13, 1973, you have requested an opinion on the following question:

"I am requesting an official opinion from your office on the question of who has final jurisdiction in the establishment of speed limits through a city when a U. S. highway goes through that city."

The highway referred to in your question is identified as a U. S. highway. Whether it bears that designation or the designation of a State highway makes no difference for the purpose of this answer since both such highways are a part of the Iowa primary road system. A primary road extension is that portion of a primary highway which lies within the corporate limits of a city and is used as a part of the primary road system of the State. *Smith v. City of Algona,* 232 Iowa 362, 5 N.W.2d 625 (1942). The first paragraph of §321.290, Code of Iowa, 1973, states that:

"Whenever the state highway commission shall determine upon the basis of an engineering and traffic investigation that any speed limit hereinbefore set forth is greater or less than is reasonable or safe under the conditions found to exist at any intersection or other place *or upon any part of the primary road system or upon any part of a primary road extension,* said commission shall determine and declare a reasonable and safe speed limit thereat which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway." (emphasis supplied)

This paragraph was the subject of a 1963 Attorney General's Opinion which determined that:

"The Highway Commission has authority to determine, after an engineering and traffic investigation, speed limits other than those set out in subsection (5), §321.285, 1962 Code of Iowa, '. . . upon any part of the primary road system . . .' but such determination must be reasonable." (1964 O.A.G., page 209-210).

It was also said in that opinion at page 210 that:

"The wording of this statute is plain and unambiguous and capable of no other construction." citing (1940 O.A.G., page 306-307)

The wording of this paragraph remains unchanged in the 1973 Code from that of the 1962 Code.

In 1963 a second paragraph was added to §321.290 which as amended in 1967 states that:

"Whenever the council in any city or town shall determine upon the basis of an engineering and traffic investigation that any speed limit hereinbefore set forth is greater or less than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of the city street system, *except primary road extensions,* said council shall determine and adopt by ordinance such higher or lower speed limit as it deems reasonable and safe thereat. Such speed limit shall be effective when proper and appropriate signs giving notice thereof are erected at such intersections or other place or part of the street." (emphasis supplied)

Section 321.293 of the Code authorizes local authorities to set higher speeds on *through highways* than those listed in §321.285 by ordinance, but such higher limits are expressly made subject to the approval of the State Highway Commission and may not in any instance exceed fifty-five miles per hour. This section presents an apparent conflict between the two statutes, but that conflict is of no practical importance since the State Highway Commission must approve any higher speed limits set by local authorities under §321.293.

Based on the clear and unambiguous language of §321.290 and the ultimate approval authority given it in §321.293, it is clear that the State Highway Commission has the authority and jurisdiction to set speed limits on primary road extensions. The only qualifications being that if the speed limits differ from those established by §321.285 they must be based on an engineering and traffic investigation and be reasonable. A city may attempt to set a higher limit on a through highway, but that limit must be approved by the State Highway Commission.

August 2, 1973

LIQUOR AND BEER: Sunday Sales; Fifty per cent of gross receipts. §123.36, Code of Iowa, 1973, as amended by S.F. 144, 65th G.A., 1st Session and §123.21(11). The requirement that 50% of the gross receipts of a licensee for Sunday sales of liquor and beer must come from the sale of goods and services other than liquor or beer means 50% or more over a specified time, including Sundays, to be prescribed by the director and council. Sunday sales alone could not qualify as the time period basis. If the licensee's business in non-liquor sales over the prescribed period is 50% or more, he cannot be required to sell more than beer or liquor on Sunday. (Turner to Gallagher, Director, Iowa Beer and Liquor Control Department, 8-2-73) #73-8-1

Mr. Rolland A. Gallagher, Director, Iowa Beer and Liquor Control Commission: Reference is made to your letters of June 26, 1973, and July 16, 1973, relative to Section 1 of the Sunday Sales of Liquor and Beer Act, Senate File 144, Acts of the Sixty-fifth G.A., First Session, which amended Section One Hundred Twenty-three point Thirty-six (123.36), Code of Iowa, 1973, which reads in part as follows:

"Any club, hotel, motel, or commercial establishment holding a liquor control license for whom the sale of goods and services other than alcoholic liquor or beer constitutes 50% or more of the gross receipts of the licensed premises, subject to the provisions of Section One Hundred Twenty-three point Forty-nine (123.49), subsection two (2), Paragraph B of this Chapter, may sell and dispense alcoholic liquor and beer to patrons on Sunday for consumption on the premises only."

In your letters you request opinions of the attorney general with respect to the following two questions:

"We request your opinion as to whether or not the sale of goods and services constituting fifty percent or more of the gross receipts from the licensed premises refers to sales on Sundays only, or, in your opinion, is it the intent that they refer to the accumulated sales covering a period of normal working days."

"[W]e request your opinion as to whether or not licensees and permittees who have been issued, or will be issued, a Sunday license are in violation of the law if they do not provide on Sundays the same goods and services that they do on the other six days of the week.

Your questions are prompted by the fact that it has been brought to your attention that several licensees throughout the state have arbitrarily changed their mode of operation on Sunday sales. That is that during the week they have goods and services other than alcoholic beverages, such as restaurant facilities which account for 50% or more of their total sales other than alcoholic beverages, but on Sundays have closed their restaurant and are operating solely as taverns or lounges, selling only alcoholic beverages.

While you do not indicate that you are aware that it is in fact being done, there is the possibility that certain licensees who normally sell no goods or services other than alcoholic liquor or beer might undertake to do so on Sunday only in order to qualify for a Sunday license.

It would appear that the answer to both your questions hinges on a determination of over what period of time a licensee must be able to show that its sales of goods and services other than liquor constitutes 50% or more of its gross receipts. The statute, alas, is silent on the subject. However, it is our opinion that such a decision is one which is especially suited for administrative determination by the director and council under the broad rule making powers conferred upon them by §123.21 and particularly §123.21(11) which provides:

"The director may, with the approval of the council and subject to the provisions of chapter 17A, make such rules and regulations as are necessary to carry out the provisions of this chapter. Such authority shall extend to but not be limited to the following:

* * *

"11. Prescribing, subject to the provisions of this chapter, the conditions and qualifications necessary for the obtaining of licenses and permits and the books and records to be kept and the remittances to be made by those holding licenses and permits and providing for the inspection of the records of all such licensees and permittees."

In making and promulgating rules the director and council will, of course, be mindful of the declaration of public policy found in §123.1:

"This chapter shall be cited as the 'Iowa Beer and Liquor Control Act', and shall be deemed an exercise of the police power of the state, for the protection of the welfare, health, peace, morals, and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose, and it is declared to be public policy that the traffic in alcoholic liquors is so affected with a public interest that it should be regulated to the extent of prohibiting all traffic in them, except as provided in this chapter."

We have been able to find only one case even remotely touching on the questions you present. *Ellis v. Pennsylvania Liquor Control Board,* 1965, ... Pa. ....., 211 A.2d 3. *Ellis* involved the 55% food sales requirement found in the Pennsylvania Sunday sales statute. Unlike the Iowa law the Pennsylvania statute in describing premises where food is served used the term "habitually" which the court construed to mean "customarily". Hence, the case is probably of marginal relevance. Nevertheless, it is worth noting that in determining whether or not the 55% requirement had been satisfied both parties and the court used a period of one year although, as in Iowa, the Pennsylvania statute does not prescribe this or any other fixed period of time.

Withal, it is our opinion that the director and council may make reasonable rules prescribing the period of time over which the 50% non-liquor sales must occur. However, we do not think non-liquor sales only on Sunday could reasonably be found to qualify and indeed would be contrary to the manifest intent of the general assembly in enacting the Sunday sales law. As stated by the Pennsylvania court in *Ellis:* "[T]he provisions of the Code must be interpreted in the interest of the public welfare and not in aid of persons seeking private gain."

However, a licensee who can demonstrate that non-liquor sales over whatever period of time is fixed by regulation exceeds 50% cannot be required to sell food on Sunday so long as his non-liquor sales over the prescribed period, including Sundays, still exceeds 50%.

We recognize that it may well have been the intent of the legislature, at least in large part, to authorize Sunday in a limited way so that a person could purchase a beer or an alcoholic beverage with his dinner. Such a construction is perfectly reasonable. But we do not believe the legislature intended the consequence that every tavern not ordinarily selling anything except beer and alcoholic beverages could sell such on Sunday provided that on that day, only, they served a dinner or charged a cover or admissions which constituted more than 50% of their gross receipts for that day; which it seems to us is the logical consequence of such construction. In construing a statute, we cannot read into it words that are not there such as "both on Sunday" *and* over a specified period of time. We understand that amendments to the bill were presented to clarify it and make it more specific and understandable, but were rejected or not acted upon. We are bound by what the legislature said; not what it should or might have said. Rule 344(f)(13), Iowa Rules of Civil Procedure. *Davenport Water Co. v. Iowa State Tax Commission,* 1971 Iowa, 190 N.W.2d 583.

We believe the legislature intended that ordinary taverns, not selling anything but liquor and beer, could not obtain a license for Sunday sales. The sale of liquor and beer has been repeatedly held to be inherently unlawful and that those licensed to sell such are granted nothing more than a bare privilege; not a property right. *Walker v. City of Clinton,* 1953, 244 Iowa 1099, 59 N.W.2d 785; *Michael v. Town of Logan,* 1955, 247 Iowa 574, 73 N.W.2d 714

and *Smith v. Iowa Liquor Control Commission,* 1969 Iowa, 169 N.W.2d 803. In drafting the law in a way which would prevent the ordinary tavern from obtaining a Sunday license, we believe the legislature was exercising its power to reasonably classify the persons and corporations to whom it would grant licenses to do that which is inherently illegal. *Dickinson v. Porter,* 1949, 240 Iowa 393, 35 N.W.2d 66 and *Lee Enterprises, Inc. v. Iowa State Tax Commission,* 1968, 162 N.W.2d 730.

August 8, 1973

STATE OFFICERS AND DEPARTMENTS: Requirements for a Meeting Hall, Chapter 103 and §156.10, Code of Iowa, 1973; Rule 38.1(2), 1973 I.D.R. 807. There is no prohibition against or regulations on, using a building for funerals or wakes as long as the embalming and preparation is done elsewhere. There shall be lighted exit signs above the exit doors. (Blumberg to Mendenhall, State Representative, 8-8-73) #73-8-2

Honorable John C. Mendenhall, State Representative: We are in receipt of your opinion request of July 16, 1973. Your request concerns a building that is being constructed as a community center by a private concern. Said building will be rented for various meetings including funerals and wakes. You ask whether exit signs are necessary over the doors, and if so, what type. You also ask whether there are any regulations concerning or prohibiting the use of the building for funerals and wakes, and whether a body may be kept there unattended overnight. No embalming or preparation of the body will be done in the building.

We can find no statutes or rules concerning funerals or wakes held at a place other than where the embalming or preparation is done, except for §156.10, Code of Iowa, 1973. That section provides that the Commissioner of Public Health "shall inspect all places where dead human bodies are prepared or held for burial . . . ." Since a body would be held for burial in the building, the commissioner has the duty to inspect. However, there appear to be no other rules or statutes concerning this use for the building that would be prohibitive. With respect to your other question, it appears that pursuant to Chapter 103, of the Code, rule 38.1(2), 1973 Iowa Departmental Rules 807, and from a discussion with the Fire Marshall that "Exit" signs should be placed at each exit, and that they shall be lighted.

Accordingly, we are of the opinion that the building may be used for funerals or wakes, subject to the Commissioner of Public Health's authority to inspect. Lighted exit signs shall be placed over each exit door.

August 10, 1973

COUNTY AND COUNTY OFFICERS: Civil Service Status for Deputy Sheriffs, H.F. 439, Acts of the 65th General Assembly. §§80B.3, 80B.11(2)(4), 340.8 and 748.3, 1973 Code of Iowa. Method for implementing the Act establishing Civil Service for Deputy Sheriffs. (Jacobson to Callaghan, Director, Iowa Law Enforcement Academy, 8-10-73) #73-8-3

Mr. John F. Callaghan, Director, Iowa Law Enforcement Academy: We have received from you a request for an Attorney General's opinion concerning

various areas of House File 439, Acts of the 65th General Assembly, which establishes civil service status for deputy sheriffs. Your questions relating to that Act are set out numerically below.

"1. *Do the words 'persons passing the examination' in Section 6(7) require that candidates for positions in classified civil service attain a passing score on an examination in order to be included on the eligibility lists referred to in Sections 8 and 13?*

"2. *Must incumbents compete for their positions with applicants?*

"3. *If the answer to this question is in the negative, must deputies in classified positions submit to examination?*

"4. *If a deputy sheriff elects not to take a civil service examination, or fails to qualify for civil service through examination, is his employment affected?"*

House File 439 creates in each county a civil service commission composed of three members. These commissions are charged with the responsibility of implementing and administering the Act. They have the authority to classify and subdivide deputy sheriff positions according to rank and grade, and to arrange, compile, and administer competitive tests to determine the relative qualifications of persons seeking employment in those classes for the purpose of establishing eligibility lists. See §§6(6) and 6(9), H.F. 439. Both §§8 and 13 of the Act provide that each civil service commission shall certify not more than the ten (10) highest people on the eligibility list (list of ratings) as candidates for promotion. Section 8 states how the eligibility lists shall be made up and is set out, in part, as follows:

"The commission shall for the purpose of certifying to the sheriff the list of deputy sheriffs eligible for promotion, rate the *qualified deputy sheriffs* on the basis of their service record, experience in the work, seniority, and military service ratings."

It would appear that the eligibility list is not made up of all possible candidates, but only "qualified deputy sheriffs." An earlier sentence in §8 explains how one becomes a "qualified deputy sheriff" and provides that:

"Promotion shall be made from among deputy sheriffs *qualified by competitive examination*, training and experience to fill the vacancies and whose length of service entitles them to consideration."

From the above it appears that a deputy sheriff may become a "qualified deputy sheriff" by taking the competitive exam for the position he seeks, if he meets the other requirements of the statute. He may then be rated on the eligibility list for that position.

New candidates must also qualify by taking a competitive exam for the position they seek. In this regard, §8 states that:

"*All appointments to* and promotions to classified civil service positions . . . shall be made solely on merit, efficiency, and fitness, which shall be ascertained by *open competitive examinations* and impartial investigations."

Since there are no guidelines explaining how to qualify by competitive examination, it seems a reasonable interpretation that a deputy would qualify by getting a passing score on the exam for the position he seeks. This is consistent

with §6(7) which gives the civil service commission the power to certify candidates from a list of names of those "passing the exam." The setting of a "cut-off" or "passing" score is necessary in order to provide a standard for appointing incumbents into civil service in their respective positions.

Section 9 states that:

"All persons holding a position on the effective date of this Act which is deemed classified by Section seven (7) of this Act *are eligible* for a permanent appointment under civil service to the offices or positions currently held *if they qualify for appointment pursuant to section eight (8) of this Act* . . . ."

The use of the words "are eligible" indicates that incumbents would not automatically be inducted into civil service, but that if they desired to attain civil service status, they would have to qualify pursuant to §8, paragraph 1. If an incumbent elected not to take the examination or did not qualify through examination, he would not be inducted into civil service, however, his employment in his present position would not be affected. For incumbents, the purpose of the examination is to establish civil service status and not to compete for the position held.

It would appear that it was the intent of the legislature to establish civil service for deputy sheriffs by orderly progression. Normal attrition of those deputy sheriffs who did not desire civil service status or who failed to qualify by examinations would require their replacement through the civil service process.

The United States Supreme Court has stated that the Civil Rights Act of 1964 prohibits giving such examinations controlling force unless they have demonstrated a known significant relationship to job performance. *Griggs v. Duke Power Co.*, 401 U.S. 424, 436; 91 S.Ct. 849, 28 L.Ed.2d 128 (1971). A test validation takes a substantial period of time and tests recently made up by the commissions would not have the required validity. We recommend that each commission lower all test cut-off scores so that tests do not act as a controlling force in screening applicants or incumbents until the tests are properly validated. See Iowa Civil Rights Commission Rules, Chapter 2.9 (105A). It is our opinion that until the various tests are validated, candidates for deputy sheriff positions, those seeking promotion, and incumbents seeking civil service status would merely be required to take their respective tests in order to "qualify by competitive exam." Selection would be made based on the other requirements listed in the Act.

For example, a deputy sheriff desiring promotion may become a "qualified deputy sheriff" under §8, paragraph 2, by taking the competitive exam for the position he seeks, if he already has the necessary training, experience and length of service. He would then be rated by the commission on the basis of his "service record, experience in the work, seniority, and military service rating." Once new candidates have taken the competitive exam for the position they seek, they will be selected solely on merit, efficiency, and fitness, determined by impartial investigations under §8, paragraph 1. Incumbents may attain civil service status by taking the exam for their present position, if they are already "qualified deputy sheriffs" in other respects.

"5. *What persons are to be included in classified civil service positions under this act?*"

There are two sections which define what persons may attain a civil service position under the provisions of this Act.

Section 7 provides that:

"The classified civil service positions covered by this Act *shall include persons actually serving* as deputy sheriffs who are salaried pursuant to Section three hundred forty, point eight (340.8) of the Code, but do not include a chief deputy sheriff, two second deputy sheriffs in counties with a population of more than one hundred thousand, and four second deputy sheriffs in counties with a population of more than two hundred thousand."

Section 10 provides that:

"An applicant for any position under civil service shall be a citizen of the United States who can read and write the English language, and shall meet the minimum requirements set forth by the Iowa law enforcement academy for a law enforcement officer."

Under §7, persons actually serving as deputy sheriffs shall be covered by civil service although chief deputies and second deputies in counties of certain population levels are excluded. We interpret this to mean that only those deputies who are required to perform the duties of a deputy sheriff as set out in the Code will be included. Deputy sheriffs are "peace officers" and the duties of a "peace officer" given in Chapter 748.3 of the Code of Iowa are substantially the same as those of a law enforcement officer given in Chapter 80B.3, Code of Iowa, 1973. A "law enforcement officer" is:

"A conservation officer, a member of a police force or other agency or department of the state, county, city or town regularly employed as such and who is responsible for the prevention and detection of crime and the enforcement of the criminal laws of this state and all individuals, as determined by the council [Iowa Law Enforcement Academy Council], who by the nature of their duties may be required to perform the duties of a peace officer."

Thus, those employees of the sheriff's office who may be designated as deputy sheriffs, but who do not actually perform law enforcement duties are not included in civil service.

Chapter 80B.11(2)(4), Code of Iowa, 1973, gives the Iowa Law Enforcement Academy Council the power to set minimum physical, educational, mental, moral and training requirements for law enforcement officers. It is our opinion that in order to be in a classified civil service position, a deputy sheriff must meet these minimum requirements and be employed in a position with duties as defined under §80B.3.

"6. *What is the meaning of the last sentence of Section 9 concerning the designation of a permanent rank for chief deputies?*"

The last sentence of §9 states that:

"The commission shall designate a permanent rank for those persons (serving) as chief deputy on the effective date of this Act and such persons shall be inducted permanently in civil service in that rank."

Under §7, chief deputies are not included in the classified civil service positions covered by this Act. It is the express intention of §9 to induct without examination into civil service those persons who are serving as chief deputy on the

effective date of this Act. The commission is responsible for designating the permanent rank for this individual. This rank will depend upon the classifications, ranks, and grades established by the commission under §6, paragraph 9, of the Act. Under §7, a deputy sheriff who is designated chief deputy sheriff, may retain such rank during the period of his service as chief deputy sheriff. Upon termination of his duties as chief deputy sheriff, he will revert to his permanent rank.

"7. *Since Section 9 makes no provision for second deputies and they are expressly excluded from civil service classification by Section 7, are these individuals eligible under this Act for civil service status?*"

Section 7 states that the classified civil service positions do not include "one chief deputy in each county and two second deputy sheriffs in counties with a population of more than one hundred thousand, and four second deputy sheriffs in counties with a population of more than two hundred thousand." There is no provision for inducting second deputies into civil service without examination similar to the provision in §9 which provides for the induction of chief deputies. It is our opinion, then, that inasmuch as the second deputy positions are excluded from classification, and no other provision allowing induction of second deputies into civil service appears in the Act, that they are thereby ineligible for civil service status, as a second deputy. Such a person may after he leaves his second deputy position, attain civil service status by obtaining employment in a position classified by this Act if he qualified by examination pursuant to §8.

"8. *Is there an inconsistency between the probationary period set forth in Section 11 as a condition precedent to permanent appointment, and the failure to specify such a provision in Section 13 where appointment by the sheriff of one of the ten persons on the certified list shall be deemed permanent?*"

The pertinent portions of §§11 and 13 of the Act read as follows:

"The tenure of every deputy sheriff holding an office or position of employment under the provisions of this Act shall be conditional upon a *probationary period* of not more than twelve months and where such deputy sheriff attends the law enforcement academy or a regional training facility certified by the director of the Iowa Law Enforcement Academy, a probationary period of not more than six months . . . ."

Section 13 states:

"Whenever a position in the classified service is to be filled, the sheriff shall notify the commission of that fact, and the commission shall certify the names and addresses of the ten candidates standing highest on the eligibility list for the class or grade to be filled. The sheriff shall appoint one of the ten persons so certified and the appointment *shall be deemed permanent.*"

A reading of these sections in context with the remainder of the Act indicates that Section 11 refers to new employees starting in classified civil service positions. In situations such as this probationary periods are traditionally utilized. Section 13 deals with promotions or filling classified positions from an eligibility list made up of deputy sheriffs who are already in civil service and are seeking other positions. Such persons are permanently appointed into civil service and may only be removed for cause under the procedures provided for by Section 12. Therefore, there is no inconsistency between Section 11 and Section 13, and permanent appointees in the civil service are not subject to a probationary period upon promotion.

"9. *May county treasurers or auditors refuse to pay the salaries of deputy sheriffs after the effective date of this Act, until the provisions of Section 14 have been met?*"

Section 14 states that:

"No treasurer, auditor, or other officer, or employee of any county subject to this Act shall approve the payment of or be in any manner involved in paying, auditing or approving salary, wage, or other compensation for services to any person, subject to the provisions of this Act, unless a payroll . . . containing the names of the persons to be paid . . . bears the certificate of the civil service commission . . . . The certificate shall state that the person named therein have been appointed or employed in compliance with the terms of this Act . . . ."

The effective date of this Act is August 15, 1973. It is provided under §2 that a three member civil service commission shall be set up within sixty days of the effective date. Section 6, paragraph 2, provides that thirty days prior notice of the civil service tests be posted in the offices of the sheriff and board of supervisors. Thus, together, §§2 and 6 provide a period of at least ninety days to allow for the formation of civil service commissions, the election of a chairman, the appointment of a personnel director and the posting of notice of civil service tests.

Until this has been accomplished, the commissions cannot compile a payroll list as required under §14 certifying that persons have been appointed or employed in compliance with this Act. The legislature, in providing for civil service to deputy sheriffs, did not intend to disrupt the machinery of the county sheriff's office. The Act, therefore, provides reasonable time limitations to insure orderly implementation of its provisions.

To require that §14 be implemented immediately on the effective date of the Act is to disregard §§2 and 6 which make provisions for implementation within certain specified time limits. Until such time limits (90 days) have elapsed, the county auditors should continue to handle the sheriff's office payroll under the existing system.

It is noted that the civil service commission will be able to certify to the county auditor for pay purposes only those employees of the sheriff's office who qualify as deputy sheriffs in conformance with this Act. Deputy sheriffs who do not qualify for civil service, either through election not to submit to examination, or who fail to qualify through examination, will continue to be paid under the existing county payroll system. Other employees of the sheriff's office who are ineligible for civil service will likewise continue to be paid under the existing system.

August 15, 1973

INSURANCE: Group coverage. Mandatory statutory provisions of H.F. 156, 65th General Assembly pertaining to conversion does not apply to contracts in force prior to August 15, 1973. (Nolan to Huff, Commissioner of Insurance, 8-15-73) #73-8-4

Mr. William H. Huff, III, Commissioner of Insurance: Reference is made to your request for an opinion concerning House File 156 of the 65th General Assembly of Iowa, which is an act relating to group insurance. Section 3 of this recently enacted legislation amends §509.3, Code of Iowa, 1973, by adding a new sub-section providing for mandatory conversion to an individual or

family policy of hospital and medical expense which is substantially similar to the coverage held under the group contract.

The question you present is, what effect this legislation has upon contracts which were negotiated, consumated or enforced prior to August 15, 1973.

It is the opinion of this office that contracts which were in force prior to August 15, 1973, are not required to contain the mandatory conversion language. However, such language does become a requirement of the contract on any anniversary date, subsequent to August 15, 1973, at which time other amendments are made to the group contract. A statute is presumed to be perspective in its operation unless expressly made retrospective. §4.5 Code of Iowa, 1973.

August 15, 1973

MENTAL HEALTH: Expense of indigents — §§229.42, 230.1, 347.22. The county has the responsibility of paying for the care of indigents applying for voluntary admission at a mental hospital when such person has a legal settlement in the county regardless of whether the person was residing in another county at the time of entering the hospital for examination and treatment. (Nolan to Williams, Humboldt County Attorney, 8-15-73) #73-8-5

Mr. Richard A. Williams, Humboldt County Attorney: Reference is made to your recent request for an Attorney General's opinion concerning the responsibility of your county in providing payment for treatment of patients at the Mental Health Center in Fort Dodge, Iowa. Your letter indicates that the board of supervisors of Humboldt County are concerned about the responsibility for paying for the cost of treatment for those who are residents of Humboldt County or those who have legal settlement in Humboldt County when treatment is given at such facility.

It appears that under §229.42 a person wishing to make application for voluntary admission to a mental hospital shall have the cost of hospitalization paid by the county of legal settlement after such is determined by the clerk of the district court where the application is filed.

Under Code §230.1 the necessary and legal costs and expenses attending the taking into custody, care, investigation, admission, commitment and support of a mentally ill person sent to a state hospital are to be paid by the county in which such person has legal settlement and under §347.22, the board of supervisors has sole discretion as to the determination of indigent persons entitled to care at the county's expense.

In view of the above, it is the opinion of this office that the county has the responsibility of paying for the care of those persons who have legal settlement in Humboldt County, even though they may have been residing in another county at the time they were sent to the Mental Health Center for psychiatric examination and treatment.

August 15, 1973

TAXATION: Availability of extraordinary homestead tax reimbursement to residents of private nursing homes; S.F. 376, 65 G.A., first session. Payments made to a nursing home can be rent constituting property taxes paid, and can be claimed in part for purposes of the reimbursement of property taxes paid as provided by S.F. 376. (Capotosto to Schaben, State Senator, 8-15-73) #73-8-6

Hon. James F. Schaben, State Senator: You have requested an opinion of the Attorney General with reference to application of Senate File 376, 65th G.A. 1st Session, to permanent residents of private nursing homes. Specifically, the situation and question you pose is as follows:

"A woman over 65 from Cass county has entered a nursing home which is not a tax exempt enterprise. She pays a monthly fee to the home for non medical services which include room and meals. The woman lives in the nursing home throughout the year and claims it as her homestead.

The question is: can payment made to a nursing home be considered as rent constituting property taxes paid as defined in Senate File 376. And if this is the case can the renter receive reimbursement for property taxes paid as provided in Senate File 376 as passed by the 65th General Assembly."

Section 2 of S.F. 376 provides:

"In addition to the homestead tax credit allowed under section four hundred twenty-five point one (425.1), subsections one (1) through four (4), inclusive, of the Code, persons who own or rent their homesteads and who meet the qualifications provided in this Act are eligible for an extraordinary property tax reimbursement payable in September, 1974 and in September of any subsequent year."

The term "homestead" is defined at Section 3(5) of S.F. 376 as:

". . . the dwelling actually used as a home by the claimant during all or part of the base year, whether owned or rented, and so much of the land surrounding it, not exceeding one acre, as is reasonably necessary for use of the dwelling as a home, and may consist of a part of a multi-dwelling or multi-purpose building and a part of the land upon which it is built. It does not include personal property except that a mobile home may be a homestead. . . ."

"Rent constituting property taxes paid" is defined at Section 3(9) of S.F. 376 as:

"Twenty percent of the gross rent actually paid in cash or its equivalent during the base year by the claimant or his household solely for the right of occupancy of their homestead, exclusive of charges for any utilities, services, furniture, furnishings, or personal property appliances furnished by the landlord as a part of the rental agreement whether or not expressly set out in the rental agreement."

Section 3(9) of S.F. 376 also makes provision for cases in which the gross rent as defined in the statute is not precisely ascertainable.

"If the landlord does not supply the charges for any utilities, services, furniture, furnishings, or personal property appliances furnished by him, or if the charges appear to be incorrect, the director of revenue may apply a percentage determined from samples of similar gross rents paid solely for the right of occupancy."

The first question that must be analyzed is whether a private, non-tax exempt nursing home qualifies as a "homestead", as that term is defined in Section 3(5) of S.F. 376. The law requires that there be a dwelling house and that it actually be used by the taxpayer as his home. The dwelling may be rented and it may consist of a part of a multi-dwelling or multi-purpose building. A nursing home is designed and built to house its tenants on an extended or permanent basis. A common definition of the word "dwelling house" is found in Blacks Law Dictionary, 4th Ed. at Page 596:

"The house in which a man lives with his family; a residence; abode; habitation; the apartment or building, or group of buildings, occupied by a family as a place of residence. . . .

'It may mean a single house used by one family exclusively as a home. It may include an apartment building, or any structure used by human beings. . . .'"

A nursing home occupied by a qualified taxpayer as his permanent and exclusive residence does constitute a "homestead" within the meaning of Section 3(5) of S.F. 376. The statute requires only that there be a dwelling and that it be used as a home.

Since a nursing home can come within the statutory definition of a homestead, it follows further that rental paid for the right to occupy such a home is subject to the reimbursement provisions of S.F. 376. However, it must be emphasized that the individual resident must qualify to claim the nursing home as his homestead. That is, the nursing home must be his permanent and exclusive residence. A person who is placed in the home temporarily for recovery or rehabilitation purposes only cannot get reimbursement for any part of the fees paid.

Under Section 3(8) a taxpayer is entitled to a reimbursement of twenty percent of gross rent paid during the tax year. Gross rent is defined in Section 4(9) as the amount of money paid at arms length *solely* for the right of occupancy of the homestead. [emphasis supplied]. Charges for utilities, services, furnishings, furniture or appliances are not rent within the meaning of the statute. The problem with a monthly fee paid to a nursing home is that the fee is intended to cover more than just the right to occupy the premises or a designated part of the premises. The fee encompasses the use of furniture and various appliances and equipment. It covers meals. It covers a multitude of other services ranging from linen service to recreational and nursing services. Without a breakdown of charges by the management of the nursing home it is impossible to ascertain just how much of the fee is for rent and how much is for use of other property and services.

Clearly the taxpayer is not entitled to a reimbursement of Twenty percent of the entire fee paid to the home because S.F. 376 limits it to twenty percent of "rent constituting property taxes paid." The question thus becomes, how is one to determine the amount paid for rent and the amount paid for other property and services?

The legislature has provided for a breakdown of rent and other charges in Section 3(9) of S.F. 376 by empowering the Director of Revenue to designate a certain percentage of the total fee as "rent constituting property taxes paid." This percentage must be determined on the basis of samples of similar gross rents paid solely for the right of occupancy. We have contacted the Department of Revenue and are informed that guidelines setting forth the percentage to be used have not as yet been promulgated.

In conclusion, it is the opinion of the Attorney General that payments made to a nursing home by one qualified to claim said home as his homestead, can be considered in part as rent constituting property taxes paid as defined in S.F. 376. Moreover, the renter can receive reimbursement for property taxes paid as provided in that statute. Where a monthly fee encompasses charges for more than just the right of occupancy, the amount thereof attributable to gross rent is to be determined by guidelines set by the Director of Revenue.

August 15, 1973

SCHOOLS: Area Colleges — Ch. 110, §6 (HF 775) Acts 65th G.A., First Session. Language of a statute which limits the power of area vocational schools to increase liberal arts programs does not operate to preclude a community college board from deemphasizing such a program at its campuses by discontinuing the presence of a resident liberal arts faculty and shuttling such instructors to the school from another campus in the area. (Nolan to Krause, State Representative, 8-15-73) #73-8-7

Honorable Robert A. Krause, State Representative: This is written in reply to your recent letter requesting an interpretation of Section 6 of House File 775 enacted by the 65th General Assembly of Iowa. The legislation in question is as follows:

"In exercising its power under chapter two hundred eighty A (280A) of the Code, the state board shall take all necessary action to assure that each area community college, including a college which was formerly a public community or junior college, shall be allocated a sufficient share of its area budget to provide adequate funding for its existing programs and approved new programs, and shall also take all necessary action to assure that no area vocational school which is not presently qualified as a "junior college" or "community college", as those terms are defined in section two hundred eighty A point two (280A.2), subsections two (2) and three (3), of the Code, shall expand its liberal arts or preprofessional programs, or other instruction partially fulfilling the requirements for a baccalaureate degree, except in cooperation with existing liberal arts facilities, in order to so qualify."

As I understand the situation described in your letter, Iowa Lakes Community College has recently dismissed all of its social science instructors at the Emmetsburg campus and proposes to shuttle instructors in from the Estherville campus to keep classes going as presently scheduled. Although there has been an enrollment drop at Emmetsburg, there are presently between 75 and 100 full daytime students in arts and sciences. Recruiting of additional students will be difficult with no teachers resident at the Emmetsburg campus. The question which you present is then:

"Is the board of Iowa Lakes Community College legally entitled to eliminate the arts and sciences faculty resident at the Emmetsburg campus and replace them with shuttled-in instructors?"

While House File 775, supra, clearly provides that no area vocational school which is not presently qualified as a junior college or community college shall *expand* its liberal arts or preprofessional programs or other instructions leading to baccalaureate degree, except in cooperation with existing liberal arts facilities, the reverse does not necessarily follow. Under §280A.23, the board of directors of an area vocational school or college has authority to determine the curriculum to be offered in such school or college, subject to approval of the state board. The board also has power under §280A.23 (5) to "enter into contracts and take other necessary action to insure a sufficient curriculum and efficient operation of the school or college and maintain and protect the physical plant, equipment and other property of the school or college."

Accordingly, it appears that while the new legislation contemplates a sufficient budget for the operation of any school under the jurisdiction of the area directors, the statute does not prohibit the directors from determining what is

to be taught at such schools or making arrangements for the consistent operation of any and all locations where classes are held. In other words, I find nothing in the act which requires the maintenance of a full time liberal arts resident faculty at the school in question. Area community colleges are to provide educational opportunities to the greatest extent possible within the limited territory of the boundaries of the area. (§280A.1). Area directors have discretion to accord additional emphasis to vocational programs, provided that such programs do not duplicate those others offered by other existing institutions. In doing so, they may give less emphasis to the liberal arts at a given school campus.

August 15, 1973

APPROPRIATIONS: Funds appropriated in S.F. 578, 65th G.A., for the Office of Citizens' Aide to perform the duties listed in S.F. 73, 65th G.A., which failed to pass both houses of the Legislature, shall revert to the State Treasury. S.F. 73, 65th G.A., S.F. 578, 65th G.A., §601G.14, Code of Iowa (1973). An appropriation made by the Legislature expressly in reference to a proposed bill, is nullified by the failure of that Bill to be enacted in that legislative session. (Beamer to Mayer, Office of Citizens' Aide, 8-15-73) #73-8-8

Mr. Thomas R. Mayer, Acting Citizens Aide: This opinion is in reference to your request dated July 11, 1973, regarding Senate File Appropriation 578. In your request you stated:

"Enclosed are copies of Senate Files 578 and 73. Senate File 73 is a bill directing the Citizens' Aide to appoint an assistant to investigate complaints of inmates of the State's correctional institutions. Senate File 73 does not expand, enlarge or in any way alter the jurisdiction of the Office of Citizens' Aide, as stated in Chapter 601G of the 1973 Code of Iowa. The Citizens' Aide Office has been performing this function already on a limited basis. Senate File 73 passed the Iowa Senate on April 23, 1973, by a vote of 38 to 10. It did not pass the House during the past session.

Senate File 578 is an appropriations bill for the Office of Citizens' Aide for the Biennium of 1973-1975. Subsection 1 of Senate File 578 appropriates $72,250 for 1973-1974 and$72,710 for 1974-1975. Subsection 2 states, 'To match federal funds available to carry out the provisions of Senate File 73 of the Sixty-fifth General Assembly, 1973 Session: $2,640 for each year of the biennium.

Subsection 3 makes the funds appropriated by subsection 2 available only 'at such time as federal funds are provided to carry out the provisions of Senate File 73 of the Sixty-fifth General Assembly, 1973 Session.

On July 10, 1973, the Iowa Crime Commission approved a grant to the Office of Citizens' Aide to establish a program relating to the investigation of complaints concerning correctional institutions. The program would be in conformance with the provisions stated in Senate File 73. The Crime Commission grant is contingent upon the Office of Citizens' Aide showing a line item in the budget of the Office as a cash match to the Crime Commission funds. The federal funds mentioned in item 2 of Senate File 578 are funds from the Crime Commission.

Senate File 578 was passed late in the session by the House of Representatives. It had been passed by the Senate about one month earlier. So, although Senate File 73 did not pass the House, both the Senate and House did pass Senate File 578, with a reference to Senate File 73.

Is the appropriation stated in Subsection 2 of Senate File 578 contingent upon the passage into law of Senate File 73?"

It is the opinion of this office that the appropriation listed in subsection 2 of the Senate File 578 was specifically made in reference to Senate File 73 and therefore, those funds shall revert to the state treasury. This action is clearly evidenced by Senate File 578, which states in full:

"Section 1. There is appropriated from the general fund of the state to the office of citizens' aide for the fiscal biennium commencing July 1, 1973, and ending June 30, 1975, the following amounts, or so much thereof as is necessary, to be used for the purposes designated:

	1973-74 Fiscal Year	1974-75 Fiscal Year
1. For salaries, support, maintenance, and miscellaneous purposes:	$ 72,250	$ 72,710
2. To match federal funds available to carry out the provisions of Senate File 73 of the Sixty-fifth General Assembly, 1973 Session:	$ 2,640	$ 2,640

3. Funds appropriated by subsection two (2) of this section shall only be made available at such time as federal funds are provided to carry out the provisions of Senate File 73 of the Sixty-fifth General Assembly, 1973 Session.

Sec. 2. All federal grants to and the federal receipts of the office of citizens' aide are appropriated for the purpose set forth in the federal grants or receipts.

Sec. 3. Notwithstanding the provisions of section eight point thirty-three (8.33) of the Code, all unencumbered or unobligated balances of appropriations made by subsection one (1) of section one (1) of this Act for the first fiscal year of the biennium commencing July 1, 1973, shall, on August 31, 1974, revert to the state treasury and to the credit of the fund from which appropriated."

The specific reference to Senate File 73 in Senate File 578 will allow no other conclusion. In construing statutes, courts search for legislative intent as shown by what the legislature said, rather than what it should or might have said, see *Consolidated Freightways Corporation of Delaware v. Nicholas,* 137 NW2d 900, 258, Iowa 115 (1966). The funds appropriated in subsection 2 of Senate File 578 were made for the carrying out of the provisions of Senate File 73; when this bill was not acted upon by the House the purpose of the appropriation was defeated. It has long been held in this State, that in construing a statute, the express mention of one thing by the legislature implies the exclusion of others, see for eg. *North Iowa Steel Co. v. Staley,* 112 NW2d 364, 253 Iowa 355 (1962). In the case at hand, the legislature plainly stated that the funds described in subsection 2 of Senate File 578 were to be used in the operation of Senate File 73. No other purpose can be tolerated in light of this express language. Even though there is some language in Chapter 601G, 1973 Code of Iowa already dealing with the same area to be affected by Senate File 73, i.e. institutionalized complaints, Section 601G.14, this would not authorize the use of funds designated for the operation of Senate File 73.

We, therefore, hold that the appropriation made in subsection 2 of Senate File 578 was nullified by the failure of Senate File 73 to pass the House in the past legislature session. It might be emphasized though that there seems to be

sufficient authority for the Officer of Citizens' Aide to carry on the type of activity prescribed in Senate File 73 already in §601G.14 of the Code, but the Office must accomplish this under their general appropriation and not with the funds of subsection 2 of Senate File 578.

August 16, 1973

STATE OFFICERS AND DEPARTMENTS: Iowa State Fair, raffles, prizes awarded. Sec. 4, Senate File 108, Acts, 65th G.A., First Session (1973). The fair may hold any number of raffles in which the aggregate of the merchandise prize or prizes for each raffle does not exceed a value of $25.00. In addition the fair may hold one raffle per year in which the value of the single merchandise prize award does not exceed $5,000.00. (Turner to Fulk, State Fair Board, 8-16-73) #73-8-9

Mr. Kenneth R. Fulk, Secretary-Manager, Iowa State Fair: This letter is in response to your request for an opinion on the following question:

"If the Fair were to give 10 prizes, 1 each day, each prize being of a value of about $400, with a total value of 10 prizes being $4,000, 1 drawing each day for a period of 10 days, would this be considered 1 prize, and would it be permissible?"

The term "raffle" under Senate File 108, Acts of the 65th General Assembly, has been defined under Section 1, subsection 3 of that act to mean:

"'Raffle' means a lottery in which each participant buys a ticket for a chance at a prize with the winner determined by a random method."

The definition that the legislature has given to the term "raffle" (which is a lottery), echoes not only the definition that the Iowa Supreme Court has consistently employed for well over one hundred years [*Guenther v. Dewien,* 11 Iowa 133 (1860)] but also is in kinship with the definition that other authorities have uniformly agreed upon. In *Brenard Manufacturing Co. v. Jessup and Barrett Co.,* 186 Iowa 872, 173 N.W. 101, 102 (1919) it was stated:

"The term 'lottery' has been variously defined by the courts as a scheme for the division or distribution of property or money by chance, or any game of hazard, or a species of game among persons who have paid or agreed to pay a valuable consideration for the chance to obtain a prize. Chancy Park Land Co. v. Hart, 104 Iowa, 592, 73 N.W. 1059; Burks v. Harris, 91 Ark. 205, 120 S.W. 979, 23 L.R.A. (N.S.) 626, 134 Am. St. Rep. 67, 18 Ann. Cas. 566; Commonwealth v. Jenkins, 159 Ky. 80, 166 S.W. 795, Ann. Cas. 1915B, 170; Eastman v. Armstrong-Byrd Music Co., 212 Fed. 662, 129 C.C.A. 198, 52 L.R.A. (N.S.) 108.

"Authorities uniformly agree that the three elements necessary to constitute a lottery are: (a) A consideration; (b) the element of chance; and (c) a prize. State v. Perry, 154 N.C. 616, 70 S.E. 387; Hull v. Ruggles, 56 N.Y. 424; Cross v. People, 18 Colo. 321, 32 Pac. 821, 36 Am. St. Rep. 292; Eastman v. Armstrong-Byrd Music Co., supra."

Although previously illegal, the 65th General Assembly, First Session, legalized certain forms of lotteries within the State of Iowa, i.e., fair raffles. The authorization for fair raffles is found in Senate File 108, Section 4, subsections 1 and 2, where it is stated:

"Sec. 4. Fair Raffles. A fair may conduct raffles, provided:

"1. The raffle shall be subject to the same restrictions provided for games of skill and games of chance in section three (3), subsections one (1) through eight (8) of this Act, and

"2. That notwithstanding subsections one (1) and six (6) of section three (3) of this Act, a fair may hold not more than one raffle per year at which a merchandise prize may be awarded if not greater than five thousand dollars in value by purchase price paid by the fair."

The limitations imposed by subsection 1 of §4 pertaining to fair raffles, quoted above, would allow any number of raffles "subject to the same restrictions provided for games of skill and games of chance in section three (3)". Thus, the fair may conduct any number of raffles under the restrictions of §3 so long as it is for a merchandise prize (§3(3)) and the value of the prize does not exceed $25.00 (§3(6)): "If a prize consists of more than one item, unit or part, the aggregate retail value of all items, units or parts shall not exceed twenty-five dollars." Thus, any number of raffles may be held by the fair in which the aggregate of the merchandise prize or prizes for each raffle does not exceed a value of $25.00.

Subsection 2 of §4 provides an exception in which "a fair may hold *not more than one raffle per year* at which *a merchandise prize* may be awarded if not greater than five thousand dollars in value by purchase price paid by the fair." This means that in addition to the aforementioned $25.00 raffles, the fair may have one raffle, and only one, in which the value of the prize exceeds $25.00 so long as the value of the prize is not greater than $5,000.00. So, you may not give ten prizes each with a value of about $400.00 and totalling less than $5,000.00 as you have asked. But you may have one merchandise raffle, for an automobile for example, where the prize does not exceed $5,000.00. In that raffle, there can only be one prize.

August 17, 1973

CRIMINAL LAW: Gambling, Punchboards illegal, §§3 and 12, Senate File 108, Acts, 65th G.A., First Session (1973). Punchboards and Push Cards which operate upon a concealed element basis constitute illegal gambling devices. (Coleman to Nystrom, State Senator, 8-17-73) #73-8-10

Senator John N. Nystrom: This is to acknowledge receipt of your letter on July 23, 1973, in which you requested the following from this office:

"I am requesting an opinion whether or not a punch board is legal under Senate File #108, which passed in the last General Assembly."

Formerly, under Section 99A.1, Code of Iowa 1973, a punchboard was considered to be a gambling device:

"1. 'Gambling devices' means roulette wheels, klondike tables, poker tables, *punchboards,* faro layouts, keno layouts, slot machines. . . ."

Accordingly, it was illegal to possess such device as related in Chapter 726, Section 5:

"No one shall, in any manner or for any purpose whatever, except under proceeding to destroy the same, have, keep, or hold in possession or control any roulette wheel, klondyke table, poker table, punchboard, faro, or keno layouts or any other machines used for gambling, or any slot machine or device with an element of chance attending such operation."

The foregoing sections of the Code of Iowa 1973, were amended by Senate File 108, Acts of the 65th General Assembly, Section 12:

"The provisions of this section (99A.1) shall not apply to games of skill, games of chance, or raffles conducted pursuant to this Act or to devices lawful

under section eleven (11) of this Act or to games lawful under section twenty (20) of this Act."

In essence what Section 12, Senate File 108 relates is that gambling devices formerly illegal under Chapters 99A and 726, Code of Iowa 1973, are no longer illegal and may be used in conducting lawful games under this new Act. It should be noted however that slot machines have been specifically excluded from coming within the provisions of this new Act. This is related in Senate File 108, Section 1, subsection 2:

"'Game of chance' means a game whereby the result is determined by chance and the player is determined by chance and the player in order to win aligns objects or balls in a prescribed pattern or order or makes certain color patterns appear and specifically includes but is not limited to the game of bingo. Game of chance does not include a slot machine."

The question then arises by implication, that if punchboards were formerly included in the category of illegal gambling devices and have not become specifically excluded from devices that are not legal, would they not be legal? It is our opinion, that while punchboards have not been specifically excluded as prohibited gambling devices as with slot machines, that they are nonetheless prohibited and illegal under our new gambling law.

This opinion is generated by both reference to Senate File 108 and reference to the nature of a punchboard itself. An examination of the nature of a punchboard would appear to be beneficial and appropriate in this regard. In *Scarne's Complete Guide to Gambling,* by John Scarne, the following information is given as to the nature and history of the punchboard and push card.

"Handmade raffle gameboards, the forerunners of the modern punchboard and push card, were in use in saloons in this country as early as 1795. The first was probably invented by some ingenious saloonkeeper who saw that such a board would enable him to run a raffle for the individual customer. These early raffle boards were 8-inch-square wooden boards, half an inch thick, with a hundred or so quarter-inch holes drilled through the board, *each of which contained a rolled up, numbered slip of paper. The player paid a nickel, dime or quarter for a chance, then used a nail to push out one of the numbered slips.* If his number corresponded to a predetermined winning number, he received a bottle of liquor or a cash award.

"The raffle gameboard disappeared about 1815 because too many saloonkeepers were holding out the top winning numbers for themselves. They reappeared about 1870 in a slightly different form. Still handmade, they were of cardboard instead of wood and *were called punchboards because the players pushed out the numbered slips by punching a hole through a paper covering glued to the front and back surfaces of the board.*

* * *

"Punchboards come in a variety of sizes ranging from the small pocket-sized board with thirty or more holes up to the giant 10,000 hole board whose top prize award may be as much as $500. *The player pays from 5¢ to $1 for the privilege of trying to punch out a numbered slip that corresponds to one of the prize numbers printed on the boards display section.*

"A push card is simply a different version of a punchboard. Two pieces of cardboard are glued together and the outer surface bears partially perforated circles instead of holes. The small rod used to punch out a chance on a punchboard has been eliminated. *The player merely needs to push his fingers against one of the circles, dislodging two small pieces of card, one of which bears a printed chance on its previously hidden surface."*

Mr. Scarne's description of a punchboard echoes an earlier Iowa Supreme Court decision, *Parker-Gordon Importing Co. v. Benakis,* 213 Iowa 136, 238 N.W. 611, 614 (1931), in which it was stated:

"In *Commonwealth v. Gritten,* 180 Ky. 446, 202 S.W. 884, 885, is found the following description of a punchboard: 'The punchboard consists of a square board containing numerous holes and a great many numbers. *On punching one of the holes a number would appear.* On a rack nearby are numerous articles, consisting of knives, rings, watches, etc., worth from 50 cents to $5 each, and numbered to correspond with the numbers on the board. The player purchases a post card for 5 or 10 cents and is then entitled to a punch. *He then punches one of the holes, and if there appears a number corresponding to the number of any of the articles of merchandise he is entitled to that article . . .*' (Emphasis added.) Also *State v. Turlington,* 200 Mo. App. 192, 204 S.W. 821."

It becomes apparent in light of the foregoing explanatory information with regard to punchboards and push cards, that they are designed and operated upon a concealed number, letter, or symbol system, and that concealment in one form or another is an integral element. It is this element in the punchboard and push card's nature that make them illegal under Iowa law even though they have not been specifically excluded under Iowa law as an illegal gambling device (as with slot machines). Section 3, subsection 7 of Senate File 108 states: "No concealed numbers . . . may be used to play any game. . . ."

It is therefore our opinion that punchboards and push cards in the commonly understood forms are gambling devices which the Iowa Legislature did not see fit to legalize and as such are illegal.

August 20, 1973

CONSTITUTIONAL LAW: Iowa Dissolution of Marriage Statute — Ch. 598, §79.5, Code of Iowa, 1973. The Iowa Dissolution of Marriage Statute is constitutional in light of recent U.S. Supreme Court decision. (Beamer to Monroe, State Representative, 8-20-73 #73-8-11

Honorable W. R. Monroe, State Representative: This opinion is in reference to your request regarding the constitutionality of the Iowa Dissolution of Marriage statute. You specifically stated:

"I would like an opinion as to the constitutionality of Iowa's present dissolution of marriage statutes on the various court costs in light of *Boddie v. Connecticut,* 401 U.S. 371 (1971), as applied to indigents.

Several states have declared the filing fees, service of process fees, notice by publication fees, and court clerk fees to be unconstitutional as applied to indigents through the *Boddie* Decision.

I am having legislation drafted that would waiver these fees for indigents and need your opinion for background."

It is the opinion of this office that the Iowa Dissolution of Marriage statute is not unconstitutional, even in light of the *Boddie* decision that you cited. Similar to the rationale employed by the U.S. Supreme Court in *Boddie,* it has been successfully alleged that a state court's mandatory requirement of payment of filing fees, and court costs as a condition precedent to instituting a civil action (that is not necessarily limited to divorce actions) constitutes a denial of the right to equal protection and due process under the Fourteenth Amendment to the U.S. Constitution, see *Lane v. Cornell,* (C.A.5 1970; 434 F.2d 598) and *Humphrey v. Mauzy; Stewart v. Mauzy,* (W. Va. Sup. Ct. App.

1971) 181 S.E.2d 329. However, the distinguishing point with the Iowa Dissolution of Marriage statute, Chapter 598, Code of Iowa, 1973, and the Iowa court cost provisions is that there is not a mandatory prepayment or payment in order to gain entrance to the judicial system. In *Boddie,* Section 52-259 of the Connecticut Statutes demanded payment before any civil proceeding could be commenced.

"Court fees. There *shall* be paid to the clerks of the supreme court or the superior court, for entering each civil cause, forty-five dollars, and to the clerks of the court of common pleas for entering each civil cause, thirty dollars. There *shall* be paid to the clerk of each court, other than probate courts, by any party who requests a finding of fact by a judge of such court to be used on appeal, the sum of twenty dollars, to be paid at the time the request is filed. Such clerks shall also receive for receiving and filing an assessment of damages by appraisers of land taken for public use or the appointment of a commissioner of the superior court, two dollars; for recording the commission and oath of a notary public or certifying under seal to the official character of any magistrate, two dollars; for certifying under seal in verification of copies of files or records or whenever required by law, two dollars; for making all necessary records and certificates of naturalization, the fees allowed under the provisions of the United States statutes for such services; and for making copies, at the rate of fifty cents a page, except there shall be no charge for one plain or certified copy of a judgment to any party to the action." [emphasis ours]

In Iowa, the courts have generally utilized the language of §79.5 of the Code to waive the prepayment of costs by indigent persons. Section 79.5, Code of Iowa, 1973, states:

"Fees payable in advance. All fees, unless otherwise specifically provided, are payable in advance, if *demanded,* except in the following cases:

1. When the fees grow out of a criminal prosecution.

2. When the fees are payable by the state or county.

3. When the orders, judgments, or decrees of a court are to be entered, or performed, or its writs executed." [emphasis ours]

You will note that Section 79.5 does not specifically provide an exception for indigents. However, the language "if demanded", contained therein, allows the court discretion in charging for such fees. As we have noted this discretion was not permitted under the compulsory requirements found in the Connecticut statute.

It should also be noted, that it has been held that the courts possess the inherent power to permit indigent civil litigants to seek relief without the payment of statutory fees, see *Martin v. Superior Court,* (1917) 176 Cal. 289; *Ferguson v. Keays; Colon v. Los Angeles County Superior Court; Rowe v. Los Angeles County Superior Court* (Cal. Sup. Ct. 1971) 94 Cal. Tptr. 398, 484 P.2d 70. Waiver of the prepayment and payment of fees is usually accomplished by the indigent filing an affidavit attesting to his or her indigency.

The saving factor in the Iowa Dissolution statute and the various court costs provisions, specifically Section 79.5, is that the courts can exercise some discretion as to whether to require payment or not; this was not possible under the mandatory provisions of §52-259 of the Connecticut statutes in *Boddie.* We, therefore, hold that the Iowa Dissolution of Marriage statute is constitutional.

August 20, 1973

CITIES AND TOWNS: Retirement Systems — §410.1, Code of Iowa, 1973; H. F. 717, Acts 65th G.A., First Session. House File 717 only permits a continuation of pension systems under Chapter 410 where one was in existence prior to July 1, 1971. It does not require cities to create pension systems not in existence prior to July 1, 1971. (Blumberg to Stewart, Decatur County Attorney, 8-20-73) #73-8-12

Mr. Robert C. Stewart, Decatur County Attorney: We are in receipt of your opinion request of August 3, 1973, regarding Chapter 410 of the Code. You specifically asked:

"There are essentially two questions: (1) Whether the City of Leon has an organized Police Department as specified in Section 410.1 of the Code; and (2) Whether a Policeman who had an excess of twenty years of continuous service prior to enactment of the last paragraph of Section 410.1 by the 64 General Assembly is entitled to a pension."

You also supplied the following relevant information:

"2. The City of Leon has traditionally had two full-time policemen and the last few years had additionally hired at least one part-time policeman. No police department has ever been established by the City, although, City Ordinance No. 2, adopted March 8, 1906, establishes the office of Town Marshall and prescribes his duties. The policemen are selected by the Mayor, who specifies their assignments. One of the full-time policemen with longest service has been designated 'Chief of Police' but all policemen are under the direct supervision of the Mayor and report directly to him.

"3. The City of Leon owns a police car with a police radio.

"4. The City has no full-time or part-time police radio operator or other administrative help, although, it has a full-time City Clerk that can provide assistance. The City has no formal police headquarters and no jail and policemen spend most of their time in the police car.

"5. The City has, in the past, provided a uniform allowance when requested by a police officer. In recent years the uniform allowance has been dropped as a separate allowance and considered included as part of the officer's general salary.

"6. All weapons are purchased by, and the property of, the individual officer.

"7. The City does not offer any special training for officers nor require any special training. None of the present city police officers has ever had any special police training.

"8. The City has never undertaken to establish a pension for its policemen, never levied any tax for such pension, nor required any policeman to contribute toward a pension fund.

"9. All full-time City Policemen, as well as all other City employees, are covered by a group health insurance plan, a group life insurance plan, a vacation plan and a sick leave program.

"10. The specific policeman for whom this opinion is requested has continuously served as a full-time police officer for the City for thirty-three years, and has carried a title of 'Chief of Police' for some years."

In response to your first question, Section 410.1, 1973 Code of Iowa, provides that a city "having an organized fire department may, and all cities

having an organized police department or a paid fire department shall, levy annually a tax not to exceed one-eighth mill for each such department, for the purpose of creating firemen's and policemen's pension funds." In *Johnson v. City of Red Oak,* 197 N.W.2d 548 (Iowa 1972), the city argued that it did not have an organized police force under Section 410.1. The facts showed that the city had a police department of seven full time policemen hired by the mayor with cooperation of the chief of police. Their salaries were fixed by the city council. There was a chain of command within the department running from the mayor to the police chief to his assistant to sergeant. The policemen received a uniform allowance with the necessary weapons and equipment from the city. And, a 24 hour police radio was maintained by the city. Based upon these facts, the Court held that the city had an organized police department under Chapter 410. This should not be interpreted as setting a standard upon which an organized police department is based.

The words "police department" have not been restricted to a department created by ordinance. *Sprague v. Borough of Seaside Park,* 153 A. 641 (N.J. 1931). In *Travaline v. Borough of Paulsboro,* 1938, 121 N.J.L. 453, 3 A.2d 162, 163, it was held:

"A police department, to receive the application of the statute [prohibiting summary removal of policemen], need not be created by ordinance but exists where there are facts comparable to those in this case, namely, where there exists a regular organization of marshals [policemen] serving under a chief of police with the supervision of the mayor or a committee of council and functioning as full time police officers."

We feel that your facts fit within the above definitions of an organized police department.

Your next question is more difficult to answer. Chapter 108, §3, Acts of the 64th G.A., amended Section 410.1 by adding: "The provisions of this chapter shall not apply to policemen and firemen who entered employment after March 2, 1934." Subsequently, we issued an opinion, 1972 OAG 618, wherein we held that a pension system under Chapter 410 for those who entered employment after March 2, 1934, no longer existed. That opinion was based upon case law which held that rights to a pension do not vest until the contingency (death, disability, retirement) occurs. Thus, the Legislature could withdraw the pension rights at any time up to the happening of the contingency.

The case of *Johnson v. City of Red Oak,* supra, appears to cloud this issue. There, the plaintiff, a policeman was injured and permanently disabled while on the job. The city had not complied with the mandate of Section 410.1 in that it had not set up any type of pension system. The Supreme Court held that the plaintiff was entitled to a pension under Chapter 410. However the Court pointed out that their determination was not affected by important code changes enacted *after* this claim arose — said changes expressly berring Chapter 410 "as a remedy for injured policemen and firemen who entered employment after March 2, 1934."

Subsequent to our opinion, the Legislature further amended Section 410.1 as follows:

"The provisions of this chapter shall not apply to policemen and firemen who entered employment after March 2, 1934, except that any policeman or

fireman who had been making payments of membership fees and assessments as provided in section [410.5] of the Code prior to July 1, 1971, shall on the effective date of this Act be fully restored and entitled to all pension rights and benefits, vested or not vested, under this chapter if the city has not returned to such policeman or fireman the membership fees and assessments paid by him prior to July 1, 1971, and if such policeman or fireman pays to the city within six months after the effective date of this Act the amount of fees and assessments that he would have paid to his . . . pension fund from July 1, 1971, to the effective date of this Act if [Chapter 108, Acts of the 64th G.A.] had not been adopted. If the membership fees and assessments paid by such policeman or fireman prior to July 1, 1971, have been returned to him, all pension rights and benefits, vested or not vested, under this chapter shall be fully restored to him on the effective date of this Act if, within six months after the effective date of this Act, such policeman or fireman repays the fees and assessments returned and pays the amount of the fees and assessments to the city that he would have paid to his . . . pension fund from July 1, 1971, to the effective date of this Act if [Chapter 108, Acts of the 64th G.A.] had not been adopted."

This amendment only provides for those situations where a city has established a pension system. It merely allows those who had a pension system to continue it. It does not require cities to create pension systems not in existence prior to July 1, 1971.

Because pension rights do not vest prior to the contingency, and therefore the Legislature may withdraw them, 1972 OAG 618 and the cases cited therein; because of the amendment to Section 410.1 which takes away pension rights to those who entered employment after March 2, 1934, except to those already in a pension system; and because the pension rights have not vested in this case (there being no death, disability or retirement as of this date), we are of the opinion that under this fact situation, the policeman is not entitled to a pension from the city, even though the city police force qualified as an organized police department under Section 410.1.

August 21, 1973

COUNTIES: Mental Health Center: §§444.12(2), 444.12(3), 444.12(4), 230.24, Code of Iowa, 1973. Linn County has the authority to establish a Mental Health Center, and in conjunction therewith, to hire a Medical Director, other psychologists and psychiatrists, and a supportive clerical staff to provide on-going psychiatric out-patient treatment and services. (Munsinger to Lipsky, State Representative, 8-21-73) #73-8-13

Honorable Joan Lipsky, State Representative: In your recent letter of June 15, 1973, you have requested an opinion of the Attorney General as to the legality of certain actions of the Linn County Board of Supervisors. You question whether the Linn County Board of Supervisors has the authority pursuant to S. F. 185, Acts 64th General Assembly (hereinafter referred to as Section 444.12, Code of Iowa, 1973) to create a "Department of Mental Health Services", establish a psychiatric clinic, employ psychiatrists and psychologists and a clerical staff, and employ a Medical Director at an annual salary of $43,000.

Specifically, you pose the following questions:

"1. Does the Linn County Board of Supervisors have statutory authority to create a Department of Mental Health Services?

"2. Does the Linn County Board of Supervisors have statutory authority to hire a psychiatrist as Medical Director of its Department of Mental Health Services at a salary of $43,000 a year?

"3. Does the Linn County Board of Supervisors have statutory authority to directly employ and place on salary psychiatrists and psychologists and a supportive clerical staff to directly render psychiatric services to persons in need of mental health services in Linn County through its psychiatric clinic?

"4. If the action taken by the Linn County Board of Supervisors is illegal, do the various persons employed have to refund the compensation that they have received to date?"

In answer to your first question, Section 444.12(4), Code of Iowa, 1973, provides in pertinent part as follows:

"444.12 County mental health and institutions fund. The board of supervisors of each county shall establish a county mental health and institutions fund, from which shall be paid:

* * *

"4. Any contribution which the board of supervisors may make to the establishment and initial operation of a community mental health center in the manner and subject to the limitations provided by law."

Section 444.12(4), Code of Iowa, 1973, clearly gives the Board of Supervisors authority to *initially* establish a mental health center with such initial cost being funded from the county mental health and institutions fund. However, Section 230.24, Code of Iowa, 1973, which must be read in conjunction with Section 444.12(4), Code of Iowa, 1973, provides that the board of supervisors of a county establishing such a mental health center, is limited to an initial appropriation for such center from the county mental health and institutions fund, to an amount not to exceed "two hundred fifty dollars per thousand population or major fraction thereof."

The 1970 federal population census regarding Linn County, Iowa, credited Linn County with a population of 163,213. The total expenditure allowable for the *initial* establishment of a mental health center in Linn County, therefore, would be approximately $40,802.50. The legislature did not specify what the word "establish" entails, but Section 230.24, Code of Iowa, 1973, does provide that such initial expenditure "shall not be recurring", thus effectively eliminating salaries, which clearly are of a recurring nature.

Thus, it would appear that the legislature, in using the word "establish" regarding a mental health center, was referring to initial costs of the center, i.e., procurring a building, equipment and furnishings, and a lot or site for the center. These costs are of a non-recurring nature, as opposed to salaries which are of an on-going nature.

In any event, since the facts stated by you do not indicate how much the initial expenditures for establishing the Department of Mental Health Services amounted to, I must assume, for the purposes of this opinion, that Linn County's initial expenditure did not exceed the limitation contained in Section 230.24, Code of Iowa, 1973. Consequently, Linn County did have statutory authority to create a "Department of Mental Health Servicers", which is apparently the name chosen for the mental health center.

In answer to the second and third questions you pose, Sections 444.12(2) and 444.12.(3), Code of Iowa, 1973, provide in pertinent part as follows:

"444.12 County mental health and institutions fund. The board of supervisors of each county shall establish a county mental health and institutions fund, from which shall be paid:

* * *

"2. *Any portion* which the board of supervisors may deem advisable of the cost of psychiatric examination and treatment of persons in need thereof or of professional evaluation, treatment, training, habilitation, and care of mentally retarded persons, *at any suitable public or private facility providing inpatient or outpatient care in such county* . . . .

"3. The cost of care and treatment of persons placed in the county hospital, county home, a health care facility as defined in section 135C.1, subsection 8, *or any other public or private facility:*

"a. In lieu of admission or commitment to a state mental health institute, hospital-school, or other facility established pursuant to chapter 222." [Emphasis supplied.]

The above quoted sections give the board of supervisors of a county authority to pay *all* costs of psychiatric care and treatment at any suitable facility in the county in lieu of admission to a state mental health institute or hospital-school.

In addition, Section 230.24, Code of Iowa, 1973, which, as previously noted, must be read in conjunction with Section 444.12, Code of Iowa, 1973, provides that the county board of supervisors may use funds from the county health and institutions fund to pay for psychiatric examination and treatment in any county "which has facilities available for such treatment."

Section 230.24, Code of Iowa, 1973, does contain a limitation on the amount that can be expended for such treatment from the county mental health and institutions funds, but such limitation applies only to counties with less than forty thousand (40,000) population. Since the population of Linn County is 163,213, as of the 1970 federal census, said limitation is not applicable to Linn County.

We are unable to find any other monetary limitations which would prohibit Linn County from hiring a Medical Director at an annual salary of $43,000, nor to hire other psychologists and psychiatrists and a supportive clerical staff. Indeed, apart from the limitation as to amounts smaller counties may spend for psychiatric treatment, there is no statutory maximum levy for the county mental health and institutions fund. See, 1970 OAG 359 at 360. Furthermore, should the board of supervisors fail to levy a tax sufficient to meet the actual expenses incurred for such psychiatric treatment, Section 444.12, Code of Iowa, 1973, provides that the board of supervisors of a county shall be met by a transfer of funds from the county general fund to the county mental health and institutions fund to correct any deficiency.

In view of the affirmative answers given to the first three questions you ask, it is unnecessary to reach question four.

It is therefore, our opinion that Linn County does have authority to initially establish a county mental health center pursuant to Sections 444.12 and 230.24, Code of Iowa, 1973, and to hire a Medical Director and other psychologists and psychiatrists and supportive clerical staff to provide on-going psychiatric out-patient treatment and services.

August 24, 1973

MOTOR VEHICLES: §321.457(5), Code of Iowa, 1973 — Statutory provision that no combination of vehicles coupled together which are used exclusively for the transportation of passenger vehicles, light delivery trucks, panel delivery trucks, pickup trucks, travel trailers, boats, farm and industrial tractors and self-propelled farm implements and self-propelled vehicles, shall have an unladen length, inclusive of front and rear bumpers in excess of sixty feet, but the passenger vehicles, light delivery trucks, panel delivery trucks, pickup trucks or boats being transported may extend up to three feet beyond the front and rear bumpers of the transporting vehicles when the overall length of the vehicle with load does not exceed sixty-five feet, does not violate constitutional guarantees of due process and equal protection. (Tangeman to James T. Caffrey, State Representative, 8-24-73) #73-8-14

The Honorable James T. Caffrey, State Representative, 67th District: This is in response to your recent inquiry as to the constitutionality of House File 608, which reads as follows:

"BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. Section three hundred twenty-one point four hundred fifty-seven (321.457), subsection five (5), Code 1973, is amended to read as follows:

5. No combination of vehicles coupled together which are used exclusively for the transportation of vehicles *passenger vehicles, light delivery trucks, panel delivery trucks, pickup trucks, travel trailers,* and boats, *farm and industrial tractors and self-propelled farm implements, and self-propelled vehicles* unladen or with load, shall have an overall *an unladen* length, inclusive of front and rear bumpers in excess of sixty feet, *but the passenger vehicles, light delivery trucks, panel delivery trucks, pickup trucks, or boats being transported may extend up to three feet beyond the front and rear bumpers of the transporting vehicles when the overall length of the vehicle with load does not exceed sixty-five feet.*"

In determining whether or not a law is constitutional, a basic rule that applies is that there is a presumption of constitutionality, State v. Social Hygiene, Inc., 1968, 261 Iowa 914, 156 NW 2d 288. From that presumption it is necessary to observe further that in interpreting a statute the courts will seek any reasonable basis of interpretation of the statute to support its constitutionality. A challenger of the constitutionality of a statute must negative all possible bases of reasonable interpretation supporting constitutionality, Danner v. Hass, 1965, 257 Iowa 654, 134 NW 2d 534.

While it is true that "a statute that creates unreasonable discrimination contravene the constitution", Calkins v. Adams County Coop Elec. Co., 1966, 144 NW 2d 124, it is also true that the courts are apparently reluctant to find a statute unconstitutional.

In a recent case it was held that "if a state legislative enactment classifies commercial enterprises for purposes of regulation and that classification is neither premised on suspect criteria nor infringes upon a 'fundamental right' a presumption of constitutionality attaches and a statute will be set aside as violative of due process or equal protection only if it is arbitrary and without foundation in public policy." In that case the law forbade the sale on Sunday

of mobile homes equal to or in excess of 8 ft. wide and 48 ft. long, D.C. Iowa 1972, Hames Mobile Homes, Inc. v. Sellers, 343 F. Supp. 12.

In view of that decision it seems unlikely that the courts would find fault with the classifications established in Section 321.457 at subsection 5. In our opinion the statute is not so patently unreasonable as to be clearly, plainly and palpably unconstitutional.

August 24, 1973

STATE OFFICERS AND EMPLOYEES: First year state employee's vacation leave — H.F. 503, 65th G.A.; §79.1, Code of Iowa, 1973. A statute in the absence of an unequivocal intent to the contrary, will be construed prospectively and not retrospectively. Therefore, first year state employees' increase in annual leave is not retroactive, but effective July 1, 1973. (Beamer to Rapp, State Representative, 8-24-73) #73-8-15

Honorable Stephen J. Rapp, State Representative: This opinion is in reference to your request dated July 31, 1973, regarding vacation time for state employees under House File 503 of the 65th General Assembly. Your request stated:

"I would appreciate an interpretation of House File 503, Acts of the Sixty-fifth General Assembly, First Session.

This act amended section 79.1 of the Code to provide state employees who have one year of service with two weeks of vacation rather than one week.

I am interested in knowing how this act applies to a state employee who has completed his first year prior to the July 1, 1973, effective date, and how it applies to one who has completed or will complete his first year between July 1, 1973, and June 30, 1974."

Because of the nature of your request, it will perhaps be easier to make specific reference to House File 503. That provision states:

"Section 1. Section seventy-nine point one (79.1), unnumbered paragraph one (1), Code 1973, is amended to read as follows:

Salaries specifically provided for in an appropriation Act of the general assembly shall be in lieu of existing statutory salaries, for the positions provided for in any such Act, and all salaries shall be paid in equal monthly, semimonthly or biweekly installments and shall be in full compensation of all services, except as otherwise expressly provided. All employees of the state, including highway maintenance employees of the state highway commission shall *earn two weeks* vacation *per year* during the first year of employment, and through the fourth year of employment, and three weeks' vacation per year during the fifth and through the eleventh year of employment, and four weeks' vacation *per year* during the twelfth and all subsequent years of employment, with pay. One week vacation shall be equal to the number of hours in the employee's normal workweek. Vacation allowances *shall be accrued* on a pay period, monthly, or quarterly basis as *provided by* the *rules of the Iowa merit employment department.* Said vacations shall be granted at the discretion and convenience of the head of the department, agency or commission, except that *in no case may an employee be granted vacation in excess of the amount earned by him.* In the event that the employment of an employee of the state shall be terminated for any reason other than a discharge for good cause, he shall be paid a vacation allowance for any vacation which he may have earned prior to such termination, and which he has not yet taken. For the purposes of this section, death of an employee shall be considered a termination

of employment which shall require payment of such vacation allowances as might be payable for any other termination. [emphasis ours]

Your first question, relates to the employee who has completed his first year of employment prior to July 1, 1973. In our opinion, such state employees will only be entitled to the increased vacation leave beginning July 1, 1973. We have been advised by the Iowa Merit Employment Department that the new entitlement is computed at a rate of 3.33 hours per pay period, as opposed to the former rate of 1.67 hours per pay period under the old method for first year employees. We conclude that this procedure is correct and is consistent with the clear language of House File 503 which emphasizes the words "earned", "accrued" and further states that ". . . in no case may an employee be granted vacation in excess of the amount *earned* by him." The new increase for a vacation leave did not become effective until July 1, 1973. To allow a party more time for vacation under the new amendment than he had "earned" would be in contravention of the act's language and indicate an attitude of retroactive operation which is not expressed in the amendment. A statute, in the absence of an unequivocal intent to the contrary, will be construed prospectively and not retrospectively, see for e.g. *State ex rel Shaver v. Iowa Telephone Co.,* (1916) 154 N.W. 678, 175 Iowa 607 and *Manilla Community School District v. Halverson,* (1960) 101 N.W.2d 705, 251 Iowa 496. Therefore, a party who finished his first year of employment prior to July 1, 1973, will not benefit from House File 503. However, any employees who had not completed their first years of employment by July 1, 1973, will begin accruing vacation at the new rate from that date. In other words, after July 1, 1973, they'll be credited 3.33 hours per pay period.

With respect to the second part of your question, concerning the employee who completes his first year between July 1, 1973, and July 30, 1974, it is our opinion that this person begins accruing the increased vacation leave time at the first pay period immediately after the July 1, 1973, effective date. Thus, from the first pay period following July 1, 1973, to the time the employee's first year of employment ends, this employee accrues or earns 3.33 hours per pay period of vacation leave. Therefore, employee earns a certain amount of time under the old statute (1.67 hours per pay period) and an increased amount of leave from July 1, 1973, until the end of his first year of employment with the State.

August 28, 1973

CITIES AND TOWNS: Low-Rent Housing Agencies — Ch. 403A, Code of Iowa, 1973. A Low-Rent Housing Agency may rent out space in a low-rent housing project building for the elderly for a small retail outlet to accommodate the tenants of that building. (Blumberg to Potter, State Senator, 8-28-73) #73-8-16

Honorable Ralph W. Potter, State Senator: We are in receipt of your opinion request of May 16, 1973, regarding Low-Rent Housing Agencies. You specifically asked:

"1. Is it permissable for a Low Rent Housing Agency to rent out space in a Public Housing Building for the Elderly for a small retail outlet to accommodate the tenants in that high-rise building?

In the event this question is answered in the negative, please provide a ruling then on the following:

2. Is it permissable for the tenants of a Low Rent Housing Agency Building for the Elderly to form a retail "Co-op" to be operated within that building?"

Chapter 403A of the Code is controlling. Section 403A.3 sets forth the powers of a municipality with reference to Low-Rent Housing Projects, and provides in part:

"Every municipality in addition to other powers conferred by this or any other chapter, shall have power:

* * *

3. To arrange or contract for the furnishing by any person or agency, public or private, of services, privileges, works or facilities for, or in connection with, a housing project or the occupants thereof. . . .

4. To lease or rent any dwellings, accommodations, lands, buildings, structures or facilities embraced in any project . . . to sell, lease, exchange, transfer, assign, pledge or dispose of any real or personal property or any interest therein. . . .

* * *

9. To exercise all or any part or combination of powers herein granted. No provision of law with respect to the acquisition, operation or dispostion of property by public bodies shall be applicable to a municipality in its operations pursuant to this chapter unless the legislature shall specifically so state."

Section 403A.5 gives a municipality the authority to set up a public body corporate and politic to be known as the "Low-Rent Housing Agency." That section also provides that if an agency is set up, it shall be vested with all of the low-rent housing project powers in the chapter. In other words, such an agency is vested with powers that a municipality has under this chapter. In fact, it can be said that the municipality is exercising its powers through the agency.

Chapter 403A gives municipalities and agencies broad powers with respect to low-rent housing projects. Along with these broad powers, the existence of Home Rule would seem to indicate that cities and their Low-Rent Housing agencies could be more flexible in exercising these powers. Section 403A.3(3) appears to give municipalities and agencies the power to provide for services and facilities. Such a power is not limited by the Chapter in that there is no limitation as to what types of services or facilities may be arranged for. Thus, Home Rule would indicate that the municipalities may determine what types of services and facilities are to be furnished to a low-rent housing project.

Accordingly, we are of the opinion that a Low-Rent Housing Agency may rent out space in a Low-Rent Housing project building for the elderly for a small retail outlet to accommodate the tenants in that building.

August 28, 1973

CRIMINAL LAW: Uniform Traffic Citation — §753.13, Code of Iowa, 1973. If traffic citation and complaint forms other than those adopted by the Department of Public Safety are used, an information must be filed. (Voorhees to Keller, Mills County Attorney, 8-28-73) #73-8-17

Mr. Michael E. Kelley, Mills County Attorney: This letter is in response to your request for an opinion on the question of whether traffic citation and preliminary complaint forms that are not of the type adopted by the Commissioner of Public Safety are legally adequate. Your letter points out that many local police forces will continue to use the existing supply of old forms.

Section 753.13, Code of Iowa, 1973, provides in part:

"The commissioner of public safety shall adopt a uniform, combined traffic citation and complaint, which shall be used for charging all traffic violations in Iowa under state law or municipal ordinance, unless the defendant is charged by information or section 321.36, subsection 1, is applicable . . . ."

It is apparent from this provision that the form adopted by the Department of Public Safety is required unless an information is filed. It is apparently the practice in some areas of the state to file informations on traffic charges and not the practice elsewhere. However, informations must be filed if the citation and complaint forms are not those adopted by the Department of Public Safety.

August 28, 1973

CIVIL RIGHTS: Chapter 601A, Code of Iowa, 1973. A difference in wages and benefits between full and part time employees is not illegal where there is an express agreement and no discrimination on any basis forbidden by Chapter 601A, Code of Iowa, 1973. (Conlin to Fischer, State Representative, 8-28-73) #73-8-18

The Honorable Harold O. Fischer, State Representative: In your letter dated July 18, 1973, you requested an Attorney General's opinion on whether the "(Merit) exempt part-time employees" of the State Beer and Liquor Control Department are being discriminated against. Specifically, you refer to the fact that there is a thirty-three cent difference in hourly wages between part time and full time employees, as well as a lack of sick leave and vacation benefits for part time employees.

It is our opinion that there is no employment discrimination based upon the facts as outlined in your letter. Subject to a few minimum standards imposed by law, for example, the minimum wage requirements and the prohibitions against race and sex discrimination in Chapter 601A, Code of Iowa, 1973, employees and their employers may enter into any contract of employment they agree upon. *Taylor v. Southern Pennsylvania Bus Co.,* 203 Pa. Super. 229, 199 A.2d (1964). Compensation for an employee is generally determined by one of two methods — quantum meruit (the reasonable value for services rendered) or by the terms of the contract. It has become a well settled principle of law that where there is an express agreement fixing the amount of salary, quantum meruit is in appropriate. In the situation you have outlined an action in quantum meruit would be inappropriate since each prospective employee is appraised of the compensation he or she is to receive, and this compensation is well above federal minimum wage requirements. When parties agree upon a compensation, the agreed upon compensation is considered reasonable. *Marnon v. Vaughan Motor Co.,* 189 Or. 339, 219 P.2d 163 (1950).

Sick leave and vacation benefits present a like situation. Each depends upon the express or implied terms of the employment contract. Our office has checked with the personnel director of the Beer and Liquor Control Department and he informs us that prospective employees are fully appraised that as part time employees they will not receive sick leave or vacation pay.

Consequently, it is our opinion that where there is an express agreement between employer and employee concerning wages, vacations, and sick leave, the agreement will be considered reasonable irrespective of what the employee's services may, in fact, actually be worth. It follows then that an action by the part time employees of the Beer and Liquor Control Department for employment discrimination will not lie.

August 28, 1973

ELECTIONS: Campaign expense limitation. §§3 and 15, Senate File 583, Acts, 65th G.A., First Session (1973). The expense limitations contained in S.F. 583 apply only to candidates for offices in the legislative and executive branches of state government and the United States Congress. "Political committees" as statutorily defined which neither accept contributions or make expenditures in excess of $100.00 in any calendar year are not required to file any reports under the Act. (Haesemeyer to Synhorst, Secretary of State, 8-28-73) #73-8-19

The Honorable Melvin D. Synhorst, Secretary of State: This is in response to your letter of August 24, 1973, in which you asked:

"Your opinion is respectfully requested on two questions which arise in interpreting the provisions of S.F. 583, Acts of the 1973 Session of the Sixty-fifth General Assembly.

"1. Is there any limit on campaign expenditures which may be made by a candidate for public office in Iowa other than for those offices described in Sec. 15 of the act?

"2. Does a political committee, which means a person, including a candidate, or committee, including a statutory political committee, which accepts contributions or makes expenditures in the aggregate of less than one hundred dollars in any one calendar year for the purpose of supporting or opposing a candidate for public office, have to file a statement of organization, periodic reports, or a statement of dissolution under the provisions of the act?"

§15 of Senate File 583, Acts, 65th G.A., First Session, (1973) provides:

"Executive, Legislative and Congressional Offices. The state commissioner shall determine the total number of votes cast for candidates for the office of president of the United States by the electors of the state in each state legislative district, in each congressional district, and state-wide at the preceding presidential election.

"The state commissioner shall in each case multiply the total number of votes cast for all presidential candidates by thirty cents. The resulting amount shall be the campaign expense limitation for candidates seeking offices in the executive and legislative branches of state government and candidates seeking congressional offices, respectively."

It is to be observed that this section by its terms has application only to candidates seeking offices in the executive and legislative branches of state government and candidates seeking congressional offices. In other words, its reach does not attend to, for example, county offices. §56.7, Code of Iowa, 1973, formerly provided an expense limitation which swept considerably broader.

"Limitation on expenses. It shall be unlawful for any candidate to expend in connection with any primary election campaign more than fifty percent of the

annual salary applicable to the position for which he is a candidate, and unlawful for him to expend in connection with his campaign for election to any office more than fifty percent of the annual salary applicable to the position for which he is a candidate."

However, §56.7 was in effect repealed along with the rest of Chapter 56 by §1 of Senate File 583 which substituted §§2 through 27 of such Senate File 583 for Chapter 56 of the 1973 Code. Thus, while many of the other requirements of Senate File 583 apply to public offices other than federal and state, the expense limitation provisions do not.

§3 of Senate File 583 provides in part:

"As used in this Act, unless the context otherwise requires:

* * *"

"6. 'Political committee' means a person, including a candidate, or committee, including a statutory political committee, which accepts contributions or makes expenditures in the aggregate of more than one hundred dollars in any one calendar year for the purpose of supporting or opposing a candidate for public office.

* * *"

The provisions of the Act requiring the filing of various reports in each case imposes the requirement on "political committees". It is axiomatic that where a statute defines its terms they must be given that meaning. We are accordingly of the opinion that a political committee as defined which includes a candidate or committee including a statutory political committee which accepts contributions or makes expenditures in the aggregate of less than one hundred dollars in any one calendar year for the purpose of supporting or opposing a candidate for public office is not required to file a statement of organization, periodic reports, or a statement of dissolution under the provisions of Senate File 583.

August 29, 1973

CITIES AND TOWNS: Political Activities of Civil Service Employees — §365.29, Code of Iowa, 1973. Civil service employees may not endorse and campaign for selected candidates at an election. (Blumberg to Cusack, State Representative, 8-29-73) #73-8-20

Honorable Gregory D. Cusack, State Representative: You have requested an opinion of the Attorney General with respect to the rights of members of police associations or unions to participate in political activities. In your letter you state:

"I would like to request a formal opinion as to the extent members of local police associations or unions can engage in partisan politics.

"The occasion arises because members of Davenport's police local wish to endorse and campaign for selected candidates at this coming Fall's municipal elections.

"They have been told in past years that Civil Service does not permit them to do so.

"Would you please delineate their rights as citizens regarding the extent to which they can engage in partisan politics and the limits thereto?"

Section 365.29 of the 1973 Code provides:

"365.29 Campaign contributions. No officer or employees under civil service shall, directly or indirectly, contribute any money or anything of value, to any candidate for nomination or election to any office, or to any campaign or political committee, or take any active part in any political campaign except to cast his vote and to express his personal opinion, nor shall any such candidate or committee solicit such contribution or active political support from any such officer or employee. Any person violating any provision of this section shall pay a fine of not less than twenty-five dollars or more than one hundred dollars, or be imprisoned in the county jail not to exceed thirty days.

"Nothing in this section shall prohibit any employee or group of employees, individually or collectively, from expressing honest opinions and convictions, or making statements and comments concerning their wages or other conditions of their employment.

"Any employee who shall become a candidate for any elective office shall, commencing thirty days prior to the date of the primary or general election and continuing until such person is eliminated as a candidate, either voluntarily or otherwise, automatically receive leave of absence without pay and during such period shall perform no duties connected with the office or position so held.

"However, an employee who is a candidate for a nonpartisan office not related to his employment, shall not be required to take a leave of absence if such employee refrains from campaigning while on duty as an employee."

There have been numerous cases concerning laws similar in nature to this one. *Annot.*, 28 A.L.R. 3d 717 (1972). A majority of the earlier cases held that restrictions on political activity by public employees was permissible, and in most cases the particular statutes were held to be constitutional. See, e.g., *United Public Workers v. Mitchell,* 1947, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed 754; *Exparte Curtis,* 1882, 106 U.S. 371, S. Ct. 381, 27 L. Ed. 232; *McKitrick v. Kirby,* 1942, 349 Mo. 988, 163 S.W.2d 990. There has been a trend away from these rulings in recent years. See, e.g., *National Association of Letter Carriers, AFL-CIO v. United States Civil Service Commission,* 346 F. Supp. 578 (D.C.D.C. 1972); *Minielly v. State,* 1966, 242 Ore. 490, 411 P.2d 69; *Bagley v. Washington Township Hospital District,* 1966, 55 Cal. Rptr. 401, 421 P.2d 409; *Kinnear v. City and County of San Francisco,* 1964 38 Cal. Rptr. 631, 392 P.2d 391; *Fort v. Civil Service Commission of County of Alameda,* 1964, 38 Cal. Rptr. 625, 392 P.2d 385. Most of these cases held the particular statutes in question to be unconstitutional because of overbreadth, vagueness, and in some cases because the statutes were too restrictive in not even allowing a public employee to run for elective office.

Iowa's statute can be distinguished from most of these. Although it does not allow an employee under civil service to take an active part in a political campaign, or to contribute anything of value to a campaign, it does allow such an employee to vote, express his personal opinion, and make statements concerning wages and working conditions. Unlike most of the other statutes, Iowa's permits employees to run for elective partisan office. The only restriction is that the employee must take a leave of absence commencing thirty days prior to the election until the candidacy ends. After the election, said employee may return to work. 1970 OAG 285, 1972 OAG 471. The question then becomes one of incompatibility of offices. We have previously held that civil service employee could not retain his position and be on the city council at the same

time. 1970 OAG 285. We have also held that a civil service employee, such as a fireman, could retain his position while being a member of the Legislature. 1972 OAG, 471. In addition, a statute similar in some respects to Iowa's has been upheld. *Chatham v. Johnson,* 1967, 195 So.2d 62.

Particular attention must be focused on *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO,* 1973, 93 S. Ct. 2880, which reversed *National Association of Letter Carriers AFL-CIO v. U. S. Civil Service Commission,* supra. The Supreme Court, speaking through Mr. Justice White, held (93 S. Ct. at 2886):

"We unhesitatingly reaffirm the *Mitchell* holding that Congress had, and has, the power to prevent [public employees] from holding a party office, working at the polls and acting as party paymaster for other party workers. An Act of Congress going no further would in our view unquestionably be valid. So would it be if, in plain and understandable language, the statute forbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for an elective public office, initiating petition or soliciting votes for a partisan candidate for a public office; or serving as a delegate, alternate or proxy to a political party convention. Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan conduct by federal employees."

In a companion case, *Broadrick v. Oklahoma,* 1973, 93 S. Ct. 2908, the Supreme Court, again speaking through Mr. Justice White, held the Oklahoma statute, which is similar to Iowa's, constitutional. Said statute provided, in part, (74 Okla. St. Ann. §818(6), (7)):

"(6) No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.

"(7) No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management of affairs of any political party or in any political campaign, except to exercise his rights as a citizen privately to express his opinion and to case his vote."

The Court held (93 S. Ct. at 2918):

"Under the decision in *Letter Carriers,* there is no question that §818 is valid at least insofar as it forbids classified employees from soliciting contributions for partisan candidates, political parties, or other partisan political purposes; becoming members of . . . committees of political parties, or officers or committee members in partisan political clubs, or candidates to any paid public office; taking part in the management of affairs of any . . . partisan political campaign, serving as delegates or alternates to caucauses or conventions of political parties; addressing or taking an active part in partisan political rallies or meetings; soliciting votes or assisting voters at the polls or helping in a partisan effort to get voters at the polls; participating in the distribution of partisan campaign literature; initiating or circulating partisan nominating petitions; or riding in caravans for any political party or partisan political candidate.

"These proscriptions are taken directly from the contested paragraphs of §818, the Rules of the State Personnel Board . . . and the authoritative opinions of the State Attorney General."

After reviewing the above two cases, we do not doubt that §365.29 is constitutional, and is permissible implementation of legislative prerogative. The validity of the Hatch Act and Oklahoma statute, both of which are much more restrictive than §365.29, leads us to the conclusion that §365.29 would pass the test of validity.

In specific answer to your question, a prior opinion dealt with a similar question. 1970 OAG 44. There, we held, in part:

"The United States Supreme Court has held that acting as chairman of a committee and ex officio member of a dinner committee for the purpose of raising funds, for a political party constituted taking 'an active part' in violation of the Hatch Act, which was intended to prevent improper political activities by officers and employees covered by United States Civil Service. *State of Oklahoma v. U.S. Civil Service Commission,* 67 Supp. Ct. 544, 553, 330 U.S. 127, 91 L. Ed. 794.

"The language in the Iowa act also prohibits taking an 'active part' in any political campaign. With this as a reference point, we proceed to answer the specific questions as submitted:

'1. Are decals on trucks or cars owned by firemen, policemen, etc. legal?

'2. Can signs posted on their private property advertising election of political candidates be considered legal?

'3. Is it legal to participate in conventions, parades or political gatherings for the purpose to hear speakers on political natures?

'4. Is it legal to supply money to political funds for election of candidates?

'5. Can firemen, policemen, etc. civil service employees under state law openly discuss political candidates?

I.

Section 365.29 prohibits a civil service employee from driving his car in a political parade, but probably does not prohibit the owner of such car from decorating it in any manner he desires or restrict the use of such car except in organized political campaign activity.

II.

If a person subject to the restrictions contained in §365.29 were to place on his private property a sign advertising the election of a political candidate, in my opinion the action would be taking an active part in such political campaign and would, therefore, he prohibited by the section cited.

III.

If the purpose of participating in a political convention or gathering is merely to hear the speaker in an effort to form opinion on the candidates and if no other active part were taken 'except to cast his vote and to express his personal opinion,' such activity would not be prohibited by §365.29.

IV.

Any officer or employee under civil service is specifically prohibited by §365.29 from supplying money to political funds for the election of candidates.

V.

In the 1967 amendment to §365.29 the legislature changed the following language:

'and to express his personal opinion privately'

to read:

'and to express his personal opinion.'

By striking the word 'privately,' while there had been no constitutional test of the language prior to this amendment, the change clearly is compatible with the line of cases which uphold the right of every citizen to engage in political expression and association under the guarantees of the first amendment to the United States Constitution. See *Fort v. Civil Service Commission of County of Alameda,* 1964, 38 Cal. Rptr. 625, 392 Pacific 2d 385. In *United Public Workers of America (CIO) v. Mitchell,* 1947, 330 U.S. 75, 67 Supp. Ct. 556, 91 L.Ed. 754, the United States Supreme Court upheld the Hatch Act as not restricting public expressions on public affairs and personalities so long as the activity did not involve an 'objective of party action' and was not directed toward 'party success.' It is my opinion that the principle applied there is applicable to the question presented."

The above opinion remains valid except with respect to question two. Expressing one's personal opinion can encompass many areas. Putting a poster on one's property is no different than a bumper sticker on a car.

We cannot possibly delineate all situations and acts which are allowed or prohibited under our statute. In the Appendix to the *Letter Carriers* case, the Supreme Court listed some activities that may or may not be done by federal employees. Most of these are applicable to civil service employees under §365.29. They include:

1. Candidacy for or service as a delegate, alternate or proxy in any political convention or service is prohibited. Mere attendance as a spectator is permissible, but said employee must not take any part in the convention or deliberations.

2. Service on or for any political committee or similar organization is prohibited. Attendance as a mere spectator is permitted.

3. Employees may be members of political clubs, but may not be active in organizing them or be an officer of a club or a member or officer of a club's committees.

4. Service in preparing for, organizing or conducting a political rally or meeting, or addressing or taking any active part therein is prohibited.

5. Service as election judge, inspector, checker, teller or as election officer is prohibited.

6. An employee may not take part in a political parade, organize or be a leader of same.

7. An employee may sign a petition as an individual, but may not initiate or circulate them, or canvass for signatures of others.

8. Employees may not distribute campaign literature, badges or buttons.

9. An employee may be active in organizations having for their primary object the promotion of good government of the local civic welfare.

In addition to the above, we are mindful, again, that speech and expression encompass many forms. One of the leading cases in this area is *Tinker v. Des Moines Community School District,* 1969, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731. There, the Supreme Court held that wearing of a black arm band was a form of speech and expression that could not be infringed upon. Similarly, in *Schact v. United States,* 1970, 398 U.S. 58, 90 S. Ct. 1555, 26 L. Ed. 2d 44, it was held that wearing of a military uniform was a form of speech and expression. Keeping these cases in mind, we find that such forms of expression as campaign buttons, bumper stickers, posters, letters to newspapers concerning matters that may have been endorsed by a political party or speaking to another about a political party, campaign or issue, as long as it is the personal opinion of the employee and is not done on behalf of or to further that party supporters of the campaign or issue, is permissible.

The above listed items of what type of activity is or is not permissible by a civil service employee are not all inclusive. However, they are sufficient for us to state that civil service employees may *not* endorse and campaign for selected candidates at an election. There is a further aspect of the matter which perhaps should be borne in mind and that is, in the event a particular police association or union is currently enjoying tax exempt status under §501 of the U.S. Internal Revenue Code, such exempt status might be placed in jeopardy in the event the particular organization were to undertake to engage in political activities of one kind or another.

September 6, 1973

LOTTERIES AND GAMBLING: Gambling licenses — 1972 OAG 345. The distribution scheme of the Iowa Beer and Liquor Control Department's proposed drawing is not a lottery because it does not involve an element of consideration and that department is not required to purchase a gambling license. (Sullins to Gallagher, Director, Iowa Beer and Liquor Control Department, 9/6/73) #73-9-1

Mr. Rolland A. Gallagher, Director, Iowa Beer and Liquor Control Department: You have requested an Attorney General's Opinion concerning the following question:

"Whether the Beer and Liquor Control Department will have to purchase a gambling license to distribute 600 American Legion commemorative liquor bottles by lottery?"

We are advised that pursuant to the proposed method of distribution, those persons desiring to purchase a bottle must register at state liquor stores. The right to purchase a bottle will be determined by a drawing of names from the registrant lists. The 600 persons whose names are drawn will be given an opportunity to purchase a commemorative bottle.

Lottery schemes, which were once prohibited by Section 28, Article IV, Constitution of Iowa, have now been legalized if the lottery organizer purchases a state gambling license. But in the present situation this is not necessary.

It is uniformly agreed that the three elements necessary to constitute a lottery are a prize, the element of chance, and a valuable consideration for the chance. *St. Peter v. Pioneer Theatre Corporation,* 227 Iowa 1391, 291 N.W. 164 (1940); *Brenard Mfg. Co. v. Jessup and Barrett Co.,* 186 Iowa 872, 173 N.W. 101 (1919); *Idea Research and Development Corp. v. Hultman,* 256 Iowa 1381, 131 N.W.2d 496 (1964).

The proposed distribution scheme, which does not require the registrants to provide consideration for the chance to purchase a commemorative liquor bottle, is therefore, not a lottery.

In 1972 OAG 345, a similar question was raised. The opinion reasoned that the drawing for special deer hunting licenses, where the license fee is returned to unsuccessful applicants, was not an illegal lottery because the essential element of a valuable consideration for the chance was lacking.

We are, therefore, of the opinion that since the proposed method of distribution in the instant case does not involve an element of consideration, the distribution scheme is not a lottery and the Iowa Beer and Liquor Control Department is not required to purchase a gambling license.

September 6, 1973

STATE OFFICERS AND DEPARTMENTS: Agriculture Department, Practice of Veterinary Medicine. Chapter 169, Code of Iowa, 1973. It is not a violation of Iowa law by either party where an Iowa veterinarian consults professionally by telephone with a veterinarian in another state. (Haesemeyer to Plymat, State Senator, 9/6/73) #73-9-2

The Honorable William N. Plymat, State Senator: Reference is made to your letter of September 6, 1973, in which you state:

"It has come to our attention that The Iowa Veterinary Medicine and Surgery Act, Chapter 169, Sec. 169.1, is perhaps unclear in an important aspect which might effect Iowa's veterinarians in their effort to exploit the best possible resources in their practice.

"Specifically we ask that you answer the following:

"If an Iowa veterinarian consults by telephone or otherwise with a veterinarian licensed in another state, does the veterinarian in that other state violate Iowa's Veterinary Medicine and Surgery Act?

"Or is it lawful for a veterinarian licensed in another state (Illinois) to advise, collaborate and participate with an Iowa veterinarian in animal health care when the Iowa veterinarian seeks the assistance of the Illinois veterinarian."

The Veterinary Medicine and Surgery Act, Chapter 169, Code of Iowa, 1973, provides in §169.1:

"169.1 Persons engaged in practice. For the purpose of this chapter the following classes of persons shall be deemed to be engaged in the practice of veterinary medicine:

"1. Persons practicing veterinary medicine, surgery, or dentistry, or any of the branches thereof.

"2. Persons who profess to be veterinarians, or who profess to assume the duties incident to the practice of veterinary medicine.

"3. Persons who make a practice of prescribing or who do prescribe and furnish medicine for the ailments of animals.

"4. Persons who act as representatives of licensed veterinarians in doing any of the things mentioned in this section."

Section 169.3 prohibits the practice of veterinary medicine by any person who shall not have obtained a license for that purpose from the Department of

Agriculture. Section 169.36 sets forth certain grounds for revocation of the license to practice veterinary medicine none of which grounds would appear to be applicable to the situation you describe. Section 169.45 makes it a misdemeanor to violate any provision of Chapter 169.

While as you point out §169.1 is perhaps unclear at best as to what constitutes practice of veterinary medicine we do not believe that it contemplates the type of situation you describe and it is our opinion that where an Iowa veterinarian consults by telephone with a duly licensed veterinarian in another state neither veterinarian is in violation of the Iowa law.

September 11, 1973

COUNTY AND COUNTY OFFICERS: County liability for fugitive dust — §§613A.1, 613A.2, 613A.4, 657.1, Code of Iowa, 1973; §4.3(2)c IDR 1973 p. 274 and §4.3(2)c(5) IDR 1973 p. 275. Counties are financially responsible under Ch. 613A for any violation of fugitive dust regulations committed by county officers, agents or employees without the exercise of due care. Only in extreme situations would it be necessary for the county to use night patrol crews to avoid the accumulation of accident producing deposits of earth or other material. (Whorley to Harthoorn, Acting Director, Air Quality Management Division, Department of Environmental Quality, 9/11/73) #73-9-3

Mr. Bryce E. Harthoorn, Acting Director, Air Quality Management Division, Department of Environmental Quality: You have requested an opinion of the attorney general with respect to the following questions:

"Could the present fugitive dust rules make the counties financially responsible under tort liability?

Would this liability only apply to a situation where other than ordinary travel existed?

Is it unreasonable that a county be held responsible in the event that fugitive dust from other than ordinary travel contributes to an accident?

In Subparagraph 4.3(2)c(5), would 'prompt removal' require all-night patrols by county crews to keep road surfaces free of possible accident-producing deposits?"

In answer to your first question, it is our opinion that the present fugitive dust requirements, §4.3(2)c, Rules and Regulations relating to air quality, make counties financially responsible for any injury to third parties by reason of violation of said rule by county officer, agents, or employees.

Section 613A.2 of the Code of Iowa, 1973, states:

"Except as otherwise provided in this chapter, every municipality is subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function."

However, Section 613A.4, Code of Iowa, 1973, provides that "the liability imposed by Section 613A.2 shall have no application to any claim enumerated in this section." Specifically, subsection 3 of 613A.4 states that "any claim based upon an act or omission of an officer or employee, exercising due care, in the execution of a statute, ordinance, or officially adopted resolution, rule or regulation of a governing body" is exempted from §613A.2 liability.

Section 613A.1 of the Code of Iowa, 1973, defines municipality as any "city, town, county, township, school district, and any unit of local government."

Since §613A.2 withdraws sovereign immunity from counties for tort committed by their officers, agents and employees, unless the claim is based on an act committed during the exercise of due care in the execution of a duty (613A.4), the counties are liable for any torts committed by their officers, agents or employees in the absence of due care.

In regard to your second question, the Rules and Regulations Relating to Air Pollution Control of the Iowa Pollution Control Commission (now Air Quality Commission of the Department of Environmental Quality) §4.3(2)c provide:

"After September 1, 1972, no person shall allow, cause, or permit any materials to be handled, transported, or stored; or a building, its appurtenances or a construction haul road to be used, constructed, altered, repaired, or demolished, with the exception of farming operations or dust generated by ordinary travel on unpaved roads, without taking reasonable precautions to prevent particulate matter in quantities sufficient to create a nuisance, as defined in section 657.1, Code of Iowa, 1971, from becoming airborne. All persons, with the above exceptions, shall take reasonable precautions to prevent the discharge of visible emissions of fugitive dusts beyond the lot line of the property on which the emissions originate."

Under this rule, a county would be responsible in tort for the conduct of any officer, agent or employee who handles, transports, or stores any material or allows any building or haul road to be altered, repaired or demolished without taking reasonable precautions to prevent the activity from becoming a nuisance as defined under §657.1 of the Code of Iowa, 1973. Howver, the county as well as a private citizen's responsibility under these rules, is excepted if earth or other polluting materials are generated from farming operations or by ordinary travel.

Therefore, in answer to your second question, since no specific exception is made, counties must take reasonable precautions to prevent visible emissions as set forth in the rules where there is other than ordinary travel on a haul road. Notwithstanding these rules, it should be noted that if any activity, even if it is the result of farming operations or ordinary travel, constitutes a nuisance under §657.1, the county may be held liable for such activity unless due care was exercised by the county officers, agents, or employees involved.

The inclusion of the "reasonable precuation" provision in the fugitive dust requirements has the effect of directly incorporating the "due care" exception of county tort liability into this regulation. (613A.4) Thus, if the county takes reasonable precautions in its conduct "to prevent particulate matter in quantities sufficient to create a nuisance, as defined in §657.1, Code of Iowa, 1973," it would be exercising due care in its activity. Therefore, a county would be exempt from liability under the fugitive dust rules if it takes reasonable precautions or exercises due care in its activity.

In answer to your third question, we believe county liability for pollution resulting from other than ordinary travel on a haul road would be found by the courts to be reasonable. There is a presumption of validity with legislative acts. The legislature gave the Iowa Air Quality Commission authority to adopt rules pertaining to the evaluation, abatement, control and prevention of air

pollution. We feel the fugitive dust regulations would be found reasonably necessary and proper to abate pollution. To find otherwise would be contrary to the expressed intention of the legislature as contained in §455B.12, Code of Iowa, 1973. Such rules seem reasonably calculated to protect the general health, safety and welfare of the citizens of Iowa.

Finally, we will consider the requirements of "prompt removal" under the "reasonable precautions" that must be initiated to avoid liability under the fugitive dust requirements. In 34 Words and Phrases, p. 567, the word "prompt" is defined as "meaning to act within a reasonable time". See also, *Miller v. Zurich General Acc. & Liability Ins. Co.*, 115 A2d 597, 36 N.J. Super 288 (1955). In most instances, "prompt removal," under the reasonable time criterion, would not require the use of all-night patrols by county crews to keep haul road surfaces free, unless use of such haul roads continued all night in such a manner as to indicate a likelihood of accumulation of accident-producing earth or other material and county liability therefor.

September 11, 1973

CITIES AND TOWNS: Hospital and Medical Expenses for Injured Firemen and Policemen — §411.15, Code of Iowa, 1973. If a fireman or policeman, injured while on duty, receives any amount for hospital, nursing or medical attention, pursuant to a private insurance policy, that amount is to be deducted from any amount that the city must pay for the same attention. (Blumberg to Gluba, State Senator, 9/11/73) #73-9-4

Honorable William E. Gluba, State Senator: We are in receipt of your opinion request of August 22, 1973, regarding section 411.15 of the Code. You specifically asked:

"If a policeman or fireman, covered under Chapter 411, provides for himself and his family a private insurance or hospitalization policy the cost not contributed to by the city, and paid for by the individual policeman or fireman, and the said policeman or fireman were injured while in the performance of his duties as a member of such department, and under all circumstances would be covered under Section 411.15, would the benefits paid to said policeman or fireman under his private insurance or hospitalization policy be deducted from the amount paid by such city or town under provisions of Section 411.14?"

Section 411.15, Code of Iowa, 1973, provides:

"Cities and towns shall provide hospital, nursing, and medical attention for the members of the police and fire departments of such cities, when injured while in the performance of their duties as members of such department, and the cost of such hospital, nursing, and medical attention shall be paid out of the appropriation for the department to which such injured person belongs; provided that any amounts received by such injured person under the workmen's compensation law of the state, or from any other source for such specific purposes, shall be deducted from the amount paid by such city or town under the provisions of this section."

The obvious purpose of this section is to insure that firemen and policemen have their medical expenses paid for, other than by themselves, when they are injured while in the performance of their duties. This section mandates that municipalities provide and pay for hospital, nursing and medical attention to such employees. The exception to this occurs when said expenses are paid by workmen's compensation or any other source for that purpose ("that purpose" meaning hospital, nursing and medical attention).

Your question deals with the words "from any other source." The words are plain and unambiguous. "*Any* other source" means just that. If the Legislature had wanted to limit the types of sources, it would have so done. If an injured employee received any amount for hospital, nursing or medical attention through an insurance policy, that would fit within the meaning of "any other source." To hold otherwise might create a wind fall to employees in that they would receive double amounts from both the city and the insurance carrier for their injuries and resulting expenses. This is not the purpose of the section. The purpose is to insure that employees' medical costs are paid for other than by themselves. The welfare of the employee is the criterion not the double collection for one set of expenses.

Accordingly, we are of the opinion that if an injured policeman or fireman receives any amount for hospital, nursing and medical attention pursuant to a private insurance policy, that amount is to be deducted from any amount that the city must pay for the same attention.

September 11, 1973

OMVUI — BLOOD TESTS: Obligations and liabilities of peace officers in handling an "operating a motor vehicle while under the influence of an alcoholic beverage" arrest situation — §§321B.3 and 321B.4, Code of Iowa, 1973. Peace officers making arrests of persons for operating a motor vehicle while under the influence of an alcoholic beverage are not obligated to advise them of right to give blood specimens; if a blood specimen is requested by the accused there is not liability on the part of the person, authorized to take the specimen. (Sullins to Hughes, Ringgold County Attorney, 9/11/73) #73-9-5

Mr. Arlen F. Hughes, Ringgold County Attorney: In your letter you requested an opinion concerning the following questions:

"1. Are peace officers making arrests of persons for operating a motor vehicle while under the influence of an alcoholic beverage obligated to advise them of their right to give blood specimens for the purpose of analysis to determine alcoholic content?

"2. If the answer to question one is 'yes' then if the person requests that a blood specimen be drawn and analyzed, is he entitled, as a right, to have this specimen drawn and analyzed?

"3. If the party accused requests from the peace officer that a blood specimen be drawn and if the peace officer is then obligated to request a blood specimen be drawn by the authorized persons, as set forth in 321B.4, does this subject the person or persons withdrawing the blood specimen from the accused to any liability for their withdrawal of the same?"

It is our opinion that the answer to each of these questions is "no." The Iowa Supreme Court has never ruled on the first two questions, however, these questions have appeared in other jurisdictions. The only rights given to an accused under §§321B.3 and 321B.4 are the right to refuse testing and the right to supplement the tests with tests performed by the accused's own physician. These rights accrue only if and when the chemical tests are offered by a peace officer. A peace officer is under no obligation to advise an accused of the chemical tests, nor is an accused entitled, as a right, to have specimens drawn and analyzed. For particular case cites see *People v. Gilbert,* 8 Mich. App. 393, 154 N.W.2d 800 (1967); *People v. Kerrigan,* 8 Mich App. 216, 154 N.W.2d 43 (1967); *People v. Collett,* 8 Mich. App, 419, 154 N.W.2d 531 (1967).

With regard to your third question, where an accused has given his consent to withdrawal of blood, he is then unable to bring a civil action for assault upon his person against the person or persons withdrawing the blood. It is a well settled principle of law that consent is a defense to a civil action for assault and battery. By consenting to a blood test the accused is consenting to any reasonable procedures employed by an authorized person for removal of such blood.

September 11, 1973

CRIMINAL LAW: Uniform traffic citation and complaint — Ch. 767, §§4.7, 754.1, 762.2, Code of Iowa, 1973. Uniform traffic citation and complaint need not be sworn to before a magistrate as it is specifically exempted therefrom by §754.1, Code of Iowa, 1973. (Sullins to Price, Assistant Black Hawk County Attorney, 9/11/73) #73-9-6

Mr. David Price, Assistant Black Hawk County Attorney: This is to acknowledge receipt of your letter dated August 9, 1973, in which you requested an opinion from this office regarding the following matter:

"Must the uniform traffic complaint be sworn to when filed, pursuant to Code Section 762.2, or is a uniform traffic complaint exempt from oath by Section 754.1?"

Chapter 767 sets forth the procedure to be followed for the trial of nonindictable misdemeanors. Section 762.2, Code of Iowa 1973, provides:

"Criminal actions for the commission of a public offense must be commenced before a magistrate by an information or complaint, subscribed and sworn to, and filed with the magistrate."

Section 754.1, Code of Iowa, 1973, defines a complaint or preliminary information as:

"... a statement in writing, under oath or affirmation, made before a magistrate, or in his absence before the district court clerk or his deputy, of the commission or threatened commission of a public offense, and accusing someone thereof. *Provided, however, that this section shall not apply to the uniform traffic citation and complaints under section 753.13.*" (Emphasis added.)

It is apparent that the general provisions of §762.2, requiring all informations or complaints to be sworn to before a magistrate, are in direct conflict with §754.1, which specifically exempts the uniform traffic citation and complaint from the affirmation procedure.

Section 4.7, Code of Iowa 1973, states:

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

The conflict here is irreconcilible and, as a result, the specific exemption in §754.1 prevails over §762.2.

It is our opinion, therefore, that the uniform traffic citation and complaint need not be sworn to before a magistrate as it is specifically exempted therefrom by §754.1.

September 11, 1973

DOMESTIC RELATIONS: Marriage Licenses — Ch. 595, Code of Iowa, 1973. §595.3, Code of Iowa, 1973 — A male under 18 years of age or a female under 16 years of age may not be granted a valid marriage license. Exception — court may grant order, §595.2, Code of Iowa, 1973. (Nolan to Rodenburg, Pottawattamie County Attorney, 9/11/73) #73-9-7

Mr. Lyle A. Rodenburg, Pottawattamie County Attorney: Reference is made to your letter requesting an opinion regarding the clerk of court's duty in the issuance of marriage licenses. Your letter states as follows:

"A question in regard to Chapter 595 of the Code of Iowa has been presented to this office as to whether or not a male, under the age of 18, or a female under the age of 16, with parental consent, and the female not being pregnant, can apply for and obtain a marriage license from the Clerk of Court.

It is my opinion that as long as the Clerk of Court has the consent of the parents, pursuant to Section 595.8, they could lawfully issue a license to such minors, notwithstanding Section 595.2. It is further my opinion that Section 595.2 makes a marriage between a male of less than 18 and a female of less than 16, voidable at the option of the parties, but it is lawful for the clerk to issue a license and the marriage would be valid until voided.

I further conclude that the acts of the clerk in issuing marriage licenses are ministerial in nature and the clerk is not requested to enforce age limitations except to assure themselves and the records that the ages as stated on the application are correct.

Since my opinions seem to be in conflict with the procedure of the clerk of long standing, and a memorandum of marriage laws published by the Bureau of Vital Statistics, I am requesting an Attorney General's opinion to clarify this issue.

Would you please review these sections and issue your opinion accordingly. Thank you in advance for your courtesy."

I cannot agree with your conclusion. Section 595.3, Code of Iowa, 1973, provides:

"Previous to the solemnization of any marriage, a license for that purpose must be obtained from the clerk of the district court. Such license must not be granted in any case:

1. Where either party is under the age necessary to render the marriage valid. . . ."

In an opinion of the Attorney General dated August 14, 1947, 1948 O.A.G. 68 at page 70 the following appears:

"This view of the matter [consent given by one parent is not legal consent] is confirmed by the mandatory character of the obligation placed upon the parents or the guardian in making the statutory consent certificate in writing in accordance with the requirements of section 595.8. Imposing such duty in terms of 'must' is conclusive of the legislative intent to make this duty mandatory. And this view of the authority conferred by section 595.3 is further confirmed by the criminal penalty imposed upon the clerk if he issues a license contrary to the express terms of the foregoing section 595.3. The imposition of the penalty upon the clerk for neglect or omitting to perform statutory duties in connection with a marriage solemnization accords with established legislative policy generally; to penalize the persons charged with performing these duties."

Further, an opinion dated December 22, 1964, issued by this office states that it is obvious that one of the purposes of §595.3 is to insure that there is sufficient capacity to contract marriage. 1964 O.A.G. 106. The doctrine of expressio unius est exclusio alterius is often applied in situations requiring the interpretation of marriage statutes. And it is our opinion that this doctrine is applicable here. Since this statute clearly states that the marriage between a male of 18 and a female of 16 years of age is valid, the clerk of court is limited by the terms of statutes and should not issue a license to persons who cannot contract a valid marriage. There is an exception in §595.2 of the Code whereby the court may grant an order "authorizing issuance of a marriage license by the clerk of the district court to said applicants and the marriage under such license shall be valid" in the case where the female is pregnant or is the mother of a child which is still in her custody. It is our view, and a view generally held, that it is against public policy for parents to consent to the marriage of children who are not of a sufficient age to contract a valid marriage.

September 11, 1973

STATE OFFICERS AND DEPARTMENTS: Military leave — §29A.28, Code of Iowa, 1973. An officer or employee of the state or political subdivision who is ordered to active state or federal service by proper military authority is entitled to a leave of absence from his government employment irrespective of the fact that the military service may have been actively sought by the employee or the fact that such service may be of benefit to him. (Haesemeyer to Keating, Iowa Merit Employment Department, 9/11/73) #73-9-9

Mr. W. L. Keating, Director, Iowa Merit Employment Department: Reference is made to your letter of August 7, 1973, in which you request an opinion of the attorney general with respect to the interpretation and application of §29A.28, Code of Iowa, 1973, as it applies to officers and employees of the state or of its political subdivisions who through their own initiative are ordered to active state or federal military service.

Such §29A.28, Code of Iowa, 1973, provides:

"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 status state for 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."

In your letter you ask whether or not distinction can be made by the appointing authority between situations where an employee is ordered to active duty out of genuine military necessity or requirement and those where the initiative for the active duty assignment comes from the employee himself and is primarily for his own benefit. In the latter case you have asked if the appointing authority might not refuse to grant leave under §29A.28.

In our opinion no such distinction is justified. The plain language of §29A.28 makes it clear that all that is required for an employee to be entitled to

a leave of absence is that he be ordered by proper authority to active state or federal service. There is no basis in the statute for looking behind orders proper on their face to discover the initiative impetus or motivation for their issuance.

September 11, 1973

ELECTIONS: Nominating papers, school district elections — §277.4, Code of Iowa, 1973, as amended by §268, H.F. 745, Acts, 65th G.A., First Session (1973). The affidavit attached to nominating papers filed in connection with school elections held under Chapter 277 may be made and signed by the candidate. (Haesemeyer to Milroy, Benton County Attorney, 9/11/73) #73-9-8

Mr. Boyd J. Milroy, Benton County Attorney: You have requested an opinion of the attorney general on the question of whether or not a nominating petition for election to office to public school districts under §277.4 is valid where the affidavit attached to such petition is signed by the candidate himself.

Section 277.4, Code of Iowa, 1973, as amended by §268, H.F. 745, Acts, 65th G.A., First Section (1973) provides:

"277.4 Nominations required. Nomination papers for all candidates for election to office in each school district shall be filed with the secretary of the school board not more than sixty-five days, nor less than forty days prior to the election. Nomination petitions shall be filed not later than five o'clock p.m. on the last day for filing. Each candidate shall be nominated by a petition signed by not less than ten qualified electors of the district. To each such petition shall be attached the affidavit of a qualified elector of the district that all of the signers thereof are electors of such district and that the signatures thereto are genuine.

"The secretary of the school board shall deliver all nomination petitions to the county commissioner of elections not later than five o'clock p.m. on the day following the last day on which nomination petitions can be filed."

While §277.4 is silent on the question on whether or not a candidate may make and sign the affidavit to his own nominating petition other sections of the code, specifically §§43.17 and 273.5, require that the affidavit be of an elector other than the candidate. However, §43.17 deals with primary elections and §273.5 relates to county school boards and in our opinion haven't any relevance to other school elections held under Chapter 277. Since §277.4, as amended, does not prohibit any candidate from attaching his own affidavit to his nomination papers it is our opinion that the papers with such an affidavit attached would be valid.

September 17, 1973

BEER AND LIQUOR CONTROL DEPARTMENT — Federal gambling stamp. Sections 123(11)(b), 123.30(1), 123.127(2)(a), 123.128(2), 123.129(2), Code of Iowa, 1973; S.F. 108, Acts of the 65th General Assembly, First Session. If a person is required to have a federal gambling stamp, he may not obtain an Iowa liquor license or beer permit. (Haskins to Gallagher, Director, Iowa Beer and Liquor Control Department, 9/17/73) #73-9-10.

Mr. Rolland A. Gallagher, Director, Iowa Beer and Liquor Control Department: You ask whether, if a person is required to have a federal gambling stamp, he may obtain an Iowa liquor license or beer permit. It is our opinion that if a person is required to have a federal gambling stamp, he may not obtain an Iowa liquor license or beer permit.

Under the Iowa liquor and beer laws, an applicant for a liquor license or beer permit must be a "person of good moral character". *See* Sections 123.30(1), 123.127(2)(a), 123.128(2), 123.129(2), Code of Iowa, 1973. The phrase "person of good moral character" has a specific definition. Section 123.3(1), Code of Iowa, 1973, defines that phrase as follows:

"'Person of good moral character' means any person who meets all the following requirements:

* * *

"6. He does not possess a federal gambling stamp."

We read the above section to refer to persons who are required to have a federal gambling stamp, whether they actually have one or not. To read the above section to encompass only persons who actually have a federal gambling stamp would permit a person to hold an Iowa liquor license or beer permit so long as he violated federal law by not having a federal gambling stamp when one was required under the law but prevent a person from holding an Iowa liquor license or beer permit if he obtained a federal gambling stamp in compliance with the federal law. So read, the above section would encourage violations of federal law, a result prohibited by the Supremacy Clause (Article VI) of the United States Constitution. Thus, if a person is required to possess a federal gambling stamp, he cannot obtain an Iowa liquor license or beer permit. The fact that the Iowa legislature authorized certain forms of gambling in S.F. 108, Acts of the 65th General Assembly, First Session, makes no difference. Had the legislature intended to eliminate the federal gambling stamp bar to being a "person of good moral character" under Section 123.3(1), Code of Iowa, 1973, it would have expressly repealed the section. But it did not choose to do so, and therefore the bar of the section must be recognized. We express no opinion on the question of when a federal gambling stamp is required. This question is properly addressed only to the federal authorities. We do not feel that we should interpret federal law in the present instance. In sum, if a person is required to have a federal gambling stamp, he may not obtain an Iowa liquor license or beer permit.

September 17, 1973

COUNTIES: County Office — §509A.1, Code of Iowa, 1973. County officers may be covered under group insurance plans, including life and disability coverage pursuant to §509A.1 and amended by Senate File 441, Acts of 65th G.A., and such persons may also be included in deferred compensation plans, based on a group life insurance contract under §509A.12. (Nolan to Straub, Kossuth County Attorney, 9/17/73) #73-9-11.

Mr. Joseph J. Straub, Kossuth County Attorney: This is written in response to your request for an opinion on the following questions:

"Does Iowa Code Section 509A.1 of the 1973 Code of Iowa, as amended by Section 8 of Senate File 441 of the Acts of the Sixty-Fifth General Assembly, read in conjunction with Section 509A.12 of the 1973 Code of Iowa, give the County Supervisors authority to provide group life insurance coverage and group disability insurance coverage for the County Auditor, County Treasurer, County Attorney, County Recorder, Clerk of Court, Members of the Board of Supervisors, and the Sheriff, and if so, is there any limit to the amount of such coverage which may be provided out of public funds?"

Section 8 of the Senate File 441, Acts of the Sixty-fifth General Assembly provides:

"Authority of Governing Body. The governing body of the state, county, school district, city, town or any institution supported in whole or in part by public funds may establish plans for and procure group insurance health or medical service for the employees of the state, county, school district, city, town or tax-supported institution. *The county board of supervisors may establish plans for the procure group insurance, health or medical service for the county auditor, the county treasurer, the county attorney, the county recorder, the clerk of the district court, the members of the board of supervisors, and the sheriff.*" [emphasis ours]

It is well settled that statutes which relate to the same thing should be read together. Therefore, §509A.1 as amended should be read in conjunction with §509A.6 which authorizes the governing body to contract with a nonprofit corporation or with an insurance company having a certificate of authority to transact business in this state with respect of a group insurance plan "which may include life, accident, health, hospitalization and disability insurance during the period of active service of such employees. . . ."

It is our view that the import of Senate File 441 is to include the county officers in such group plans where they had previously been excluded because they were not "employees". Consequently, now such officers may be provided group insurance coverage and the reasonableness of the limitation, is left to the governing body, with the exception that as with the group coverage for employees, such coverage cannot be extended at public expense to cover persons other than those actually employed, or now holding office. Accordingly, it would be improper for the county board of supervisors to allocate public funds for premiums for the coverage of family members of an office holder although such coverage may be available under a group policy at the employee's or officer's expense.

Further, where the governing body is requested to obtain a group life insurance contract to serve as a vehicle for a deferred compensation plan pursuant to §509A.12, the county officers may participate in such plan.

September 17, 1973

STATE DEPARTMENTS: General Services. Ch. 84, Acts, 64th G.A., Session 1. With respect to state educational television, Executive Order 14, December 28, 1972, merely transfers to the Department of General Services administrative functions previously exercised by the Comptroller and does not affect the control on responsibility of the State Educational Radio and Television Board. Ch. 84, Acts, 64th G.A., First Session. (Nolan to McCausland, 9/17/73) #73-9-12.

Mr. Stanley McCausland, Director, Department of General Services: Reference is made to your letter requesting an Attorney General's opinion on the following:

"Chapter 19B of the Iowa Code transferred the administrative duties and responsibilities of the Iowa Educational Television Network under Chapter 8A from the Comptroller to the Director of General Services. To facilitate the legislative intent as set forth in Chapter 19B, Governor Ray on December 28, 1973, issued an Executive Order transferring those administrative responsibilities previously vested with the Comptroller to this office. I enclose a copy of this Executive Order for your further reference.

The intent of this transfer was, as with other concentrations of administrative services in the Department of General Services, to better coordinate and control certain administrative functions of state government thereby achieving financial savings through centralization of certain administrative and purchasing procedures.

A question has arisen concerning the scope of this transfer of authority particularly as it related to the decision-making power of the State Educational Radio and Television Facilities Board. My department has taken the position that the phrase "for administrative purposes" (code section 8A.3) means just what it says and that this department is charged with certain administrative responsibilities as related to the Iowa Educational Television network. It is further our opinion that certain responsibilities such as programming decisions, certain personnel matters, fund allocations and other policy decisions which directly affect programming remain the responsibility of the appointed board as constituted under Chapter 8A. I enclose for your further information a copy of the administrative procedures which set forth in outline form those matters which are considered administrative, and therefore, subject to the control of this department. The question of the division of administrative authority and programming decisions is particularly important to the IEBN since it receives its license to operate a television facility from the FCC and the Commission is concerned with the political control of programming.

I would appreciate it if you would advise me if our understanding of the division of responsibility as I have stated it above is consistent with Iowa Code Chapter 8A and 19B and Executive Order No 14."

It is the opinion of this office that you are correct in your interpretation of the effect of Executive Order 14 signed by the Governor on December 28, 1972. The effect of the Order is to transfer the duties and responsibilities of the comptroller to your office — not to transfer control over the stations, without FCC approval, from the State Educational Radio and Television Facility Board, which is the present licensee. The Executive Order, although specifically referring to powers, functions and responsibilities of the State Educational Radio and Television Facility Board, cannot validly transfer powers not included in the scope of the authorizing legislation. It does not effect the discretion of the Board to make decisions as to what programs are to be broadcast, subject to the limitations of its appropriation, nor does it change the responsibility of IEBN personnel to the Board.

Section 14 of Chapter 84 of the laws of the 64th General Assembly as amended by Section 7 of Chapter 1015, laws of the 64th General Assembly, Second Session, provides as follows:

"All councils, boards, and commissions created by this chapter [chapter 8A, Code of Iowa] shall be placed, for administrative purposes, in the office of the director.

Before any obligations for expenditures shall be incurred from appropriations made under the provisions of this chapter, the same shall be approved by the state comptroller." (§8A.3, Code of Iowa, 1973)

The "councils, boards and commissions" created by Chapter 8A of the Code includes in addition to the State Educational Radio and Television Facility Board, the state communications advisory council.

The Governor is not authorized by statute to go beyond the limitations of Chapter 84 and §14 thereof, which directs the transfer by executive order, specifically states:

"The assignment of functions shall consist of a realigning of authority and responsibility in accord with the terms of this Act . . ."

Executive Order 14 should not be construed to do more than provide for the transfer of administrative functions previously exercised by the Comptroller to the Director of General Services. The Order should not be construed in any way to change the responsibility of the State Educational Radio and Television Facility Board with respect to control or procedures not specified in Chapter 84, laws of the 64th General Assembly, First Session.

Accordingly, it is my view that your understanding of the division of responsibility, as outlined in your letter, is consistent with Iowa Code Chapters 8A and 19B, Code of Iowa, 1973.

September 19, 1973

STATUTORY CONSTRUCTION: Limits on county building projects, §345.1. Statute authorizing Supervisors to order additions, remodeling or reconstruction for county buildings without voter approval of the project, subject to a $10,000 ceiling when additional taxes must be levied and a $50,000 limitation where funds are available and no additional taxes need be levied, is applicable with cumulative effect to all projects for a given building in a fiscal year but does not impress a single monetary limitation on the aggregate of projects for different buildings specified in the section. (Nolan to Dillon, Louisa County Attorney, 9/19/73) #73-9-13.

Mr. John L. Dillon, Louisa County Attorney: This letter is written in response to your request for an opinion interpreting §345.1, 1973 Code of Iowa. The specific questions raised by your letter are answered in the order in which they were presented. We understand that all money used will be obtained from Revenue Sharing funds.

1. "The wiring in the courthouse is obsolete and the entire building must be rewired. Does this come under this section [345.1] or is it a repair?"

It is our view that a complete rewiring of the courthouse constitutes a "remodeling" and as such is covered by §345.1, Code of Iowa, 1973 which provides:

"The board of supervisors shall not order the erection of or the building of an addition or extension to, or the *remodeling* or reconstruction or relocation and replacement of a courthouse, . . . except as otherwise provided, when the probable cost will exceed ten thousand dollars . . . until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, . . . However, such proposition need not be submitted to the voters if any such erection, construction, *remodeling*, reconstruction, relocation and replacement, or purchase of real estate may be accomplished without the levy of additional taxes and the probable cost will not exceed fifty thousand dollars. . . ." [emphasis supplied]

2. "They need to air condition the court house, particularly the court room and jury rooms. If they could do so in different lettings over two years would this be permissible?"

It is our view that an improvement to the court house may be made in such stages as the board of supervisors order. The statutes set out above sets a limitation upon the improvement which may be made to the court house without the approval of the legal voters of the county and we believe it is reasonable to interpret such section as providing a limitation on the amount that can be expended in any year for such improvement.

3. "They also need to do extensive remodeling and repairs at the County Home because of recent legislative enactments. The Assistant State Fire Marshal has not made his inspection or report as yet but the Board are sure that they will be required to expend considerable money, probably in excess of $50,000.00. Part of which may be repairs and the balance remodeling."

It is our view that the provisions of §345.1 are applicable to this situation.

4. "They also need to build a new shed at the county yard. Estimated to cost between $10,000 and $20,000."

Insofar as applicable, the provision of §345.1 applies here also. It may be said that the board of supervisors is not limited to $10,000 in the aggregate for improvements made at the court house, jail, county hospital, county home or other county buildings or facilities. The limitation, as we view it, applies separately to each county building or facility.

5. "Does Section 345.1 as now written supersede Miller v. Merriam, 94 Iowa 126, 62 N.W. 689? I have read your offices opinion of 8-16-72."

Miller v. Merriam is a case decided by the Iowa Supreme Court in 1895 which holds that before a board of supervisors can order the erection of a court house, the probable cost of which will exceed $5,000, it must be authorized to do so by vote of the electors of the county, and when there is money in the treasury available and sufficient to pay for the building, it is not necessary to submit to the people a provision to levy a tax. The case further holds that there was a surplus in the county fund sufficient with the swamp-land fund to erect the proposed building and consequently the vote of electors in favor of the proposition to build a court house was not affected by omitting to submit with the proposition a provision to levy a tax.

The statute in question in *Miller v. Merriam* was Iowa Code §311 which clearly is a forerunner of the present statute now codified as §345.1. However, successive legislatures have enlarged the powers of supervisors so that the present authorization is considerably broader and there is now a clear provision for the supervisors subject to the limitations of the statute, to order certain improvements without submitting the same to the vote of the electors.

6. "In view of questions 3, 4, & 5 being three separate buildings does the $50,000.00 requirement apply to each individually or would it be cumulative?"

As stated above, it is our opinion that the $50,000 limitation applies to each building improvement project and that the projects referred to in §345.1 for the various buildings listed there are not impressed in the aggregate with the $50,000 limitation, but that the limitation is applicable to all such projects proposed for a given building within a fiscal year.

September 19, 1973

CITIES AND TOWNS: Taxing Powers. Amendment 2, 1968, Iowa Constitution; §93, Chapter 1088, Acts of the 64th G.A., Second Session. A municipality may not lexy a one mill tax, pursuant to Section 93.5 of the

City Code, for a cultural or scientific facility that is owned and operated by private groups. (Blumberg to Nuzum, Jasper County Attorney, 9/19/73) #73-9-14

Bruce J. Nuzum, Jasper County Attorney: We are in receipt of your opinion request of August 8, 1973, regarding a new community center in Newton. The community center will house the YMCA and the Newton Community Theater. The funds for construction of the facility have been raised by private donation. The facility will operate as a community center and will be available for meetings, programs, theater presentations and physical activities. The community center will be under the ownership of a trust or building corporation organized by the boards of these two non-profit corporations. The city will not own this facility. Your question is whether the city can levy a one mill tax for this facility under §93.5, Chapter 1088, Acts of the 64th G.A. (hereinafter referred to as the City Code).

Section 93.5 of the City Code provides:

"A city may certify, for the general fund levy, taxes which are not subject to the thirty-mill limit provided in section eighty-two (82) of this Act, and which are in addition to any other moneys the city may wish to spend for such purposes, as follows:

"5. A tax not to exceed one mill for the operation of cultural and scientific facilities . . . ."

Amendment 2, 1968, Iowa Constitution, provides:

"Municipal corporations are granted home rule power, and authority, not inconsistent with the laws of the General Assembly, to determine their local affairs and government, *except that they shall not have power to levy any tax unless expressly authorized by the General Assembly.*" [Emphasis added]

Upon reading the above constitutional amendment, we find that the home rule power does not extend to taxing matters of a municipality. The power to tax must be specifically expressed by the Legislature, and therefore should be strictly construed to be in line with the obvious legislative intent, that is to keep a rein on taxing matters.

We do not believe that the Legislature intended to limit the taxing powers of municipalities, and then allow them to levy a tax to help pay the cost of a facility owned and operated by the private sector. Both appear to be contradictory. We believe that the Legislature intended such a tax to be levied only when the municipality operated the facility. In addition, the Constitution of Iowa, Article III, section 31, provides in part:

"[N]o 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." [Emphasis added]

This section has been interpreted, as applied to the limitation of a city council power, in *Love vs. City of Des Moines,* 1930, 210 Iowa 90, 94, 230 N.W. 373, as follows:

"One of the fundamentals of popular government is that the power of taxation and the expenditure of taxes shall not be exercised for private benefit or for the purpose of mere gratuities to private interests."

This opinion should not be interpreted to mean that a municipality may not give money to a cultural or scientific facility that is operated by private groups. We are referring specifically to that part of section 93 which states that a city may certify taxes "which are in addition to any other moneys the city may wish to spend for such purposes." It appears that this question is still open.

Accordingly, we are of the opinion that the city of Newton may not levy a one mill tax for a cultural or scientific facility (housing a community theatre and the YMCA) which is owned and operated by the private sector.

September 19, 1973

COURTS: Judicial Magistrates. §§602.52, 602.53. There is no statutory bar to the operator of a credit bureau serving as judicial magistrate. Whether a conflict of interest may exist in a given case is a question of fact not subject to opinion of this office. (Nolan to Anderson, 9/19/73) #73-9-15

Mr. Calvin R. Anderson, Winneshiek County Attorney: Reference is made to your request for an opinion on the question of whether or not the owner and operator of a credit bureau who is in the business of collecting accounts and furnishing credit information on named individuals can hold the office of judicial magistrate.

The qualifications for the office of judicial magistrate are set out in Section 602.52, Code of Iowa, 1973. This section provides as follows:

"A judicial magistrate shall be an elector of the county of appointment, shall be less than seventy-two years of age, and shall cease to hold office upon obtaining that age."

Section 602.53 further provides:

"No magistrate shall accept any fee or reward from or on behalf of anyone for services rendered in the conduct of any official business except as provided in this chapter. A magistrate or any member of any corporation, partnership, firm or association with which he may be connected, may not be directly or indirectly engaged in any capacity for any party in any action or proceeding pending or arising within his jurisdiction based upon substantially the same facts upon which a prosecution or proceeding has been prosecuted or commenced before him."

The question you submitted is not one of compatibility of offices, but appears to be one of possible conflict of interest. Whether or not such a conflict exists in a given case requires a determination of the facts rather than a legal opinion. In the absence of such facts, there is no statutory bar to the operator of a credit bureau serving as a judicial magistrate.

September 19, 1973

OFFICES: County, Area and State Offices. *State, ex rel. LeBuhn v. White,* 1965, 257 Iowa 606, 133 N.W.2d 903. Director of merged area board and county school superintendent, and legislator and member of a county board are described as incompatible offices within the above named ruling. Employee of community college and member of county board of education presents no incompatibility. (Nolan to Schroeder, State Representative, 9/19/73) #73-9-16

The Honorable Laverne Schroeder, State Representative: This responds to your request for an opinion as to whether the following offices are compatible:

a) Director of Merged Area Board and County School Superintendent;

b) Employee of Community College and Member of County Board of Education;

c) Legislator and Member of County Board.

I am of the opinion that examples (a) and (c) describe incompatible offices for the reason that the duties of such offices are inherently inconsistent and that it is improper from considerations of public policy for a person to hold such offices concurrently. *State ex rel LeBuhn v. White,* 1965, 257 Iowa 606, 133 N.W.2d 903.

While there may be an occasion in which a conflict might arise for the person holding positions described by (b), this example does not constitute incompatibility of offices. There can be no incompatibility of offices unless more than one office is involved.

September 19, 1973

SCHOOLS: Area schools. Area schools are now authorized by §280A.22, Code, 1973, to borrow money for purposes for which a tax has been voted and to pledge such tax to pay the loan and the interest thereon. (Nolan to Faches, Linn County Attorney, 9/19/73) #73-9-17

Mr. William G. Faches, Linn County Attorney: This is written in response to your request for an Attorney General's opinion asking whether an opinion issued by this office on December 26, 1969, is negated by the provisions of Code §280A.22 as amended by the 64th General Assembly.

The opinion to which you refer may be found in 1970 Opinions of the Attorney General at page 380. At the time that opinion was issued, §280A.22 Code of Iowa, 1966, provided as follows:

"Additional tax. In addition to the tax authorized under section 280A.17, the voters in any merged area may at the annual school election vote a tax not exceeding three-fourths mill on the dollar in any one year for a period not to exceed five years for the purchase of grounds, construction of buildings, payment of debts contracted for the construction of buildings, purchase of buildings and equipment for buildings, and the acquisition of libraries, and for the purpose of maintaining, remodeling, improving, or expanding the area vocational school or area community college of the merged area."

This section was subsequently amended by Chapter 1061, Acts of the 64th General Assembly, Second Session, and now provides:

"Additional tax. In addition to the tax authorized under section 280A.17, the voters in any merged area may at the annual school election vote a tax not exceeding three-fourths mill on the dollar in any one year for a period not to exceed five years for the purchase of grounds, construction of buildings, payment of debts contracted for the construction of buildings, purchase of buildings and equipment for buildings, and the acquisition of libraries, and for the purpose of maintaining, remodeling, improving, or expanding the area vocational school or area community college of the merged area which tax shall be collected by the county treasurers and remitted to the treasurer of the merged area as other taxes are collected and remitted, and the proceeds of said tax shall be deposited in a separate and distinct fund to be known as the voted tax fund, to be paid out upon warrants drawn by the president and secretary of the board of directors of the merged area district for the payment of costs incurred in providing the school facilities for which the tax was voted.

In order to make immediately available to the merged area the proceeds of the voted tax hereinbefore authorized to be levied, the board of directors of any such merged area is hereby authorized, without the necessity for any further election, to borrow money and enter into loan agreements in anticipation of the collection of such tax, and such board shall, by resolution, provide for the levy of an annual tax, within the limits of the special voted tax hereinbefore authorized, sufficient to pay the amount of any such loan and the interest thereon to maturity as the same becomes due. A certified copy of this resolution shall be filed with the county auditors of the counties in which such merged area is located, and the filing thereof shall make it a duty of such auditors to enter annually this levy for collection until funds are realized to repay the loan and interest thereon in full. Said loan must mature within the number of years for which the tax has been voted and shall bear interest at a rate or rates not exceeding seven percent per annum. Any loan agreement entered in to pursuant to authority herein contained shall be in such form as the board of directors shall by resolution provide and the loan shall be payable as to both principal and interest from the proceeds of the annual levy of the voted tax hereinbefore authorized, or so much thereof as will be sufficient to pay the loan and interest thereon. In furtherance of the foregoing the board of directors of such merged area may, with or without notice, negotiate and enter into a loan agreement or agreements with any bank, investment banker, trust company, insurance company, or group thereof, whereunder the borrowing of the necessary funds may be assured and consummated. The proceeds of such loan shall be deposited in a special fund, to be kept separate and apart from all other funds of the merged area, and shall be paid out upon warrants drawn by the president and secretary of the board of directors to pay the cost of acquiring the school facilities for which the tax was voted.

Nothing herein contained shall be construed to limit the authority of the board of directors to levy the full amount of the voted tax, but if and to whatever extent said tax is levied in any year in excess of the amount of principal and interest falling due in such year under any loan agreement, the first available proceeds thereof, to an amount sufficient to meet maturing installments of principal and interest under the loan agreement, shall be paid into the sinking fund for such loan before any of such taxes are otherwise made available to the merged area for other school purposes, and the amount required to be annually set aside to pay the principal of and interest on the money borrowed under such loan agreement shall constitute a first charge upon all of the proceeds of such annual special voted tax, which tax shall be pledged to pay said loan and the interest thereon.

This law shall be construed as supplemental and in addition to existing statutory authority and as providing an independent method of financing the cost of acquiring school facilities for which a tax has been voted under this section and for the borrowing of money and execution of loan agreements in connection therewith and shall not be construed as subject to the provisions of any other law. The fact that a merged area may have previously borrowed money and entered into loan agreements under authority herein contained shall not prevent such merged area from borrowing additional money and entering into further loan agreements provided that the aggregate of the amount payable under all of such loan agreements does not exceed the proceeds of the voted tax. All acts and proceedings heretofore taken by the board of directors or by any official of any merged area for the exercise of any of the powers granted by this section are hereby legalized and validated in all respects." (emphasis ours)

It is the view of this office that area schools now have authority to borrow money which did not exist at the time that the 1969 Opinion was issued by this office.

September 19, 1973

BANKING: Credit Unions. When all of the business of a credit union is conducted in another state the restrictions of §533.3, Code of Iowa, 1973, do not apply, but where personal contacts are made or advertising is done in this state the statute applies. (Nolan to Marlin Reed, Banking Department, 9/19/73) #73-9-18

Mr. Marlin Reed, Supervisor Credit Unions, Department of Banking: This is written in response to your request for an opinion of this office as to whether or not it is permissible for the IBM Rochester Employees Credit Union, which is chartered by the State of Minnesota, to service IBM employees in the State of Iowa by mail and to make direct contact with potential members in the State of Iowa.

Section 533.3, Code of Iowa, 1973, is applicable to this inquiry. This section of the Code provides:

"533.3 Restriction. No person, firm, corporation, copartnership, or association, except a credit union organized under the provisions of this chapter or under the federal credit union Act [12 U.S.C. §1751 et seq.] or except the Iowa credit union league, incorporated, or chapters of said league, shall use a name or title containing the words "credit union" or any derivation thereof or shall represent themselves, in their advertising or otherwise, as conducting business as a credit union.

"Any person, firm, corporation, copartnership, or association, upon conviction of the violation of the provisions of this section shall be fined not more than five hundred dollars or imprisoned not more than one year or both; and may be enjoined from such continued use of said words, advertising or other representation."

Where all of the business of a credit union is conducted in another state, and its advertisements are all issued outside of this state, the restrictions of §533.3 do not apply. On the other hand when a representative of a credit union comes into the State of Iowa and makes contact in person with potential members of this state, such activity would appear to be subject to the supervision of the State Banking Department and to the restrictions contained in §533.3, supra.

September 19, 1973

COUNTIES: Court house remodeling project. §345.1. When, based on architect's estimate, the probable cost of remodeling the court house was $40,000 it was not necessary to submit the question of remodeling to the voters if funds for such project were available without additional levy. When lowest bid received exceeds $50,000 the supervisors should not order such remodeling but should reject all bids and re-let the project either on the same or revised specifications. (Nolan to Simpson, Boone County Attorney, 9/19/73) #73-9-19.

Mr. Stanley R. Simpson, Boone County Attorney: This office has received a request for an opinion interpreting §345.1, Code of Iowa, 1973, as it applies to the following factual situation.

The Boone County Board of Supervisors obtained an architect's estimate for the remodeling of the Boone County Court House to accommodate the magistrate's court at an approximate cost of $40,000. Bids were received for the remodeling after the requisite public notice and hearing. No election was held giving the voters of Boone County a right to vote on this project. Four bids for the project were received, the low bid being just under $52,000.

The questions presented are:

"1. In the light of §345.1, can the Board eliminate some part of the project to bring the bids down below $50,000?

2. Could the Board do this by negotiation with the low bidder, or would it be mandatory to hold a new letting?"

Section 345.1 provides in pertinent part:

"The board of supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction or relocation and replacement of a courthouse . . . when the probable cost will exceed ten thousand dollars . . . until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or a special election, notice of the same being given as in other special elections. However, such proposition need not be submitted to the voters if any such . . . remodeling . . . may be accomplished without the levy of additional taxes and *the probable cost will not exceed fifty thousand dollars . . .*" [emphasis supplied]

As we interpret the above section, in view of the architect's estimate of $40,000, it was not necessary to submit the question of whether the court house should be remodeled to the voters as long as the funds for such project were available without the levy of additional taxes.

The answer to your second question is governed by the provisions of Code §23.18 which provides:

"When the estimated total cost of construction, erection, demolition, alteration or repair of any public improvement exceeds five thousand dollars, the municipality shall advertise for bids . . . and shall let the work to the lowest responsible bidder submitting a sealed proposal; provided, however, if in the judgment of the municipality bids received be not acceptable, all bids may be rejected and new bids requested."

It may be necessary to revise the specifications for the project so as to bring it within the limitation imposed by §345.1. However, in my opinion, it would be improper for the board to attempt to negotiate with the low bidder by issuing a change order to bring the project within the fifty thousand dollar ceiling after the bids have been opened. The better practice is to reject all bids and to re-let the project either on the same or on revised specifications.

September 19, 1973

COUNTIES: Supervisors. Within the limitations prescribed by §445.62, Code of Iowa, 1973, the Supervisors may remit taxes paid by mobile home owners (Ch. 135D) upon their application for relief after loss of such property due to storm. (Nolan to Jenkins, Monroe County Attorney, 9/19/73) #73-9-20

Mr. James D. Jenkins, Monroe County Attorney: This is written in response to your request for our opinion as to whether or not §445.62 is applicable to mobile homes and trailers taxed under Chapter 135D, Code of Iowa, 1973. From your letter we understand that several mobile home parks in Monroe County were badly damaged by severe wind storms in the spring of this year, resulting in total loss to several of the mobile homes. Some of the mobile home owners have now made application for remission of the school tax paid by them on their mobile homes pursuant to the provisions of §445.62 supra. This section of the Code provides:

"Remission in case of loss. The board of supervisors shall have power to remit in whole or in part the taxes of any person whose buildings, crops, stock or other property has been destroyed by fire, tornado, or other unavoidable casualty, if said property has not been sold for taxes, or if said taxes have not been delinquent for thirty days at the time of the destruction. The loss for which such remission is allowed shall be such only as is not covered by insurance. The loss of capital stock in a bank operated within the state and the making and paying of a stock assessment for the year such stock was assessed for taxation shall be a destruction within the meaning of this section."

In a 1923 opinion issued by this office, it is stated that the section cited above applies to both the real and personal property of taxpayers, that opinion dealing specifically with crop loss due to hail, (1923 OAG 405). However, the board of supervisors is authorized only to remit taxes directly attributable to the loss of physical property and therefore, this would not cover uninsured losses arising from loss of rental income, (1964 OAG 435).

Accordingly, it is our view that within the limitations set forth above, the supervisors may remit, in whole or in part, taxes paid by mobile home owners upon their application for such relief.

September 19, 1973

SCHOOLS: Contracts. An electrical contractor is not required to divest himself of profit from a contract entered into with the Board prior to his election to such board. In the absence of fraud or promise of bribe to influence voters the School District is not entitled to return of any monies paid to the contractor. (Nolan to Benton, Superintendent of Public Instruction, 9/19/73) #73-9-21

Honorable Robert D. Benton, State Superintendent of Public Instruction: We have your letter submitting a question presented by the board of directors of the Marshalltown Community School District on the following matter. In 1971 the Marshalltown Community School District entered into a written contract for labor and materials to be furnished by a local electrical contractor for the construction of an addition to Franklin Grade School. Subsequent to entering into the contract and during the time of performance, the contractor became a candidate for the Marshalltown Community School Board. He was elected and appointed as Director on September 20, 1971, and is presently serving his three year term as a director. On September 16, 1971, he wrote a letter to the President of the Marshalltown Community School Board indicating a plan to divest himself of any profit from the contract accruing subsequent to September 20, 1971. The contract was completely performed in August, 1972, and on September 13, 1972, he wrote a letter to the secretary of the school district, presenting calculations showing a profit on the contract of $609.35. The letter stated that $309.35 had been contributed to the Senior Citizens Center and the balance as a political contribution to three candidates for election to the school board.

The question submitted by your letter is whether the manner of handling and disposition of the profit of $609.35 by the Director was proper, under whatever statutes and legal principles may apply and whether or not he should have returned such profits to the school district.

It has long been the law of this state that a school board cannot enter into a contract with a director thereof for the furnishing of materials, supplies or services. In *Kagy v. Independent School District of West Des Moines,* 1902, 117 Iowa 694, at page 697, the Iowa Supreme Court stated:

"We agree with the appellant that the policy of the law forbids a member of the board of directors becoming a party to, or the beneficiary of, any contract made by such board. . ."
and at page 699:

". . . There is nothing morally wrong or inequitable in saying to a school district that it must pay a fair consideration for benefits received, before it will be permitted to repudiate an executed contract by virtue of which it has obtained and continues to hold, something of substantial value."

In the case which you present, it clearly appears that the contract was awarded and the partial performance was had prior to the election of this director to the school board. Consequently, it cannot be said that this is a case of the board contracting with one of its members. Likewise, there is no indication in the facts that you submit that there was any promise of the director as a candidate to divest himself of any profit derived from the contract subsequent to the date on which he took office as a director. Accordingly, it is our view that the properiety of the disposition of the profit under this contract is not now subject to question. In an opinion dated September 15, 1924, 1924 O.A.G. 372, 374, it is stated:

"In the absence of fraud, and upon a showing of value received and reasonableness of the consideration after the services have been rendered and the district received the benefits therefrom, a recovery cannot be had of the money thus paid by the district. This does not prevent a taxpayer resident of the district from enjoining the payment for services of a member of the board of directors upon an unlawful contract with the district when the contract remains executory. In case of fraud or excessive payment to the director of the school board, then there could be a recovery of the amount paid in excess of a fair compensation or consideration."

September 19, 1973

CITIES & TOWNS: Revenue from parking meter fines. §366.1, 1973 Code of Iowa, H.F. 585, §27, 65th G.A., First Session. Municipal corporation's power to enforce parking meter ordinances by fine is subject to requirement that it relinquish 10 percent of such revenue to county treasurer of the county in which that municipal corporation is located. (Sullins to Smith, State Auditor, 9/19/73) #73-9-23

The Honorable Lloyd R. Smith, Auditor of State: You have requested an opinion from this office concerning whether §366.1, 1973 Code of Iowa, requires that 10 percent of all money collected by municipal corporations for violation of ordinances including parking meter violations should be turned over to the county treasurer.

It is the opinion of this office that §366.1, 1973 Code of Iowa, as amended by Acts of the 65th G.A., House File 585, §27, does apply to the revenue in fines for parking meter violations received by municipal corporations.

Section 366.1, 1973 Code of Iowa, provides that a municipal corporation shall have the power to make ordinances not inconsistent with the laws of the state, as seem necessary and proper to provide for the order, safety, prosperity,

and convenience of such municipal corporations. The enactment of parking meter ordinances falls within that purpose. Parking meter systems provide substantial sources of revenue for the cities and towns which use them. They also help maintain order, safety, and convenience by providing definite locations for vehicle parking and by helping to provide for an orderly flow of traffic. Section 366.1, 1973 Code of Iowa, provides that such ordinances are enforceable by fine. Therefore House File 585, §27, which mandates that 10 percent of all fines collected by municipal corporations be remitted to the county treasurer of the county in which the municipal corporation is located, is applicable to fines collected from parking meter violations. It is the revenue to municipal corporations by fine that is the object of House File 585, §27, not the revenue from the day to day operational use of parking meters. The latter is controlled by §390.8, 1973 Code of Iowa.

September 19, 1973

CRIMINAL LAW: Pardoned felon, right to own, possess and carry firearms. Iowa Constitution, Article IV, §16, §248.2, 1973 Code of Iowa; 1970 O.A.G. 482. Where a convicted felon receives a full restoration of citizenship rights, he must still receive an express authorization from the Governor in order to own, possess, and carry firearms. (Sullins to Anderson, Washington County Attorney, 9/19/73) #73-9-22

Mr. Tracy Anderson, Washington County Attorney: You have requested an opinion from this office on the following question:

"May a person previously convicted of a felony who obtains a certificate restoring all his rights of citizenship under Iowa Code Section 248.12, possess a firearm without being in violation of the 1968 Federal Gun Control Act, or qualify for a gun permit under Iowa Code Section 695.4?"

Under §248.12, 1973 Code of Iowa, "the governor shall have the right to grant any convict . . . a certificate of restoration of all his rights of citizenship." Iowa Constitution, Article IV, §16. The effect of this pardon was considered in *Slater v. Olson,* 230 Iowa 1005, 229 N.W. 879 (1941). The Iowa Supreme Court considered the right of a pardoned felon to qualify for a civil service position where one of the requirements for the position was that he should not have been convicted of a felony. The court indicated that:

"We do hold, however, that a full pardon contemplates, as stated in State v. Forkner, 94 Iowa 1, 62 N.W. 772, supra, a remission of guilt 'both before and after conviction', forgives the offender and relieves him from the results of the offense, relieves not only from the punishment which the law inflicts for the crime but also exempts him from additional penalties and legal consequences in the form of disqualification or disabilities based on his conviction."

Under the authority of *Slater* the pardoned person is not subject to disabilities based on his previous conviction and receives his full civil rights.

The 1968 Federal Firearms Act provides that a pardoned felon may receive, possess, or transport in commerce a firearm if his pardon expressly authorizes that he may do so. 18 U.S.C. App. §1203(2).

"If a full pardon reinstates [a felon's] civil liberties, then inherent in these liberties would be the right to own, possess, or carry a firearm. Hence, an amendment to the pardon to meet the requirements of the federal law would be sufficient without resubmitting a new pardon application. The right to the use of the firearm was in actuality already inherent in the pardon previously

granted. The board of parole has in effect previously considered the rights attendant to a pardon when it made its original recommendation. Therefore, it would be redundant to resubmit a new pardon application with an amendment annexed to it describing a right already encompassed by the original full pardon." 1970 OAG 482.

Thus, it is our opinion that a person previously convicted of a felony who obtains a certificate restoring all his rights of citizenship can possess a firearm without being in violation of the 1968 Federal Gun Control Act or qualify for a gun permit under §695.4, 1973 Code of Iowa, if an amendment is made to the original pardon, expressly authorizing the same. He may apply directly to the governor for this amendment.

September 20, 1973

STATE OFFICES: Incompatibility. The offices of Iowa State Highway Commissioner and Judicial Nomination Commissioner are not incompatible offices, and a person would not be disqualified for that reason from holding both concurrently. (Nolan to Shaff, Commissioner for the Seventh Judicial District, 9/20/73) #73-9-24

Honorable David O. Shaff, Shaff, Farwell & Senneff: Your letter to the Clerk of the Supreme Court has been referred to this office for an opinion on the two questions which you submitted concerning the effect of your appointment to the Highway Commission and the continuation of your service as a Judicial Nominating Commissioner for the Seventh Judicial District. The questions are:

"a. I have been appointed as a member of the Iowa State Highway Commission and am serving thereon for a four year term. Does my service on the State Highway Commission in any way disqualify me from serving as a Judicial Nominating Commissioner?

b. If I am not otherwise disqualified, has my prior service on the Commission been of such a length as to disqualify me for re-appointment for the term commencing in January of 1974."

Inasmuch as there is no statutory bar to the concurrent holding of the two offices you described, we have considered whether or not these offices may be incompatible within the guidelines set out by the Iowa Supreme Court in *State ex rel LeBuhn v. White,* 1965, 257 Iowa 606, 133 N.W.2d 903. In this cited case, the Iowa Supreme Court, holding that a person cannot serve as a member of a local school board and as a member of the County Board of Education at the same time, stated that the test of incompatibility of offices is whether there is: (1) 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; (2) where the duties of the two offices are inherently inconsistent and repugnant. An additional test recognized by the court is whether 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. Where an incompatibility exists, a person vacates the first office held by accepting the second.

In view of the above, I am of the opinion that there is no incompatibility in the offices you presently hold. Accordingly, I am of the opinion that no disqualification exists for such reason.

Further, there appears to be no statutory limitation on the number of terms which an individual may serve as a judicial nominating commissioner.

Therefore, prior service on the nominating commission is not a bar to re-appointment or re-election.

September 21, 1973

STATUTORY CONSTRUCTION. School Budget Review Committee. Ch. 258, Section 11(6), Acts, 65th G.A., Session 1. School Budget Review Committee does not contravene constitutional limitations by increasing allowable growth pursuant to Ch. 258, Acts, 65th G.A., Session 1. (Nolan to Welden, State Representative, 9/21/73) #73-9-25

Honorable Richard W. Welden, State Representative: Your letter requesting an opinion on the constitutionality of §11, subsection 6 of House File 359, Chapter 258, Acts of the 65th General Assembly, First Session, has been received. The legislation in question provides authority for the school budget review committee to grant additional state aid to local school districts "from any funds appropriated to the Department of Public Instruction for the use of the school budget review committee". The law also permits the school budget review committee to "establish a modified allowable growth for the district by increasing its allowable growth". Your letter interprets this second authorization to increase the standing unlimited appropriation by the amount of increased allowable growth granted to a school district.

Your letter asks:

"In the second instance stated above, is the school budget review committee, a committee of the executive branch, appropriating money in contravention of Art. III, Section 24 of the Iowa Constitution?"

The constitutional provision to which you make reference provides:

"No money shall be drawn from the treasury but in consequence of appropriations made by law."

In *Graham v. Worthington,* 1966 259 Iowa 845, 146 NW2d 626, the Iowa Supreme Court stated:

"It is for the General Assembly to enact laws governing expenditure of state funds including the appropriation of moneys for payment. But once this is constitutionally done, the procedures, mechanics, the fact finding process upon which payment shall be made, may with reasonably proper guides or standards be delegated to judicial or quasi-judicial bodies. (259 Iowa, p. 857)

The court further stated at page 862:

"Plaintiff claims we should find the subject legislative enactment unconstitutional because no definite amount is appropriated out of some specified fund.

This contention might have some merit if directed to the consideration of those state constitutions which require a specification of amount and funds.

But our constitution only requires there be no expenditure of state funds except upon a legislative appropriation.

The constitutional provisions here concerned simply require the appropriation by the legislature, not necessarily an appropriation of a sum certain out of some 'earmarked' fund. See Article III, sections 24 and 31, Constitution of Iowa.

* * *

In the case now before us the amount of the appropriation cannot be predetermined but is limited by the terms of the Act to the . . .

* * *

Doubts, if any, on this subject, must be resolved in favor of constitutionality of the Act. Carroll v. City of Cedar Falls, 221 Iowa 277, 290, 261 N.W. 652."

Section 11 (6th of House File 359, supra) provides:

"If a district has unusual circumstances, creating an unusual need for additional funds, including but not limited to the following circumstances, the committee may grant supplemental aid to the district from any funds appropriated to the department of public instruction for the use of the school budget review committee for this purpose, and such aid shall be miscellaneous income and shall not be included in district cost; or may establish a modified allowable growth for the district by increasing its allowable growth; or both:

a. Any unusual increase or decrease in enrollment.

b. Unusual natural disasters.

c. Unusual transportation problems.

d. Unusual initial staffing problems.

e. The closing of a nonpublic school, wholly or in part.

f. Substantial reduction in miscellaneous income due to circumstances beyond the control of the district.

g. Unusual necessity for additional funds to permit continuance of a course or program which provides substantial benefit to pupils.

h. Unusual need for a new course or program which will provide substantial benefit to pupils, if the district establishes such need and the amount of necessary increased cost.

i. Unusual need for additional funds for special education or compensatory education programs.

j. Year-round or substantially year-round attendance programs which apply toward graduation requirements, including but not limited to trisemester or four-quarter programs. Enrollment in such programs shall be adjusted to reflect equivalency to normal school year attendance.

k. Severe hardship due to the exclusion of miscellaneous income from computations under this chapter. For the school year beginning July 1, 1973, the committee shall increase the district's allowable growth to the extent necessary to prevent such hardship."

The term modified allowable growth is defined under Section 442.7, Code of Iowa, 1973, as amended by §6, House File 359, supra. This requires the state comptroller to compute the state percent of growth each year. Section 442.26, Code of Iowa, 1973, was not changed by any provisions of House File 359, supra, and continues to provide:

"There is hereby appropriated each year from the general fund of the state an amount necessary to pay the state school foundation aid.

All state aids paid under this division, unless otherwise stated, shall be paid in installments . . . as nearly equal as possible as determined by the state comptroller, taking into consideration the relative budget and cash position of the state resources.

All moneys received by a school district from the state under the provisions of this chapter shall be deposited in the general fund of the school district, and may be used for any school general fund purpose."

Accordingly, it is our view that the school budget review committee does not contravene the constitutional limitations by increasing allowable growth pursuant to Ch. 258, Acts 65th G.A., 1st Session.

September 24, 1973

CITIES AND TOWNS: Election to fill a vacancy — §69.12, Code of Iowa, 1973. If a vacancy exists more than ten days prior to filing for an election, and less than ninety days remain in the unexpired term, the person who is successful at the general election for the next regular term shall fill the vacancy as soon as he or she is qualified. (Blumberg to Anderson, State Senator, 9/24/73) #73-9-26

Honorable Leonard C. Anderson, State Senator: We are in receipt of your opinion request of September 11, 1973, regarding an election to fill a vacancy on the city council. You indicated that two members of the city council, whose terms expire on December 31, 1973, resigned their positions in January, 1973. Two appointments were made to fill those vacancies, and those two council members wish to run for election for the next regular terms in the November election. You ask whether there need to be an election to fill the unexpired terms from the election date until December 31, 1973, in addition to the regular election for a new term.

Section 69.12, 1973 Code of Iowa, provides:

"If a vacancy occurs in an elective office ten days or more before the filing date prior to a general election, it shall be filled at such election if the remainder of the term of office is greater than ninety days after the date of the election. If the unexpired term is less than ninety days after the election day at which the vacancy is filled, the person elected to the office for the next regular term shall take office as soon as he qualifies."

This section means that if a vacancy occurs at least ten days prior to a general election, and if more than ninety days remains in the unexpired term after the election, that vacancy must be filled at that election for the unexpired term. However, if the unexpired term after the election is less than ninety days, the person elected to office for the next regular term shall take office as soon as possible to fill in the remainder of the unexpired term.

Your situation falls within the second sentence of section 69.12. The unexpired term from the date of the election until the new term begins is less than ninety days. Thus, those that are elected for the new term shall fill the vacancies for the remainder of the unexpired terms.

It was also indicated in your request that the two seats up for election are at large, along with one other at large seat. You ask how the two vacancies are to be filled from the three who won the election. If the two appointees are successful, they would, of course, continue on in those seats. If they are defeated, the answer would be determinative upon the procedures at the election. For instance, if candidates are aligned in pairs in opposition to one another, the person who defeated the appointee would fill the vacancy. Also, if the incumbent for the third seat was re-elected, it is obvious that the remaining two would fill the vacancies. If the election is such that the three candidates with the most votes are elected, the result may be different. It would be

fruitless to list each variation for filling the vacancy. However, we suggest that one possible method would be to select the two that received the highest number of votes.

September 25, 1973

STATE OFFICERS AND DEPARTMENTS: Public Safety Department; public records, arrest data. Chapter 68A, Code of Iowa, 1973; Senate File 115, Acts, 65th G.A., First Sesstion (1973). Records of current arrests are public records and open to public inspection until such time as they are placed in a manual or automated data storage system maintained by the department of public safety or bureau of criminal investigation. At that time arrest data (except that involving non-indictable public offenses under Chapter 321 of the Code) becomes criminal history data and may not be disseminated from these sources by the bureau or department or redisseminated by criminal justice agencies except under certain conditions prescribed by statute. (Turner to Sellers, Commissioner of Public Safety, 9/25/73) #73-9-27

Mr. Michael M. Sellers, Commissioner, Department of Public Safety: You have requested an opinion of the attorney general as to the extent which Senate File 115, Acts of the 65th General Assembly, First Session (1973), an Act relating to disclosure of criminal history and intelligence data, prohibits the public disclosure of arrests.

Prior to enactment of S.F. 115, Chapter 68A, which is still in effect, made it the right of every Iowa citizen to examine all public records and copy them and provided that "the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential." See §68A.2, Code of Iowa, 1973. §68A.7 lists *"public records" which "shall be kept confidential,* unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information" including:

"9. Criminal identification files of law enforcement agencies. *However, records of current and prior arrests shall be public records."* (Emphasis added)

Thus, Chapter 68A, enacted by the 62nd General Assembly in 1967, is itself somewhat enigmatic. It broadly defines public records which every citizen has a right to examine, and the news media to publish, but excepts certain public records, obviously including arrest records, as confidential. Then it makes an exception to the confidential public records of arrest exception by saying that "however" these confidential records are public records!

At any rate, prior to S.F. 115 enacted this year, and even before Chapter 68A was enacted in 1967, no one seems to have questioned the free publication of arrests in Iowa. Indeed, there may be merit in the argument most strongly urged by newsmen that publication of an individual's arrest is a safeguard which protects the individual from mysterious disappearance and helps insure a free society.

The 65th General Assembly enacted S.F. 115, however, to protect individuals from misuse of their criminal histories which are now being indexed and centrally stored, sometimes inaccurately, on a large-scale basis in many states, including Iowa. By use of the computer, the entire criminal history of any Iowan is, or soon could be, instantly retrievable at one hundred or more police or sheriff's offices throughout Iowa and broadcast over the police radio

network to patrol cars and even to criminals and ordinary citizens who monitor law enforcement radio frequencies for their own entertainment. Also, the spector of cousin John and gossiping Gertrude, the relative or good friend of the local deputy, not to mention Big Brother State, having such readily accessible keyholes to the skeletons in many closets, has caused editors, legislators and indeed nearly every privacy loving Iowan, some varying degrees of uneasiness. Computers are notoriously insensitive to human emotion and indiscriminating, if not downright indiscreet, as to whom they reveal their omniscience.

S.F. 115 was the comprehensive and hasty result. It provides in §§1 and 2 that the department of public safety, division of criminal investigation and bureau of criminal investigation of the State of Iowa "may provide copies or communicate information from criminal history data *only* to criminal justice agencies, or such other public agencies as are authorized by the confidential records council." §2.

"Criminal history data" is specifically defined in §1(3) to mean "any or all of the following information maintained by the department or bureau *in a manual or automated data storage system* and individually identified:

"a. Arrest data.

b. Conviction data.

c. Disposition data.

d. Correctional data." (Emphasis added)

Arrest data is part of criminal history data and is defined in §1(4) to mean "information pertaining to an arrest for a public offense and includes the charge, date, time, and place. Arrest data includes arrest warrants for all public offenses outstanding and not served and includes the filing of charges, by preliminary information when filed by a peace officer or law enforcement officer or indictment, the date and place of alleged commission and county of jurisdiction."

§3 provides that no "peace officer, criminal justice agency, or state or federal regulatory agency" shall "redisseminate criminal history data, within or without the agency, received from" the department of public safety or bureau of criminal investigation except as therein provided and such information so received from the department or bureau clearly cannot be made public or redisseminated for public purposes *from that source* by any peace officer, criminal justice agency or state or federal regulatory agency, (at least according to its terms). §7 prescribes severe fines and imprisonment in the penitentiary for up to two or three years and removal from office for unlawful communication of criminal history data and intelligence data. Being a criminal and penal statute as a consequence of the punishment it prescribes for its violation, S.F. 115 must be strictly construed against the state and any doubt must be resolved in favor of any person charged with violating it, (even a public official or peace officer). *State v. Wiese,* 1972 Iowa, 201 N.W.2d 734; *State ex rel Turner v. Koscot Interplanetory, Inc.* 1971 Iowa, 191 N.W.2d 624; *State v. Nelson,* 1970 Iowa, 178 N.W.2d 434; *State v. McNeal,* 1969 Iowa, 167 N.W.2d 674, and a myriad of Iowa cases, Iowa Digest, Statutes, Key No. 241.

Not only is this a penal statute, but we must decide whether it conflicts with Chapter 68A as quoted above. In this regard, §18 provides as follows:

"Nothing in this Act shall prohibit the public from examining and copying the public records of any public body or agency as authorized by chapter sixty-eight A (68A) of the Code.

"Criminal history data and intelligence data in the possession of the department or bureau, or disseminated by the department or bureau, are not public records within the provisions of chapter sixty-eight A (68A) of the Code."

Obviously, from §18, it appears the legislature was aware of Chapter 68A when it enacted S.F. 115 and I must conclude they saw no conflict between the provisions of §68A.7(9) that "records of current and prior arrests shall be public records" and anything in S.F. 115, or they would have amended §68A.7(9). Clearly, and it does not take a strict construction, the General Assembly recognized that records of current and prior arrests shall be public records as stated in Chapter 68A. And records of arrests, while a part of "criminal history data" as defined in §1(3) of S.F. 115 nevertheless do not become criminal history data until they are "in a manual or automated data storage system" maintained by the department of public safety or bureau of criminal investigation. This means that any peace officer, or even any officer or employee of the department of public safety or bureau of criminal investigation, including a highway patrolman, agent of the bureau of criminal investigation, state narcotics agent, sheriff, deputy sheriff, policeman, county attorney or anyone else may consider records of current and prior arrests as public records available to any citizen or the news media, and the news media may publish such records "unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential. §68A.2. Whether some other provision of the Code does so limit such right is a question we shall later consider herein. But for the moment we emphasize again that arrest data, including arrest records, does not become a part of *criminal history data* until it is "in the manual or automated data storage system maintained by the department or bureau." §1(3). Obviously, in view of the history heretofore stated, the General Assembly meant to restrict only such information as is found in files or computers maintained by the department or bureau. See opinion of Philip T. Riley, Corporation Counsel, City of Des Moines, 9-20-73, hereto attached and with which I fully agree.

Once such criminal history data has been so filed in files or computers of the department or bureau, it cannot be communicated or disseminated by the department or bureau or any officer, employee or agent thereof from that source, including any highway patrolman, BCI agent or narcotics agent, except to criminal justice agencies, or such other public agencies as are authorized by the confidential records council. A "criminal justice agency" is defined in §1(10). Authorized agencies and criminal justice agencies receiving arrest reports which have come from criminal history data maintained in the department or bureau's manual or automated data storage system as provided in §2, may not redisseminate it except as provided in §3. But this does not mean that such other criminal justice agencies, peace officers (except highway patrolmen, state BCI and narcotic agents), policemen, sheriffs, county attorneys, etc. may not communicate or disseminate arrest records received from other sources than the files or computers maintained by the department or bureau. Nor do highway patrolmen, BCI and narcotic agents have any duty to rush current arrest reports into their department's files or computers as an excuse for not publicly releasing it.

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1. It is significant that the last paragraph of §3, limiting the redissemination of *intelligence data* adds the words *"or from any other source"* whereas that additional limitation does not apply to *criminal history data.*

It is also important that even the department or bureau or any officer or agent thereof may communicate and disseminate arrest reports maintained by the department or bureau in a manual or automated data storage system and such arrest reports may be redisseminated, if they pertain only to the arrest of a person for a nonindictable public offense under the provisions of Chapter 321 of the Code, pertaining to the motor vehicle laws of the state, or local traffic ordinances. §1(8). A noninductable public offense is one in which the statute does not prescribe punishment greater than a fine of $100.00 or imprisonment for more than 30 days. Thus, even the department or bureau may release arrest records filed or stored if they pertain only to a violation of the motor vehicle laws, such as speeding or running a stop sign. But not for another nonindictable misdemeanor under another chapter, such as assault and battery or drunkenness, for example, or even for an indictable misdemeanor which is a violation of Chapter 321, such as operating a motor vehicle while intoxicated, for example.

Our final consideration is whether some other provision of the Code, or S.F. 115, not heretofore considered, somehow expressly limits the right of every citizen to examine and the news media to publish, arrest records or requires them to be kept secret or confidential. §68A.2. The only such possible limitation of which I am presently aware is in those provisions of §§8 and 3 of S.F. 115 pertaining to "intelligence data" as defined in §1(11) to mean "information collected where there are reasonable grounds to suspect involvement or participation in criminal activity by any person." The question arises as to whether intelligence data includes arrest data. I conclude it does not and therefore that the prohibition against dissemination and redissemination of intelligence data does not apply to arrest records. The main thrust of the proscriptions of the act are against dissemination and redissemination of two types of data: "criminal history data" and "intelligence data" both of which are defined terms and only the former of which specifically enumerates "arrest data" as a part of its statutory definition. The first paragraph of §8 provides that intelligence data "contained in the files of the department of public safety or a criminal justice agency shall not be placed within a computer data storage system." But as we have already noted, arrest data is among "criminal history data" which is "maintained by the department or bureau in a manual or automated data storage system." An automated data storage system as distinguished from a manual data storage system would surely include a computer data storage system if, indeed, the two were not intended to be synonymous. Logic compels the conclusion that if arrest data is within the definition of that placed in a computer and intelligence data is forbidden to be placed in a computer, the legislature obviously did not consider intelligence data to include arrest data. See also §17 which provides:

"Exclusions. *Criminal history data in a computer* data storage system does not include:

"1. Arrest or disposition data after the person has been acquitted or the charges dismissed." (Emphasis added)

This section also recognizes that arrest data (by definition a part of criminal history data) may be *placed in a computer,* although under §8, intelligence data shall not.

But §17 quoted above raises a new question: Does it require the destruction or erasure of arrest data after acquittal or dismissal of the charges? Or does it

simply modify the definition of criminal history data in such a case, with the ironic result that the arrest and disposition of an innocent person may be publicly disseminated and redisseminated whereas the arrest record of a man found guilty may not? This is a classic example of carelessness in legislative drafting and one which frustrates and destroys what surely was a primary purpose of the Act: protection of the innocent. In a statute which the courts must strictly construe, §17 allows the very kind of information to be disseminated which the legislature sought to restrict. It lets public officials and peace officers publicly disseminate what they would otherwise be prohibited in §§2 and 3 from distributing as criminal history data! It is true that §16 requires that any "Iowa arrest recorded within a computer data storage system which has no disposition data after five years shall be removed unless there is an outstanding arrest warrant or detainer on such charge" and seems to suggest that perhaps §17 also intended an erasure in the case of a person acquitted or where the charges were dismissed. But that is *not* what the law *says*. And if the courts are confronted with a question of whether an employee or agent of the department or bureau, or a sheriff or policeman, is guilty of publicly disseminating or redisseminating otherwise prohibited data, and whether to punish him with a fine of not more than $1,000.00 or imprisonment in the state penitentiary for not more than two years, or both, such a defendant will go free if the information he disseminated was the arrest record of an innocent person who had been acquitted or against whom the charges had been dismissed!

It is too well settled to require citation of authority that in construing a statute (any statute, but particularly a penal or criminal statute) the courts are bound by what the legislature actually said rather than what it should or might have said. In fact, the Supreme Court has made this *substantive* rule of construction a part of its Rules of Civil *"Procedure"!* Rule 344(f) provides:

"The following propositions are deemed so well established that authorities need not be cited in support of any of them;

* * *

"(13) in construing statutes the courts search for the legislative intent as shown by what the legislature said, rather than what it should or might has said."

If, as is probable, our legislature intended in §17 that the arrest record of an innocent person should be *removed* from the computer, the same as it would be under §16 when no disposition is shown after five years, they should or might have said so. Instead they said the arrest record of a person acquitted is *not* criminal history data, one of the two classifications of data law enforcment officials are limited in disseminating. Thus, it appears our legislators have unintentionally approved public dissemination of the arrest records of the innocent, but not the guilty.

September 26, 1973

COUNTIES: Bicentennial Celebration. §332.3(25), Code of Iowa, 1973, H.F. 766, 65th G.A., Ch. 1286, Acts, 63rd G.A., Second Session. County fund may be used on a matching basis to fund bicentennial programs on a matching basis only. (Nolan to Hibbs, Field Representative, Iowa American Revolution Bicentennial Commission, 9/26/73) #73-9-30

Mr. Phaene G. Hibbs, Field Representative, Iowa American Revolution Bicentennial Commission: This is written in response to your request for an At-

torney General's opinion regarding the allotment of county funds to county bicentennial commissions by the board of supervisors. Your letter states that one county believes funds are available that could be allocated to their county bicentennial for the purpose of helping develop their program for 1976. You ask:

"Please let us know if county boards of supervisors have the power to allocate available tax funds for this purpose."

Within certain limitations, the supervisors do have the authority to appropriate money from the general fund. Section 332.3(25) authorizes the board of supervisors:

"To appropriate funds from the general fund to match any grant to the county under any state or federal program for the purpose of matching funds available to such county from federal programs including, but not limited to, crime control, public health, civil defense, highway safety, juvenile delinquency, narcotics control and pollution."

It appeared at the present time that legislation would be necessary to provide for a distribution of state funds to counties for the purpose you have described. House File 766, enacted by the 1973 regular session of the 65th General Assembly provided an appropriation for the Iowa American Revolution Bicentennial Commission. But neither this act, nor Chapter 1286 of the Acts of the 63rd General Assembly, Second Session, provide for distribution of state funds to county bicentennial commissions. In the event that either state of federal funds are or can be made available on the matching basis, the counties could utilize §332.3(25) to allocate matching funds.

September 27, 1973

ELECTION: Absentee Ballots. §53.11, Code of Iowa, 1973, as amended by §238, H.F. 745, Acts, 65th G.A., First Session (1973). Absentee ballots may be obtained only at the office of the county commissioner of elections and not at the offices of deputy commissioner of elections. (Haesemeyer to TeKippe, 9/27/73) #73-9-29

Richard P. TeKippe, Chickasaw County Attorney: Reference is made to your letter of September 19, 1973, in which you request an opinion of the Attorney General with respect to a proposed procedure for handling absentee ballots in Chickasaw County. Under this procedure the Chickasaw County Auditor, as county commissioner of elections, would supply the various deputy commissioners of elections appointed by her to the municipalities within Chickasaw County with a supply of absentee ballots which would be made available to those requesting the same at the offices of such deputy commissioners of elections in the respective communities. All other procedures with respect to the handling of absentee ballots would be according to the statute and all absentee ballots would be delivered by the deputy commissioners to the office of the commissioner at the county seat for accounting through one central absentee precinct as provided by law.

In our opinion, this procedure is not permissible. Section 47.2, Code of Iowa, 1973, as amended by §93, H.F. 745, Acts, 65th G.A., First Session (1973) provides in relevant part:

"The county auditor of each county is designated as the county commissioner of elections in each county. The county commissioner of elections shall conduct . . . all elections within the county.

* * *

"The commissioner may designate as a deputy county commissioner of elections any officer of a political subdivision who is required by law to accept nomination papers filed by candidates for office in that political subdivision, and when so designated that person shall assist the commissioner in administering elections conducted by the commissioner for that subdivision. . . .

* * *"

Section 53.11, Code of Iowa, 1973, as amended by §238 of H.F. 745 provides:

"The commissioner shall deliver an absentee ballot to any qualified elector applying in person *at his office* not more than forty days before the date of the general election and the primary election, and for all other elections, as soon as the ballot is available . . . ." (emphasis added)

Such §53.11 does not by its terms authorize personal applications for absentee ballots at any place other than the office of the county commissioner of elections. While it is true that this might impose some hardship on persons living some distance from the county seat who wish to personally vote absentee, there are other means available to them to exercise their franchise. For example, §53.2 of the Code, as amended by §235 of H.F. 745, provides a convenient means for making application by mail.

September 27, 1973

STATE OFFICERS: Ombudsman. Ch. 601G, Code, 1973. Office of Citizens Aide (Ombudsman) is to inquire into administrative actions of public agencies and duties do not encompass actions against attorneys in private practice. (Nolan to Potter, State Senator, 9/27/73) #73-9-28

Honorable Ralph W. Potter, State Senator, District 5: This office has received your letter requesting an Attorney General's opinion, on behalf of a constituent, concerning the question of whether the State Ombudsman is authorized to help people in a situation where they are unable to obtain an attorney to sue another attorney in a malpractice case.

The Citizens' Aide is an office set up to inquire into administrative actions of public agencies. The powers of this office are set out in Chapter 601G, Code of Iowa, 1973, and are limited by statute. Although the qualifications for the office of Citizens' Aide require that he be a citizen of the United States and a resident of the State of Iowa "qualified to analyze problems of law, administration and public policy", the law does not require that the Citizens' Aide be licensed to practice law in the courts of this state, further, §601G.1(5) defines administrative action as "any policy or action taken by an agency or failure to act pursuant to law". However, this same section of the Code excludes from the definition of agency "any court or judge or appurtenant judicial staff" (§601G.1 (2)(a)).

Accordingly, it is the view of this office that the duties of the Citizens' Aide do not include assisting individuals in bringing legal actions against attorneys in private practice. It is suggested that complaints of this nature be forwarded to the committee on grievances of the Iowa State Bar Association under the Supreme Court Rule 118. This rule provides in pertinent part:

"Every complaint against an attorney filed under this rule shall be signed and sworn to by a person or persons aggrieved, by the president and secretary of a regularly organized bar association of this state or by the chairman of a

regularly appointed committee of the Iowa State Bar Association and said complaint shall be sufficiently clear and specific in its charges to reasonably inform the attorney against whom the complaint is made of the misconduct he is claimed to have committed. All complaints, records, reports and papers filed under this rule shall be filed with and preserved by the Iowa State Bar Association at its headquarters office in Des Moines, Iowa."

October 1, 1973

CONSERVATION: Fishways in dams — §109.14, Code of Iowa, 1973. Clear and unambiguous provision of §109.14 require erection and maintenance of fishways in permanent dams or obstructions across waters of the state except by written approval of the state conservation director. (Peterson to Heying, State Senator, 10-1-73) #73-10-1

Honorable Hilarius L. Heying, State Senator: Receipt is hereby acknowledged of your request for an opinion of the Attorney General as to whether the fishway in the dam across the Turkey River at the Town of Elkader must be kept open so that fish can swim upstream.

Statutory provisions respecting fishways in dams are set forth in Section 109.14, Code of Iowa, 1973, which states:

"109.14 Dams — fishways. It shall be unlawful for any person, firm, or corporation to place, erect, or cause to be placed or erected, any dam or other device or contrivance in such manner as to hinder or obstruct the free passage of fish up, down, or through such waters, except as otherwise provided in this chapter. Dams for manufacturing or other lawful purposes may be erected across the waters of the state. No permanent dam or obstruction across such waters shall be erected or maintained which is not provided with a fishway, except by written approval of the state conservation director, nor shall any pumping station or plant except sand pumping and dredging machines, in or connected with such waters be constructed or operated except by written approval of the state conservation director, which is not provided with screens to prevent fish from entering the pumping station or plant. Such fishways and screens shall be constructed and used according to the plans and specifications prepared and furnished by the director. Any dam, obstruction, or pumping plant which is not so constructed is a public nuisance and may be abated accordingly."

The requirement for fishways in dams first appeared in Iowa law in 1876, Acts of the 16th General Assembly, Chapter 70, which simply prohibited the erection of a dam without a fishway. In 1939, the section was amended to its present form prohibiting the erection "or maintenance" of a "permanent" dam without a fishway "except by written approval of the state conservation director".

The language of the statute is clear and unambiguous and the Supreme Court of Iowa has found the requirement stated therein to be a legitimate exercise of the police power of the state. *State vs. Beardsley,* 1899, 108 Iowa 396, 79 N.W. 138; *State vs. Meek,* 1900, 112 Iowa 338, 84 N.W. 3. Thus, a fishway must be provided in an existing permanent dam so as to permit the free passage of fish up or down the river unless the maintenance of the dam without such a fishway has the written approval of the state conservation director.

As a practical matter, however, one seeking to enforce maintenance of a fishway in a particular dam across waters of the state should be aware of the

current attitude of state fisheries biologists with respect to the efficacy of such fishways. In that connection, we are advised by Conservation Commission officials that research conducted by that agency indicates that such fishways generally serve no useful purpose and the erection or maintenance of a dam without a fishway has been or will be approved by the Director in nearly all cases.

October 2, 1973

COUNTIES: Sheriff. H.F. 175, Acts, 65th G.A., 1973 Session. Language in H.F. 175, Acts 65th G.A., 1973 Session, does not authorize the sheriff to contract with the Board of Supervisors to board prisoners at a fixed amount per prisoner per day. (Nolan to Long, Wright County Attorney, 10-2-73) #73-10-2

Mr. William A. Long, Wright County Attorney: This is written in response to your request for an Attorney General's opinion concerning House File 175, Acts of the 65th General Assembly, First Session. Your letter states you have been requested by the Wright County Board of Supervisors to obtain an opinion as to whether the supervisors may enter into a contract with the sheriff, agreeing to pay him $5.00 per prisoner per day, or any part thereof in return for the sheriff supplying goods and services necessary to enable him to discharge his duties concerning the prisoners.

The following sections of the 1973 Code, as amended by House File 175, are pertinent:

"338.1 The duty of the sheriff to board and care for prisoners in his custody in the county jail shall be performed by the sheriff without compensation, reimbursement or allowance therefor except his salary as fixed by law. However, the board may reimburse the sheriff for the actual cost of board furnished prisoners directly by the sheriff, upon presentation of sufficient documentation showing the actual cost.

"338.2 The board of supervisors may, in such manner and under such regulations as it may deem fit, furnish to the sheriff at the county jail and at the expense of the county all supplies, wholesome provisions, and utensils, including gas, fuel, electricity and water, or may contract for the goods and services, which in its judgment are necessary to enable the sheriff to discharge his duty."

It is the opinion of this office that the provisions of §338.2 authorizing the board of supervisors to contract for "goods and services" do not authorize the supervisors to contract with the sheriff to provide such goods and services, but that the language included in this section refers to food and utilities, other than those specifically enumerated, which in its judgment are necessary for the board of prisoners in the custody of the sheriff. On the other hand, if the present facilities at the jail were deemed to be inadequate by the board of supervisors, they could, exercising authority granted by the section cited, contract for the meals to be prepared outside and delivered to the jail.

It would be improper for the board of supervisors to delegate its responsibility to provide the necessities for the care of prisoners by contract with the sheriff for a fixed amount to be expended per prisoner per day. Further, the sheriff, as an elected office of the county, has no authority to contract with the county to perform duties imposed upon him by statutes.

October 2, 1973

SCHOOLS: Schoolhouse Bonds. §75.5, §75.10, §76.1. School district bonds may not be issued in a form providing for repayment in unequal installments. (Nolan to McCartney, State Senator, 10-2-73) #73-10-3

Honorable Ralph F. McCartney, State Senator: This is written in response to your request for an opinion on the following question:

"Is it permissible for a school district to issue capital improvement bonds payable in unequal installments, i.e., interest and relatively small amounts of principal for the first few years with larger amounts of principal thereafter?"

The sale and retirement of school and other public bonds is provided for in Chapters 75 and 76, Code of Iowa, 1973. The following sections appear to be pertinent to your inquiry:

75.5 "No public bond shall be sold for less than par, plus accrued interest."

75.10 "Notwithstanding any other provisions in the statutes to the contrary, issues of public bonds of every kind and character by counties, cities, towns and school corporations shall be issued in amounts of one hundred dollars or multiples thereof not to exceed ten thousand dollars. This provision shall not apply to bonds, the interest or principal, or both, of which are payable out of special assessments against benefited properties."

76.1 "Hereafter issues of bonds of every kind and character by counties, cities, towns, and school corporations shall be consecutively numbered. The annual levy shall be sufficient to pay the interest and approximately such portion of the principal of the bonds as will retire them in a period not exceeding twenty years from date of issue. Each issue of bonds shall be scheduled to mature serially in the same order as numbered."

I find no authority for a school district to issue capital improvement bonds payable in the manner you suggest. While the fund for the retirement of such bond is accumulated over a period of years, the principal is paid in one sum on the date of the bond or coupon and I find no exception. Bonds issued by "bodies corporate or politic" should be regularly transferable and purchasers should take them free of all latent equities. To render a bond negotiable, an unconditional promise to pay at a certain time, and at all events, a certain sum in money, must appear on its face. 42 Am. Jur., Bonds §46.

The provisions in the Iowa Statute for the retirement of bonds in serial sequence rather than by reduction of the principal over the life of the indebtedness negates the possibility you suggest. Accordingly, it is our view that school district bonds may not be issued in a form providing for the repayment in unequal installments.

October 2, 1973

COUNTIES: County Attorney. §340.9(5). The compensation of the first assistant county attorney may not exceed 85% of the amount fixed by the Supervisors as the annual salary of the County Attorney. (Nolan to Rodenburg, Pottawattamie County Attorney, 10-2-73) #73-10-4

Mr. Lyle A. Rodenburg, Pottawattamie County Attorney: Reference is made to your request for an opinion of the Attorney General interpreting §340.10, Code of Iowa, 1973, which fixes the compensation of the first assistant county attorney at "not more than 85% of the amount of the salary of the county attorney".

According to your letter, the board of supervisors in Pottawattamie County suggest that the 85% provision, which is allowable to pay the first deputy county attorneys, does not apply to anything above the minimum annual salary as prescribed by §340.9 of the Code. However, you state that it is the opinion of your office that the 85% provision "applies directly to the county attorney's salary whether or not it is above the minimum". And you base your view on §340.9(6) which states as follows:

"The board of supervisors may establish an annual salary for the county attorney higher than the minimum salary established in this section. The board may accept private grants, state or federal funds and may utilize such funds in addition to, or as replacement for, county funds to pay the salary of the county attorney and the salaries of the assistant county attorneys."

It is our opinion, that you are correct in your view that the first assistant county attorney may receive up to 85% of the actual amount established by the supervisors as the annual salary for the county attorney.

October 3, 1973

COUNTIES: Fairgrounds. Land not needed for county fair purposes may be sold or leased by the county board of supervisors. The supervisors should not sell such land without advice of fair board that the land is no longer required for fair purposes. (Nolan to Miller, State Senator, 10-3-73) #73-10-5

The Honorable Elizabeth Miller, State Senator: This is written in response to your request for an Attorney General's opinion on the following questions:

"1. Can Central Iowa Fair Board, acting as an agent for the Marshall County Board of Supervisors, sell or lease to Mid-Iowa Workshops, Inc., land on the Fairgrounds or the area presently used for parking space?

"2. If so, what conditions and procedures must be met in order to complete the sale or lease?

"3. Should the Central Iowa Fair Board be unable to lease or sell land, can the Board of Supervisors sell or lease the aforementioned land and if so, under what conditions and procedures?"

From material which accompanied your request, it appears that Mid-Iowa Workships, Inc., is a private, non-profit corporation, which presently leases a building located on the Central Iowa Fairgrounds for a Work Activity Center, Sheltered Workshop Program, Vocational Evaluation, and Janitorial Services Training Program. The Mid-Iowa Workshops, Inc., requires additional space, due to a steady increase in client applications and services plus continuing growth of the operations.

Under §174.15 and §174.24, Code of Iowa, 1973, title to fairgrounds must be taken in the name of the county. The county or district fair or agricultural society is authorized to act as agent for the county in the erection of buildings, maintenance of grounds and buildings, or any improvements on the fairgrounds and to have control and management of such fairgrounds. The right of this society to control and manage such real estate "may be terminated by the board of supervisors whenever well conducted agricultural fairs are not annually held thereon by such society". (§174.16) The board of supervisors may also sell any existing fairgrounds site to which the county has title and to place proceeds in a fund for the erection of permanent buildings and a new fairground site. (§174.25)

It should also be noted that under §332.3, pertaining to the general powers of the board of supervisors, when any real estate, buildings, or other property are no longer needed for the purposes for which the same were acquired by the county, the supervisors have authority to convert the same to other county purposes, or to sell or lease the same at a fair valuation. (§332.3(13))

In view of the above, it is our opinion that the Central Iowa Fair Board has no authority to sell or lease land on the fairgrounds, but that the board of supervisors does have power to do so upon finding that the land is no longer needed for county purposes. In this connection, the Central Iowa Fair Board should advise the supervisors as to whether there is, in fact, a continuing need for the property for fair purposes prior to disposition thereof by the board of supervisors.

October 5, 1973

CRIMINAL LAW: Court costs in magistrate court. §§602.63, 606.15(9), 753.16, 1973 Code of Iowa. Court costs are $6.50 for non-indictable cases disposed of pursuant to plea of guilty. Court costs are $5.00 for "mail-in" uniform traffic citations and complaints for scheduled violations. There is not authority to charge a transcript fee for completing the yellow copy of the uniform traffic citation and complaint. (Sullins to Flint, Judicial Magistrate, 10-5-75) #73-10-7

The Honorable Edwin W. Flint, Judicial Magistrate, Magistrate's Court, Cerro Gordo County Courthouse: You have requested an opinion from this office concerning whether the judgment fee provided for in §606.15(9), 1973 Code of Iowa, is applicable to non-indictable cases heard before Judicial Magistrates and which are not appealed to the District Court. Section 602.63, 1973 Code of Iowa, provides that $5.00 will be the cost of filing and docketing a complaint for a non-indictable misdemeanor. Section 602.63 further provides that all costs in criminal cases shall be assessed and distributed as in Chapter 606, 1973 Code of Iowa. Finally, §606.15(9) provides that the fee for entering any final judgment or decree shall be $1.50.

It is the opinion of this office that the judgment fee is separate and distinct from the filing and docketing fee. Therefore, cumulative fees in a non-indictable misdemeanor case where a guilty plea is entered would be $6.50 ($5.00 for filing and docketing and $1.50 for entry of final judgment). It should make no difference that the case is not appealed to the District Court. The judgment of the Judicial Magistrate is still a final judgment. However, assessed court costs for a "mail-in" uniform traffic citation and complaint would be only $5.00. Pursuant to §753.15, 1973 Code of Iowa, in cases of scheduled violations, the defendant ". . . may sign the admission of violation on the citation and complaint and deliver or mail the citation and complaint, together with the minimum fine for the violation, *plus five dollars* cost, to a traffic violations office in the county." (Emphasis added.) Since $5.00 is the only specified court cost for a "mail-in" uniform traffic citation and complaint, no other costs may be assessed.

In your opinion request, you note that some magistrates charge a transcript fee for completing the information on the yellow copy of the uniform citation. We find no authority for this in §606.15, 1973 Code of Iowa. Such a fee might be permissible if the clerk of court were completing the information.

October 5, 1973

COUNTIES: County Civil Service Commission. Ch. 227 (H.F. 439) Acts, 65th G.A., First Session. County civil service commissioners are prohibited from holding any other elective or appointive public office during their term on the commission. (Nolan to Smith, O'Brien County Attorney, 10-5-73) #73-10-6

Mr. R. T. Smith, O'Brien County Attorney: Reference is made to your recent request for an Attorney General's opinion to interpret House File 439, Acts of 65th General Assembly, 1973 Session.

Specifically, you require an interpretation of language in §2 of H.F. 439, which provides: "commissioners shall hold no elective office or other appointive public offices during their terms of appointment to the commission".

You then ask:

"May a member of the County Civil Service Commission also be a member of the Judicial Magistrate Nominating Commission, the Commission of Hospitalization, a City or Town Attorney, member of local Draft Board, in view of the above provision?"

It is the view of this office that by plain terms, the statutory language in question negates the possibility of a civil service commissioner also holding any of the offices you have listed.

October 8, 1973

ELECTIONS: Municipal Elections. Affidavit to nominating petition by candidate. §§43.16, 43.17, 44.15, 44.16, 45.4, 363.8, 363.11, 363.13, Code of Iowa, 1973. Nomination papers for municipal office which bear the affidavit of the candidate are invalid but may be corrected even after the filing date for the same by appending a new affidavit of another elector. (Turner to Fenton and Allbee, 10-8-73) #73-10-8

Mr. Ray A. Fenton, Polk County Attorney; Mr. Richard A. Allbee, Franklin County Attorney: You have requested an opinion of the attorney general as to whether the affidavit verifying the signatures of electors appended to each nomination paper of a candidate for municipal office under the provisions of Chapter 363, Code of Iowa, 1973, is valid when signed only by the candidate, himself, rather than by one or more of the electors of the municipal corporation. If not, you ask whether anything may be done to legalize a nomination paper certified by the candidate, alone, subsequent to the deadline for filing the nomination papers.

§363.13, Code of Iowa, 1973, provides as follows:

"The affidavit of one *or more* electors of the municipal corporation, as to the qualifications and address of each signer of the petition shall be *endorsed on or attached to* each petition. When a municipal officer is elected to represent a ward, signers of his petition must be qualified electors of that ward." (Emphasis added).

In 1954 OAG 92, issued on October 14, 1953, it was the opinion of the attorney general that this section required the signature of an elector other than the candidate, even presuming the candidate to be an elector. His opinion was that the law was designed "to secure a fair election, including a guard against

fraudulent election procedure" and that the "provisions so designed are mandatory and not directory". He concluded that "the petitions bearing the affidavit of the candidate as an elector are not valid petitions and the signatures on such petitions may not be counted" and cited in support a Wyoming case so holding in a related situation where the candidate, while not making the certification, acted as notary to the certifying or verifying signature.

The 1953 opinion does not touch upon the possible difference between §363.13 and similar statutes for other offices which specifically provide that the affidavit of a qualified elector "other than the candidate" (See §§43.17 and 273.5) or "other than the petitioners and the individual for whom the petition is being filed" (See §64 of Ch. 1088, 64th G.A., Second Session, 1972, as amended by §331, H.F. 745, Acts of 65th G.A., First Session, 1973) shall be appended to each such nomination paper (suggesting, expressio unius est exclusio alterius, that since §363.13 does not include the words "other than the candidate" it should not be construed to do so). Moreover, on September 11, 1973, following the expressio unius rationale, we said in an opinion Haesemeyer to Milroy, Benton County Attorney, that nomination papers filed on behalf of a candidate in a school election under §277.4 could be legally supported by the affidavit of the candidate, himself. Nevertheless, we feel compelled here to follow the 1953 opinion on this precise question, as precedent, and are not disposed to withdraw it. We have repeatedly said that we do not lightly withdraw earlier opinions of this office unless they are patently erroneous. Moreover, allowing a candidate to verify the signatures on nomination papers nominating him for office could well defeat the very purpose of the affidavit: insuring that electors in the area from which he is to be elected did in fact voluntarily sign the nomination paper and that no signatures were added by someone else at the last minute. Regardless of our opinion on school elections, someone other than the candidate in a municipal election must execute the required verifying or certifying affidavit appended to the nomination papers or they do not become valid.

Although the nomination papers must be filed by the candidate, under the precise language of §363.11, nomination papers are not, at least in theory and indeed under Chapter 43, the *candidate's* papers but rather those of the electors who circulated and signed them. All the candidate is required to sign is an affidavit that he is a qualified voter and candidate; that he requests that his name be printed on the ballot; and that if elected he will qualify for the office. §363.14. Both theoretically, and as a matter of historical practice and custom, candidates have been nominated who have had little or nothing whatsoever to do with the papers themselves. All such candidates have done was to sign — sometimes reluctantly and from a compelling sense of civic duty — an affidavit of candidacy thrust upon them by their supporters or imploring friends. If it were not so, there sometimes would be no candidates for public office, particularly in some of our smaller communities and counties.[1]) Thus, we are hesitant to say that properly executed nomination papers, duly and timely filed, although not properly verified, may not subsequently be verified by other electors in time to have their candidate's name placed upon the ballot if there is reasonable time in which to print or reprint the ballots.[2]) Signers of nomination papers should not be defeated in their right to so nominate candidates by petition if it can be avoided.

§43.16, pertaining to nominations by primary election, provides:

"*Withdrawals and additions not allowed.* A nomination paper, when filed, *shall not be* withdrawn nor *added to,* nor any signature thereon revoked." (Emphasis added).

This is a primary election. Furthermore, §363.8, as amended by §293, H.F. 745, Acts of the 65th G.A., First Session, 1973, provides that all municipal elections shall be conducted pursuant to the provisions of Chapters 39 through 53 of the Code, except as otherwise specifically provided. Thus it appears that the proscription of §43.16 against adding to a nomination paper applies to nomination papers filed in municipal elections. So, too, §§44.15, 44.16 and 45.4 are made applicable by such §363.8 as so amended by said §293. These sections provide as follows:

"44.15 *Presumption of validity.* Certificates thus filed, and being apparently in conformity with law, shall be regarded as valid, unless objection in writing thereto shall be made, and, under proper regulations, shall be open to public inspection, and preserved by the receiving officer for not less than six months after the election is held."

1) There are numerous instances in Iowa where offices have become vacant for lack of a single candidate.

2) Even if the ballots have already been printed, a reasonable time would certainly be at least such time as is possible to have them printed or placed on voting machines before the election and never less than the time it took to print them or place them on the machines initially.

"44.16 *Corrections of errors.* Any error found in such certificate may be corrected by the substitution of another certificate, executed as is required for an original."

"45.4 *Filing — presumption — withdrawals — objections.* The time and place of filing nomination petitions, the presumption of validity *thereof,* the right of a candidate so nominated to withdraw and the effect of such withdrawal, and the right to object to the legal sufficiency of such petitions, or to the eligibility of the candidate, shall be governed by the law relating to nominations by political organizations which are not political parties. [Chapter 44, Code]." (Emphasis added).

§45.4 was written to incorporate §§44.15 and .16, the only provisions in Chapter 44 with reference to presumption of validity, and make them applicable to nomination papers, notwithstanding the fact that Chapter 44 as a whole deals with nominations by convention or caucus of political organizations which are not political parties, rather than with nominations by petition.

At first blush, it might appear that there is a conflict between preventing an addition to the nomination paper, as proscribed by §43.16 and correcting errors under §44.16. But construing these sections in pari materia, and reading them together, particularly in the light of our duty to avoid defeating the intentions of the signers of nomination papers, we can construe §43.16 in such a way as not to conflict with §44.16 or the purposes of the signers. Indeed, it is our duty to do so under the provisions of §4.2 of the Code which requires that the provisions of our Code and all proceedings under it are to be "liberally construed with a view to promote its objects and assist the parties in obtaining justice." Effect must be given, if possible, to every word, clause and

sentence of a statute, and the statute should be construed so that effect is given to all of its provisions so that no part will be inoperative or superfluous, void or insignificant. *Maguire v. Fulton,* 1970 Iowa, 179 N.W.2d 508. When the manifest intention of the legislature may be gathered from prior existing laws, and from the prevailing tone of other sections of the Act. conflicting words may be diverted from their literal meaning, in order to harmonize with more explicit portions. They may be restrained, enlarged, or qualified, so as to give effect to the obvious intention of the law. *Noble v. State,* 1848, 1 G. Greene (Iowa) 325.

Thus, it appears to me that filing and appending a new affidavit verifying a nomination paper already filed *would not be adding to it!* Harmonizing these sections, §43.16 means only that no new signatures may be added to nomination papers already filed. It does not prevent appending proof in affidavit form, without additional signatures, that a nomination paper filed was properly, knowingly and voluntarily executed by qualified electors of the district or area nominating the candidate. It has already been opined that the affidavit of candidacy in which a candidate swears that he will qualify if elected is not a part of the nomination papers within the meaning of §43.16. 1946 OAG 153. We now say that the verifying affidavit is, although necessary to be appended, separate from and not part of the nomination paper or petition. So it can be appended after the deadline to a nomination paper otherwise validly filed before the deadline. I am not the first to reach this conclusion. It was suggested to me by Governor Ray after his study of the problem. And in 1919, the attorney general, under authority of a statute similar to §44.16 went so far as to state that it was proper to substitute an *entirely new duplicate nomination paper* in an instance where the addresses of the signers had been left off the original petition and the same seventeen persons signed the duplicate as signed the original petition, even though the last day for filing the petition had passed. 1920 OAG 496. In that opinion the attorney general said:

"This department has always taken the position that the right of suffrage, guaranteed to the electors of Iowa by the constitution of the state, should not be destroyed and the electors disfranchised by a mere immaterial, unprejudicial technicality. In a matter as important as the election of the chief executive of a city, the people should be given an equal opportunity to express their choice. In the matter of the nomination of P. Hixon as a candidate for the office of mayor of your city, we believe that his nominating petition substantially complies with the statute, and that his name should be printed on the official ballot."

See also 1968 OAG 771 which upheld a nomination petition with the exact number of signatures necessary, but where one of the signers verified the petition and another did not show his address thereon.

Under both Chapters 44 and 45, there are provisions for the presumption of validity of nomination papers. §§44.15 and 45.4. The manifest purpose of the legislature in requiring nomination papers at all is to prevent an endless number of candidates on the ballots of primary elections. Nomination papers help achieve that purpose. Without the affidavits verifying the signatures, nomination papers might occasionally be fabricated. However, in this instance it is my understanding that hundreds of good-faith Iowa candidates for municipal office, including incumbents seeking re-election, made a good-faith effort to file their papers in accordance with the custom and practice of long standing that candidates for municipal elections may circulate and swear to

the validity of their own papers. The 1953 opinion was apparently unknown to many or has been simply disregarded in the past. While many candidates also filed nomination papers properly verified by electors other than themselves, it would be grossly unjust to deprive thousands of Iowans who have apparently signed these otherwise valid nominating petitions from having their candidates' name placed on the ballots.

Thus, although nomination papers have been filed which are not properly verified, we think it quite proper, under all of the circumstances and under the hodgepodge of often ambiguous, sometimes opaque and occasionally flatly contradictory statutory provisions, for one or more electors to ascertain whether the signature on an improperly verified petition have been actually, properly, knowingly and voluntarily obtained and signed thereon by qualified electors and to sign and append a new affidavit to that effect to nomination papers already otherwise duly and timely filed.

October 10, 1973

PROFESSIONAL CORPORATIONS: Sections 496C.3, 496C.10, 496C.11, 496A. Shares of capital stock in a professional corporation may be issued and held by a trustee who is also licensed to practice the profession which the professional corporation is licensed to practice. (Murray to Kreamer, 10-10-73) #73-10-9

The Honorable Robert M. Kreamer, Speaker Pro Tempore, House of Representatives: You have requested an opinion concerning the intent and interpretation of Chapter 496C, 1973 Code of Iowa, and specifically Sections 496C.10 and 496C.11, regarding the issuance and transfer of shares in a professional corporation, wherein you raised the following question:

Does the issuance of shares of capital stock of a professional corporation to a trust, the trustee of which is licensed to practice the profession which the professional corporation is licensed to practice, comply with Chapter 496C, 1973 Code of Iowa?

It is obvious that the Legislative intent of the above chapter is to prohibit the issuance or tranfer of shares of a professional corporation to anyone not licensed to practice the profession which the professional corporation is licensed to practice. Without such prohibitions, ownership or control of professional corporations could be lost to individuals or interests not professionally qualified, thus creating a potentially injurious situation to the general public of the State of Iowa who utilize the services of licensed professionals.

In 54 Am. Jur., Trusts, Section 96, it is stated that:

"The historic and universal rule, basic to the concept, origin, growth, and scope of equity jurisdiction, is that a trustee is vested with a legal, as distinguishable from an equitable, estate, which legal estate equity recognizes but compels to be used by the trustee in accordance with the terms of the trust and for the benefit of all beneficiaries, present and future."

The Iowa Supreme Court has subscribed to this basic law of trusts as seen by the cases of *Ellsworth College of Iowa Falls vs. Emmett County,* 156 Iowa 52, 135 N.W. 594 and *National Bank of Burlington vs. Huneke,* 250 Iowa 1030, 98 N.W.2nd 7. Thus, while legal title to the corporate shares would pass from individually licensed professionals to the trustee, that trustee, under the facts

you have presented, would still be an individual licensed to practice the profession which the professional corporation is licensed to practice. However, the legal estate enjoyed by the trustee would be held merely to perform the duties imposed by the terms of the trust for the benefit of the beneficiaries who also would be licensed professionals. By not allowing a professional corporation to issue its corporate shares to a trustee, as in the instant situation, the professional corporation would not be able to provide the same corporate benefits for its shareholders as are available to shareholders and employees of other corporations. Section 496C.3 clearly states that the provisions of the Iowa Business Corporation Act, Chapter 496A, shall be part of Chapter 496C and shall apply to the professional corporation. Said section gives professional corporations all the rights, powers and authority possessed by ordinary business corporations, including the right to hold shares in trust. Any interpretation which would cause such a restriction would be unreasonable and discriminatory. An answer to your question in the affirmative would not, in my opinion, undermine the intent of the Iowa Legislation in enacting the prohibitions contained in Sections 496C.10 and 496C.11, nor would it provide for the existence of a situation that would be unique to Iowa. The State of New York in Article 15, Section 1511 of its Professional Service Corporation Law provides that:

"No shareholder of a professional service corporation may sell or transfer his shares in such corporation except to another individual who is eligible to have shares issued to him by such corporation, or except in trust to another individual who would be eligible to receive shares if he were employed by the corporation."

Therefore, it is my opinion that the issuance of capital stock shares of a professional corporation to a trust under the circumstances described above does not violate the provisions of Chapter 496C, 1973 Code of Iowa, and specifically, Sections 496C.10 and 496C.11.

October 15, 1973

CITIES AND TOWNS: Conducting an election in Certain Special Charter Cities — Ch. 136, Acts of the 65th G.A., First Session. The county auditor, as county commissioner of elections, shall appoint the city clerk of special charter cities having over fifty thousand population to conduct the municipal election. Said conduction by the city clerk encompasses handling absentee ballots for that election, but does not include counting absentee ballots. (Blumberg to Cusack, State Representative, 10-15-73) #73-10-10

Honorable Gregory D. Cusack, State Representative: We are in receipt of your opinion request regarding municipal elections in Davenport. Your request is in reference to H.F. 745, passed by the 65th General Assembly, which has amended the election laws. You specifically asked:

"1. Does the City Clerk have the power to conduct primary municipal elections in Davenport? Or just the General Municipal election?

"2. Does the City Clerk have, in either (or both) the primary and general elections, the duty of receiving applications for, dispensing, collecting, and counting absentee ballots? Any, all, of these functions?

"3. Is it the option of the County Auditor to appoint the City Clerk to handle the absentee ballot applications, dispensing, collecting and counting of same? Or his duty by law? For the primary and/or general elections?

"4. May the County Auditor delegate the authority to review applications for, dispense and collect absentee ballots while retaining the authority (duty) to have his counting board count the absentee ballots? (If the Davenport City Clerk handles absentee ballots in the general election, who counts the ballots?)

"5. Mechanically, while keeping within both the intent and the letter of the law, what is the most efficient way to allow the Davenport City Clerk to conduct municipal elections while following the provisions of 53.23 (remembering that other Scott County municipalities are also conducting elections and, therefore, involving their absentee ballots)?"

House File 745, found in Chapter 136, Acts of the 65th G.A., First Session, amended many of the existing election laws. Specific reference is made to §93 of the Act which amends §47.2 of the 1973 Code to read in pertinent part:

"The County Auditor of each county is designated as the county commissioner of elections in each county. The county commissioner of elections shall conduct voter registration pursuant to Chapter 48 and *conduct all elections within the county.*

* * *

"The commissioner shall appoint the city clerk to conduct municipal elections in cities acting under a special charter in 1973 and having a population of over fifty thousand." [Emphasis added]

This section means that the county auditor, as commissioner of elections shall conduct all elections within the county with the exception of special charter cities of over fifty thousand population (which includes Davenport).

The duties of the commissioner are set forth in numerous sections within the Act. Included in these are the sections on absentee ballots, which encompass §234 through §255 of the Act. With respect to absentee ballots, the Commissioner shall mail absentee ballots (§237) or deliver them (§238) in an unsealed envelope (§239); appoint individuals to deliver ballots (§241); and maintain a list of absentee ballots and qualified electors for each precinct (§243). These duties, along with others, are performed by the City Clerk in the class of special charter cities referred to in §93. On exception that is relevant to this discussion is found in §245, which amends section 53.23 of the Code. That section provides for the existence of an absentee ballot counting board to be appointed by the Commissioner. Only one such board per county is allowed, and its duty is to count the absentee ballots for all elections held in the county. Thus, neither the commissioner nor the city clerk would count absentee ballots.

Therefore, in answer to your questions, we are of the opinion that:

1. The city clerk does have the power to conduct both primary and general municipal elections in certain special charter duties. The obvious intent of the Legislature was to allow these municipal elections to be conducted by someone other than the Commissioner. To hold that the Commissioner was to conduct the primary municipal election would undermine this intent.

2. Since the city clerk must, of necessity, assume the duties of the Commissioner with respect to municipal elections, he or she would assume the duties of the Commissioner for absentee ballots as to receiving applications, dispensing, collecting and recording them. However, only the county absentee ballot counting board, appointed by the Commissioner, has the power and authority to count the absentee ballots.

3. The County Auditor, as Commissioner, has no option in appointing the city clerk. Section 93 mandates by use of the word "shall" that the city clerk be appointed to conduct the election.

4. The answer to this question has been answered by number two.

5. We are not prepared at this time to list the possible ways that the city clerk could conduct the election. The Code, as amended by H.F. 745, is explicit as to how an election is to be conducted.

October 15, 1973

CRIMINAL LAW: Migrant worker labor camp. Right to visit without violating criminal trespass statutes. Ch. 729, 1973 Code of Iowa. Representatives of public and private organizations may enter and remain upon the premises of a state licensed agricultural workers dwelling thereon without violating the state criminal trespass statute. The licensee or person in lawful possession, however, may refuse entry to representatives of public and private organizations. (Sullins to Gluba, State Representative, 10-15-73) #73-10-11

The Honorable William E. Gluba, State Representative: You have requested an opinion from this office on the following question:

"May representatives of public and private organizations enter and remain upon the premises of a state licensed agricultural labor camp for the purpose of visiting agricultural workers dwelling thereon without violating the state criminal trespass statutes?"

Criminal trepass is defined by Chapter 729.2, 1973 Code of Iowa, as entering upon or remaining upon property without legal justification or the owner's consent, or without legal justification after being so forbidden to enter or remain by the owner. Whether or not this can be constitutionally enforced against visitors to migrant labor camps depends on the nature and use of the property involved and the purposes for which the visitors seek access to the camp.

Previous consideration of this problem in other jurisdications has led to clear and convincing results. Speaking to the identical question, the Attorney General of the State of Michigan has stated in an opinion, #4727, filed April 13, 1971:

"The owner or operator of a migrant agricultural labor camp, by permitting occupation and movement of migrant agricultural workers and their families on the premises of the agricultural labor camp, has thereby made the use of the . . . premises, including ingress and egress therefrom, public. The freedoms of religion, speech, press and assembly guaranteed by the First and Fourteenth Amendments to the United States Constitution are operative throughout the length and breadth of the land. They do not become suspended on the threshold of an agricultural labor camp. The camp is not a private island or an enclave existing without the full breath and vitality of federal constitutional and statutory protection." Michigan Attorney General's Opinion #4727 at 12.

Ownership alone cannot convey the right to censor the associations, information and friendships of the migrants living in the labor camps. A person's rights of ownership of the land must bend to the countervailing rights of those persons rightfully living on his land. *See Folgueras v. Hassle,* 331 F. Supp. 615 (W.D. Mich. 1971), holding that the owner of a state licensed migrant labor camp could not deny to the migrant laborers living in camp or members of

assistance organizations or mere visitors reasonable access to the camp and the worker's private living areas.

Even if the argument is limited to property rights only without calling constitutional considerations into play, the courts have reached the same result. Noting the position of the migrant worker within a highly disadvantaged segment of society, and the many charitable and governmental services available to alleviate the peculiar burdens of the migrant worker, the court in *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971) characterized the problem as a confrontation between the camp operator's rights in his lands, and the migrant worker's opportunities to avail themselves of the proffered aid.

"Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises." 277 A.2d at 372.

". . . (W)e see no legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, state, or local services, or from recognized charitable groups seeking to assist him." 277 A.2d at 373.

The court concluded that representatives of such service groups entering into a migrant labor camp were normally beyond the reach of the criminal trespass statute.

It is the opinion of this office that the above stated rationales are decisive of the question. Whether in terms of constitutional law or the rights surrounding the ownership of property, representatives of public and private organizations *may* enter and remain upon the premises of a state licensed agricultural labor camp for the purpose of visiting agricultural worker's dwellings thereon without violating the state criminal trespass statute.

It should be noted that migrant worker, who is considered a lessee or a person in lawful possession of the property, can refuse access to representatives of public and private organizations if he so desires. This refusal of entry would be effective only to the property to which he is considered a lessee or a person in lawful possession. *See* Chapter 729, 1973 Code of Iowa.

October 15, 1973

JUDICIAL MAGISTRATES. Prohibition against the practice of law. S.F. 585, §12, Acts of the 65th G.A., First Session. A full-time magistrate may not engage in the practice of law; a part-time magistrate, if an attorney, may engage in the practice of law, absent those circumstances which would normally be a conflict of interest. (Coleman to Miller, State Representative, 10-15-73) #73-10-12

The Honorable Kenneth D. Miller, State Representative: This is to acknowledge receipt of your letter dated September 14, 1973, in which you requested the following from this office:

"I request your legal opinion on the question of a conflict of interest of attorneys who are magistrates while at the same time actively engaging in private law practice or with a frim or partnership arrangement."

Your question may be answered by referring to House File 585, Acts of the 65th General Assembly, First Regular Session. At Section 12 of House File 585, the following appears:

"Section six hundred five point fifteen (605.15), Code 1973, is amended to read as follows:

"605.15 PRACTICE PROHIBITED. During the time that a *supreme court justice, district judge, district associate judge, or judicial magistrate appointed pursuant to section six hundred two point fifty-one (602.51) of the Code* is holding such office he shall not practice as an attorney or counselor or give advice in relation to any action pending or about to be brought in any of the courts of the state." (emphasis added).

As noted by Section 12, a judicial magistrate appointed pursuant to Section 602.51, 1973 Code of Iowa, must give up his practice of law as an attorney or counselor and must not give advice in relation to any matters pending or about to be brought before any court of this state. Section 602.51, however, deals only with full-time magistrates.

Formerly, under Section 602.52, 1973 Code of Iowa, the qualifications necessary to be a magistrate were those of being an elector in the county of appointment and being less than seventy-two years of age. However, the last session of the legislature amended Section 602.52. In Section 40, House File 585, the following appears:

"This section shall take effect July 1, 1974. Section six hundred two point fifty-two (602.52), Code 1973, is amended by striking the section and inserting in lieu thereof the following:

"602.52 QUALIFICATIONS. A judicial magistrate shall be an elector of the county of appointment during his term of office, shall be less than seventy-two years of age, and shall cease to hold office upon attaining that age. A judicial magistrate appointed pursuant to section six hundred two point fifty (602.50) of the Code *may be* licensed to practice law in Iowa, and the commission in selecting persons for those positions shall first consider for appointment applicants so licensed. After July 1, 1973, a judicial magistrate nominated and appointed pursuant to section six hundred two point fifty-one (602.51) of the Code, and amended by this Act, *shall be* licensed to practice law in Iowa." (emphasis added).

While the foregoing does not become effective until July 1, 1974, it specifically relates to the necessary qualifications of judicial magistrates, and is explicative of the fact that there are two categories of judicial magistrates — full-time and part-time. Section 12, H.F. 585, became law on July 1 of this year, and it is this section which gives direction due to that fact that currently we now have full-time judicial magistrates in Iowa. Referring back then to Section 12, we find the prohibition from engaging in the practice of law to be applicable only to those magistrates appointed pursuant to Section 602.51, or full-time magistrates.

It is our opinion, therefore, that those individuals who have been appointed to the position of full-time magistrate cannot engage in any manner in the practice of law. Further, those individuals who hold the position of part-time magistrate may engage in the practice of law without fear of allegations of conflict of interest, absent, of course, those circumstances which, even in the normal course of events, would be considered offensive.

October 15, 1973

CITIES AND TOWNS: Metropolitan Transit Authorities. §§386B.2 and 386B.3, Code of Iowa, 1973; S.F. 448, Acts of the 65th G.A., First Session. A Metropolitan transit authority created under S.F. 448 has the power of eminent domain, and may exercise same without an election. (Blumberg to Readinger, State Representative, 10-15-73) #73-10-13

Honorable David M. Readinger, State Representative: We are in receipt of your opinion request of July 17, 1973, concerning Senate File 448 of the 65th General Assembly, First Session. You specifically asked:

"Does a Metropolitan Transit Authority established pursuant to Senate File 448, 65th General Assembly and Chapter 28E, Iowa Code, 1973, have the power of eminent domain under the applicable statutory authority, and may condemnation proceedings be instituted without first having held an election or referendum?

"Is it required that cities and towns hold an election or referendum before granting the power of eminent domain to the joint authority established pursuant to Senate File 448, 65th General Assembly and Chapter 28E, Iowa Code, 1973?"

Senate File 448, which became law on May 23, 1973, was enacted to encourage the establishment or acquisition of urban mass transit systems. Section 1, S.F. 448. Section 2 of the Act provides:

"Any two or more public agencies, as defined in section twenty-eight E point two (28E.2) of the Code, may enter into an agreement pursuant to the provisions of chapter twenty-eight E (28E) of the Code to jointly and cooperatively create a separate public agency for the purpose of establishing or acquiring any urban mass transit system and to provide for its equipment, enlargement, extension, improvement, maintenance and operation under the terms of, and subject to, any conditions of such federal assistance. The agreement shall be entered into by the governing body of each participating public agency and may be entered into and implemented *without an election.* [Emphasis added]

Section 3 provides:

"The public agencies creating an urban mass transit system by an agreement under chapter twenty-eight E (28E) of the Code *may jointly exercise through a public agency all rights, powers, privileges and immunities granted to municipal corporations,* except that a public agency shall not have authority to incur bonded indebtedness. . . ." [Emphasis added]

Section 4 gives the trustees appointed under S.F. 448 the same powers, privileges and immunities prescribed for transit trustees in Chapter 386B of the Code.

Chapter 386B, Code of Iowa, 1973, prescribes the authorities and powers for municipal transit systems. Section 386B.2 provides:

"Any municipal corporation shall have the power to establish or to acquire by purchase, construction, gift, *condemnation* and to equip, enlarge, extend, improve, maintain and operate a transit system operating or to be operated either within or without the corporate limits of such municipal corporation and either within or without the territorial limits of this state, including all or any part of the plant, equipment, vehicles, property, contracts and agreements of every kind and nature, reserve funds, employees' pension or retirement funds, special funds, franchises, licenses, patents, permits and papers, documents and records, rights in property, land, easements and rights of way of such a system. All property of every kind and nature acquired under authority contained in this chapter shall be the property of the municipal corporation so acquiring the same and title thereto shall be taken in the name of such municipal corporation.

Any municipal corporation shall have the right of eminent domain to acquire private property necessary in connection with the establishment or acquisition,

enlargement, extension, improvement, operation and maintenance of a transit system. In the event of the exercise of eminent domain to acquire an existing transit system, the provisions of sections 472.46 to 472.51 shall govern so far as applicable." [Emphasis added]

Section 386B.3 requires an election by the voters of the municipal corporation before such a transit system may be acquired or established.

Senate File 448 authorizes public agencies (which include political subdivisions) to enter into agreements for the acquisition or establishment of urban mass transit systems, which authority might have already existed under Chapter 28E. The Act also gives those public agencies created by the agreement the same powers of Municipalities contained in Cahpter 386B. One such power is that of eminent domain. The Act also gives an additional benefit. No election is required for the acquisition or establishment of a transit system, notwithstanding section 386B.3. Nor can we find any election requirement for condemnation in Chapter 386B. The procedures for condemnation by a public agency created under the Act would be the normal ones exercised by municipalities. However, as pointed out in section 386B.2, in the event of the exercise of eminent domain to acquire an existing transit system, the provisions of sections 472.46 to 472.51 shall govern. Chapter 1088, Acts of the 64th General Assembly does not change the above results.

Accordingly, we are of the opinion that a public agency created under S.F. 448 has the power of eminent domain. We also find that no election is necessary to exercise this power.

October 15, 1973

COUNTIES: County Home. (1) The annual county home report published as part of the proceedings of the board of supervisors must contain an itemized statement of receipts and disbursements but the valuation of the property may be presented in category totals and need not be in detailed inventory form. (2) Size of type of printing in official newspapers is governed by §349.17. (Nolan to Greenfield, Guthrie County Attorney, 10-15-73) #73-10-14

Mr. C. F. Greenfield, Guthrie County Attorney: This is written in response to your request for an opinion of the Attorney General as to what may be published relative to the annual county home report. Your letter states you have been requested by the board of supervisors of Guthrie County to request an interpretation of Section 253.3, Code of Iowa, 1973, and you further state that the cost of publishing the present very detailed report in 1973 was $471.02 because of the various types of prints used by official newspaper.

Section 253.3 provides:

"The board of supervisors shall, during the month of January of each year, publish in the official papers of the county as part of its proceedings, a financial statement of the receipts of the county home, or county farm, itemizing the same and stating the source thereof, which report shall also set forth the total expenditures thereof and the value of the property on hand on January 1 of the year for which the report is made and a comparison with the inventory of the previous year."

The language of the above cited section requires that receipts and disbursements be itemized. However, it is my view that this section of the Code does not require a detailed inventory of all property on hand enumerating

items such as the number of muffin pans, wooden spoons, bath towels, pillow slips, boxes of pudding, cake mix, soda crackers and coffee. The requirements of the statute would, in my opinion, be substantially met by publishing an inventory in recapitulated form totaling the value of such items as cattle, swine, poultry, hay, grain, feed and seed, farm machinery, farm equipment, home equipment, farm tools, farm supplies, furniture and fixtures, laundry equipment, kitchen equipment, kitchen utensils, silver and dishes, home supplies, drug supplies, clothing supplies, bedding supplies and food staples and provisions. This is not to say that the county home stewards should not be required to maintain a detailed inventory of such property. The supervisors, pursuant to section 332.3(2)(8), are authorized to require such information.

You have also inquired as to whether the annual county home report which the board of supervisors is required to publish in the official papers of the county as part of its proceedings, is subject to be printed in "8-point or 6-point type". Section 349.17 states that no official publication (proceedings of the board of supervisors) shall be "printed in type smaller than five point". Inasmuch as the em quad of both 6-point and 8-point type is larger than that of 5-point, it is clear that the use of either 8-point or 6-point type for the printing of the county home report will satisfy the requirements of the statute.

October 16, 1973

CITIES AND TOWNS: Sick leave plans for firemen. §§410.19 and 411.16, Code of Iowa, 1973. The sick leave plan for the Dubuque firemen is not discriminatory, nor does it violate the fifty-six hour work week, because of its voluntariness. (Blumberg to Kennedy, State Senstor, 10-16-73) #73-10-15

Honorable Gene V. Kennedy, State Senator: We are in receipt of your opinion request regarding sections 410.19 and 411.16 of the Code. Your problem concerns the sick leave plan of the Dubuque Fire Department. Pursuant to that plan, members of the fire department may voluntarily have their names placed on a sick list. By so doing, they agree to work extra hours to cover the shift of any other fireman on the sick list who is on sick leave. They, in turn, get men to work their shifts when they are sick. This plan also provides for pay while on sick leave. Those who do not place their names on the list do not get compensation while on sick leave. Questions arise as to whether this plan is discriminatory, since all other city employees are on another sick leave plan, and whether it "coerces' the firemen to work more than a 56 hour week, in violation of sections 410.19 and 411.16.

The plan that is offered to other employees is an accumulation of one sick day per month, accumulating to 120 days. The firemen's plan has been in effect for at least thirty-five years, while the other plan was instituted some years later. The city has given the firemen a choice as to which plan they wanted, and they recently voted to remain on their original plan. Because the firemen were given a choice to be on the same plan as other city employees and voted to retain their old plan, they are in no position to contest their plan on the basis of discrimination.

A similar result is apparent with respect to the 56 hour week. Sections 410.19 and 411.16 of the Code are identical, and provide:

"Firemen employed in the fire department of cities of ten thousand population or more, or under civil service, shall not be required to remain on duty for periods of time which will aggregate in each month more than an average of

fifty-six hours per week and no single period of time, or shift, shall exceed twenty-four hours in length, provided that in cases of serious emergencies such firemen may be required to remain on duty until such emergency has passed, when so ordered by the Chief of the department or person acting in his place."

These sections should not be read for the proposition that a fireman cannot work more than fifty-six hour week. The sections only provide, with respect to this question, that one cannot be *required* to work over the fifty-six hour limit. A fireman may work over that limit if he so desires. The voluntariness of the plan dictates the conclusion that the firemen under this plan are not being required to work over the fifty-six hour limit. They had the choice as to which plan to come under, and chose the plan in question with full knowledge as to how it would be implemented and the fact that they might work over the fifty-six hour limit if they so chose.

Accordingly, we are of the opinion that the plan is not discriminatory, nor is it in violation of sections 410.19 and 411.16 of the Code.

October 23, 1973

CRIMINAL LAW: Recipient of certificate of restoration to rights of citizenship, right to own, possess and carry firearms. §248.12, 1973 Code of Iowa, 1970 O.A.G. 482. A person previously convicted of a felony who obtains only a certificate restoring all his rights of citizenship under §248.12, 1973 Code of Iowa, may under no circumstances possess a firearm without being in violation of the 1968 Federal Gun Control Act. (Sullins to Anderson, Washington County Attorney, 10-23-73) #73-10-16

Mr. Tracy Anderson, Washington County Attorney: You have requested an opinion from this office on the following question:

"May a person previously convicted of a felony who obtains a certificate restoring all his rights of citizenship under Iowa Code Section 248.12, possess a firearm without being in violation of the 1968 Federal Gun Control Act, or qualify for a gun permit under Iowa Code Section 695.4?"

Our former opinion in response to this question has been officially retracted and is of no force and effect. We now address ourselves to the issue in a correct statement of the applicable law.

Under §248.12, 1973 Code of Iowa, "the governor shall have the right to grant any convict . . . a certificate of restoration to all his rights of citizenship." The effect of this executive act of clemency is settled in the case of *State v. Haubrich,* 248 Iowa 978, 83 N.W. 2d 451 (1957). The court first notes that a restoration of rights of citizenship ". . . is *not* technically *a pardon.*" 248 Iowa 978, 83 N.W.2d at 455. (Emphasis added). The court later quotes the case of *Arnett v. Stumbo,* 287 Ky. 433, 153 S.W.2d 889 (1941), as follows:

"'The conviction is not affected by the Governor's act; merely the incidental consequences . . . resulting from the operation of state laws are, cancelled and relieved.'" 248 Iowa 978, 988, 83 N.W.2d 451, 457, quoting 287 Ky. 433, 153 S.W.2d 889, 890 (Emphasis added).

Since only incidental consequences resulting from the operation of *state laws* are relieved by a certificate of restoration to rights of citizenship, the certificate obviously does not relieve the federal consequences of a felony conviction which prohibits possession of a firearm by a convicted felon. Only a pardon expressly authorizing such possession will suffice to relieve the federal liability. 1970 OAG 482; 18 U.S.C.A. App. §1203. This is because a pardon speaks to

the issue of remission of guilt. *State v. Forkner,* 94 Iowa 1, 18, 62 N.W. 772, 777 (1895). The certificate of restoration to rights of citizenship does not speak to the issue of guilt and conviction. The federal prohibition against possession of firearms by convicted felons (18 U.S.C.A. App. §1202) is therefore still operative against the recipient of the certificate.

It is our opinion, then, that a person previously convicted of a felony who obtains only a certificate restoring all his rights of citizenship under §248.12, 1973 Code of Iowa, may under no circumstances possess a firearm without being in violation of the 1968 Federal Gun Control Act. This would also effectively preclude issuance of a gun permit under §695.4, 1973 Code of Iowa.

It should also be mentioned that a convicted felon may, pursuant to Title 18, United States Code, Chapter 44, §925(c), make application to the Federal Bureau of Alcohol, Tobacco and Firearms for relief from the disabilities imposed by the 1968 Federal Gun Control Act.

October 23, 1973

STATE OFFICERS AND DEPARTMENTS: Deferred compensation, miltary leave. §§29A.28, 509A.12, Code of Iowa, 1973. A state employee participating in the state's deferred compensation program who is called into active military service is considered terminated for deferred compensation purposes thirty days after being called to active duty. (Haesemeyer to Wellman, 10-23-73) #73-10-17

W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to your letter of September 28, 1973, in which you request an opinion from this office regarding the apparent conflict between §29A.28 of the Code and the leave without pay termination policy of the State's Deferred Compensation Program, §509A.12.

Section 29A.28, Code of Iowa, 1973:

"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."

Part II, §3, paragraph D of the pamphlet entitled "Deferred Compensation Program for Employees of the State of Iowa", which was issued as an informative aid to employees:

"Leave Without Pay. A Participating Employee on Leave Without Pay is considered to be terminated. There are no provisions for direct payment to the Companies other than by the Employer with deductions from current earnings. The Employee must remain out of Plan for one calendar year before being reinstated."

The view was expressed to members of the State Comptroller's Office by members of the Internal Revenue Service that should participants not be con-

sidered terminated as per paragraph D above, the deferred compensation plan would no longer be considered by them to be a viable program.

It must additionally be noted that the percentage of paragraph D terminations which might occur due to a participant being called to active duty is, prospectively, very small. Also, it is felt that the detriment which a participant might be said to have incurred due to such termination is negligible, and definitely not of sufficient import to warrant the federal income tax repercussions which would follow from attempting to append exceptions to the termination clause.

For these reasons, it is the opinion of this office that the leave without pay termination policy is not contradictory to, or in conflict with, §29A.28, and that thirty days after a participant is called to active duty he must be considered to be on leave without pay and therefore terminated.

Of course, any participating employee returning to state employment from military leave would have the same reinstatement rights as any other employee returning from a leave of absence without pay.

October 23, 1973

COUNTY AND COUNTY OFFICERS: Zoning — State-owned Lands — Ch. 358A, Code of Iowa, 1973. County zoning regulations do not apply to land acquired and maintained by the State for governmental purposes provided such immunity is exercised in a reasonable fashion so as not to arbitrarily override all important legitimate local interests. (Peterson to Anderson, Winneshiek County Attorney, 10-23-73) #73-10-18

Mr. Calvin R. Anderson, Winneshiek County Attorney: Receipt is hereby acknowledged of your request for an opinion of the Attorney General with respect to the following question:

"If Winneshiek County adopts a county-wide zoning ordinance, and in doing so all the land owned privately along the Upper Iowa River is zoned for agricultural purposes must the Iowa Conservation Commission then appeal to the County Zoning Commission to get the land owned by the Conservation Commission zoned for recreational purposes? Specifically, assuming that the real estate in question was zoned for agricultural purposes and then the Conservation Commission purchased said real estate and wanted the real estate to be used for recreational purposes would the Commission then have to appeal to the County Zoning Commission?"

It is well settled that city zoning ordinances are not applicable to the state or any of its agencies in the use of its property for governmental purposes unless the legislature has clearly manifasted the contrary intent, *City of Bloomfield v. Davis County Community School District,* 1963, 254 Iowa 900, 119 N.W. 2d 909); *Newton v. City of Atlanta,* 1939, 189 Ga. 441, 6 S.E. 2d 61; *Board of Regents of Universities and State College v. Tempe,* 1960, 88 Ariz. 299, 356 P. 2d 399; *City of Milwaukee v. McGregor,* 1909, 140 Wisc. 35, 121 N.W. 642. This rule is based upon the common law concept of sovereignty which requires that a state or its agencies performing a governmental function remain free of municipal control and, though nearly all of the judicial decisions examined relate to city ordinances, the rule logically would apply with equal force to county zoning ordinances.

The general rule is stated in Anderson, *American Law of Zoning*, §9.06, (1968), as follows:

"Absent a waiver expressed by, or necessarily inferred from, the language of a state's statutes, a state is not amenable to the zoning regulations of its political subdivisions . . ."

This question was considered by the Supreme Court of New Jersey in *Rutgers, State University, v. Piluso*, 1972, 60 N.J. 142, 286 A. 2d 697, wherein a township sought to impose its zoning ordinances on a state university.

In a well reasoned opinion, the court stated:

". . . the true test of immunity in the first instance, albeit a somewhat nebulous one, is the legislative intent with respect to the particular agency involved. That intent, rarely expressed, is to be divined from a consideration of many factors, with a value judgment reached on an overall evaluation."

The court went on to list the most commonly considered factors as follows:

". . . the nature and scope of the instrumentality seeking the "immunity"; the kind of function or land use involved; the extent of the public interest therein; the effect local land use regulation would have on the enterprise concerned; and the impact upon legitimate local interests."

The court held that the state university was immune from the township zoning regulations, in the following terms:

". . . there can be little doubt that as an instrumentality of the state performing an essential governmental function for the benefit of all the people of the state, the Legislature would not intend that [Rutgers] growth and development should be subject to restrictions or control by local land use regulations. Indeed, such will generally be true in the case of all state functions and agencies."

The New Jersey court, however, added the following caveat:

". . . such immunity . . . is not completely unbridled. Even where it is found to exist, it must not . . . be exercised in an unreasonable fashion so as to arbitrarily override all important legitimate local interests."

Clearly, the acquisition and maintenance of land along the Upper Iowa River for public park and recreational purposes is a governmental function undertaken by the state for the use and benefit of all her people and such acquisition and use appears to be neither arbitrary nor unreasonable. Nor is the sovereign immunity of the state from local regulations waived by any provisions of Chapter 358A, Code of Iowa, 1973, the statute authorizing zoning by counties.

We are, therefore, of the opinion that county zoning regulations do not apply to land acquired and maintained by the state for public park and recreational purposes provided such immunity is exercised in a reasonable fashion so as not to arbitrarily override all important legitimate local interests.

October 23, 1973

CITIES AND TOWNS: Pension and death benefits. §411.6, Code of Iowa, 1973. The surviving spouse of a deceased member is limited in his or her option to the methods provided by §411.6(8) (a) and (b). (Haesemeyer to Griffin, State Senator, 10-24-73) #73-10-20

The Honorable Jim Griffin, State Senator: You have requested an opinion of the Attorney General with respect to the following:

'1. Subsection 8 of Section 411.6 states that the ordinary death benefit is, in general, (a) payment of the member's accumulated contributions and, if the member was in service for one or more years, one-half of the member's earnable compensation during the year just before his death, or (b) a pension which, together with the actuarial equivalent of his accumulated contributions, shall be equal to one-fourth of the member's average compensation, plus certain children's benefits.

"The word 'or' that appears in line 6 of sub-paragraph (b) of the subsection referred to above would indicate that there are only two distinct options as outlined in the preceding paragraph. Is this position correct, or does a surviving spouse have the option of taking the accumulated contributions plus a pension equal to one-fourth of the average compensation reduced by the amount of the annuity that the accumulated contributions would have provided?

"2. In subsection 13 of Section 411.6 it is stated that the death benefit payable in the event of the death of a member who is receiving benefits shall be a pension to the spouse equal to one-half of the amount the member was receiving, said surviving spouse's benefit to be paid as long as she remains unmarried. In addition, a child's benefit is to be paid.

"Under the ordinary and accidental death benefits there is language to the effect that the pension of one- fourth of the average compensation is to be paid to the spouse as long as she remains unmarried or, if the spouse dies or remarries while there are children under the age of 18 years, the pension would continue to the guardian of the children.

"Is it a correct interpretation that different treatment is to be accorded the pension amount in the event of the death or remarriage of the surviving spouse in the varying situations? In other words, is it correct that the pension amount continues to the children if the spouse dies or remarries after commencing to receive an ordinary or accidental death benefit, and the pension amount does not continue to the children after the remarriage or death of the spouse who started to receive benefits as a result of the death of a retired member?"

The answer to your first question may be gleaned from a careful reading of §411.6(8) which provides:

"Upon the receipt of proper proofs of the death of a member in service, there shall be paid to such person having an insurable interest in his life as he shall have nominated by written designation duly executed and filed with the respective board of trustees:

"a. His accumulated contributions and, if the member has had one or more years of membership service and no pension is payable under the provisions of subsection 9 of this section, in addition thereto —

"b. An amount equal to fifty percent of the compensation earnable by him during the year immediately preceding his death; or

"If there be no such nomination of beneficiary, the benefits provided in paragraph 'a' and 'b' shall be paid to his estate; or in lieu thereof, at the option of the following beneficiaries, respectfully, even though nominated as such, there shall be paid a pension which, together with the actuarial equivalent of his accumulated contributions, shall be equal to one-fourth of the average final compensation of such member, but in no instance less than seventy-five dollars. In addition to the benefits herein enumerated, there shall also be paid

for each child of a member under the age of eighteen years the sum of twenty dollars per month;

"c. To the spouse to continue so long as said party remains unmarried; or

"d. If there by no spouse, or if the spouse dies or remarries before any child of such deceased member shall have attained the age of eighteen years, then to the guardian of his child or children under said age, divided in such manner as the board of trustees in its discretion shall determine, to continue as a joint and survivor pension until every such child dies or attains the age of eighteen; or

"e. If there be no surviving spouse or child under age eighteen, then to his dependent father or mother or both, as the board of trustees in its discretion shall determine, to continue until remarriage or death."

In light of the rather specific language of this statute, it is the opinion of this office that the surviving spouse is limited in her options to the methods provided in §411.6(8) (a) and (b). The first method of payment seems to be:

"Upon the receipt of proper proofs of the death of a member in service, there shall be paid to such person having an insurable interest in his life as he shall have nominated by written designation duly executed and filed with the respective board of trustees:

"a. His accumulated contributions and, if the member has had one or more years of membership service and no pension is payable under the provisions of subsection 9 of this section, in addition thereto —

"b. An amount equal to fifty percent of the compensation earnable by him during the year immediately preceding his death; . . ."

However, if there is no nomination of beneficiary, ". . . the benefits provided in paragraph 'a' and 'b' shall be paid to his estate . . ." See second paragraph of §411.6(8) (b). The second method of payment available is found in the language of §411.6(8) (b) immediately following:

". . . or in lieu thereof, at the option of the following beneficiaries, respectively, even though nominated as such, there shall be paid a pension which, together with the actuarial equivalent of his accumulated contributions, shall be equal to one-fourth of the average final compensation of such member, but in no instance less than seventy-five dollars. In addition to the benefits herein enumerated, there shall also be paid for each child of a member under the age of eighteen years the sum of twenty dollars per month; . . ."

The phrase "in lieu thereof" is synonymous with the correlatives "either" and "or" which, by definition, marks an alternative. *State ex rel. Jones v. Johnson Circuit Court,* 243 Ind. 7, 181 N.E.2d 857. Combined with the word "or", it is obvious that the phrase "in lieu thereof" is introducing an alternative method of payment. However, there is no other language in this section that would indicate a third method of payment. In construing a statute, the express mention of one thing implies the exclusion of others, the Latin phrase being "expressio unius est exclusio alterius", see for eq. *Dotson v. City of Ames,* 101 N.W.2d 711, 251 Iowa 1077 (1960). This interpretation is consistent with an earlier opinion written by this office in 1969. In that opinion, we stated when discussing a similar question under Chapter 97A dealing with the peace officers retirement — a statute of almost identical language as Chapter 411:

"The critical language is that contained in subsections (a) and (b), particularly the italized words. In our opinion the expression 'in lieu thereof' con-

tained in the second paragraph of subsection (b) relates back to the words in such second paragraph 'the benefits provided in paragraphs "a" and "b" of this subsection 8.' Thus, the ordinary death benefit would be (1), a lump sum consisting of the member's accumulated contribution plus half a year's salary, or (2) a pension which, when the actuarial equivalent of the member's contribution is included in such pension, equals one-fourth of the member's average final compensation. In other words, there are two options available, a lump sum payment or a pension, but not both. The lump sum option includes accumulated contributions plus six month's pay. The pension is three month's pay per year or $50 per month, whichever is greater." See O.A.G. 4/1/69 (p. 86).

Your second question can be answered by reference to the specific wording of subsection 13 of §411.6 ("pension to spouse and children of deceased pensioned member") and subsections 8 and 9 of §411.6 (ordinary and accidental death benefits). Subsection 13 states:

"Pension to spouse and children of deceased pensioned member. In the event of the death of any member receiving a retirement allowance under the provisions of subsections 2, 4, or 6 of this section there shall be paid a pension:

"a. To the spouse to continue so long as said partner remains unmarried, equal to one-half the amount received by such deceased beneficiary, but in no instance less than seventy-five dollars per month, and in addition thereto the sum of twenty dollars per month for each child under eighteen years of age; or

"b. In the event of the death of the spouse either prior or subsequent to the death of the member, to the guardian of each surviving child under eighteen years of age, in the sum of twenty dollars per month for the support of such child."

This subsection provides that the spouse of a deceased member who had been receiving a retirement allowance at the time of his death, is entitled to receive one-half of that amount as long as she remains unmarried; plus an additional twenty dollars per month for each child under eighteen. However, if she remarries, all of the above mentioned payments are terminated. But, if the spouse should die before or after the death of the member receiving retirement benefits then the guardian of each surviving child under eighteen receives twenty dollars a month for the support of such child. So therefore, in response to your question concerning subsection 13 of §411.6, the child under eighteen can still receive a benefit payment after the death of the member's spouse.

Your questions concerning payments under subsection 8 and 9 of §411.6 may be answered by a careful reading of these provisions.

Subpart d of subsection 8 appears to be the appropriate provision. This subpart clearly states that if the spouse remarries or dies then the guardian of the child under eighteen shall receive the ordinary death benefit to be used for the support of such child until he or she dies or attains the age of eighteen. Subsection 9, (accidental death benefit) provides that it will utilize the payment procedure of subsection 8 of §411.6, see subparagraph b of subsection 9 of §411.6.

October 24, 1973

CITIES AND TOWNS: Municipal Elections — Chapter 49, §363.26, Code of Iowa, 1973, and Chapter 136, 65th G.A., First Session. A ballot for the election of municipal officers must be printed and a write-in method may not be used. (Blumberg to Freeman, State Representative, 10-24-73) #73-10-19

Honorable Dennis L. Freeman, State Representative: We are in receipt of your opinion request of October 11, 1973, regarding the printing of ballots. You specifically asked whether the Lakeside city council may not print a ballot and use the write-in method to elect the council and mayor. You also asked whether there would be any personal financial responsibility of the individual candidates if the election results were later overturned because of this opinion.

Section 363.26 of the Code of Iowa (1973) provides that municipal elections shall be conducted in the manner provided by law for conducting general elections, which is set forth in Chapter 49 of the Code. Much of Chapter 49 was amended by Chapter 136, 65th General Assembly, First Session. Chapter 49 requires that voting shall be by ballots printed and distributed as provided by law (§49.29), and, except for presidential electors, the names of all candidates to be voted for shall be printed on one ballot (§49.30). Section 49.51, as amended, now provides that for all elections held under his jurisdiction, the county commissioner of elections shall have charge of the printing of ballots in his county, and shall cause to be placed thereon the names of all candidates. Section 49.53, as amended, provides for the publication of the ballot and notice.

Therefore, in answer to your questions, the Code of Iowa requires the commissioner of elections of Buena Vista County to place the names of all candidates on the ballot for Lakeside municipal elections. Adherence to Code requirements would preclude any personal financial responsibility to the individual council members of the mayor.

October 24, 1973

ELECTION: Publication of notice of election. §49.53, Code of Iowa, 1973, as amended by §138, H.F. 745, Acts, 65th G.A., First Session (1973). If a reproduction of a reasonable facsimile of the ballot is published accompanied by a notice stating on what day the election is to be held, the hours the polls will be open and the location of the polling place for each precinct, no further publication is necessary. (Haesemeyer to Milligan, State Senator, 10-24-73) #73-10-21

The Honorable George F. Milligan, State Senator: Reference is made to your letter of October 17, 1973, in which you request an opinion of the Attorney General with respect to the following:

"A question has arisen as to the proper format to be used in compliance with Section 138 of House File 745 pertaining to 'publication of ballot and notice.'

"Does this section require that the Commissioner shall cause to be published a reproduction of reasonable facsimile of the ballot itself and that such ballot shall be accompanied by a notice stating on what day the election is to be held, the hours the polls will be open and the location of the polling place for each precinct?"

Section 138, H.F. 745, Acts, 65th G.A., First Session (1973), amended §49.53, Code of Iowa, 1973, to provide as follows:

"The commissioner shall, not less than four nor more than twenty days prior to the day of each election to which this chapter applies except those elections for which more specific notice or publication requirements are provided by law, publish a list of all candidates or nominees for public office

and all public questions which are to be voted upon at the election. The list shall be published as nearly as possible in the form in which the candidates' or nominees' names and the public questions, if any, will appear on the official ballot. The list shall be accompanied by a notice stating on what day the election is to be held, the hours the polls will be open, and the location of the polling place for each precinct. *No fact which is apparent from the ballot as published in the required notice need be set forth in words in the notice.* The publication shall be in two newspapers representing, if possible, the two political parties whose candidates for president of the United States or for governor, as the case may be, received the largest and next largest number of votes in the county at the last preceding general election, except that in city elections the publication may be made in only one newspaper, which shall be of general circulation in the city." (emphasis added)

It seems to us that the foregoing statute is fairly clear and that if a reproduction of a reasonable facsimile of the ballot is published accompanied by a notice stating on what day the election is to be held, the hours the polls will be open and the location of the polling place for each precinct, no further publication would be necessary.

October 25, 1973

STATE OFFICERS AND DEPARTMENTS: Bureau of Labor — §§88.3(4), 88.8, 88.9, 88.21, 679.16, 1973 Code of Iowa. The Bureau of Labor may enforce the Iowa OSHA law with regard to a state agency or department. The prohibition of litigation between state agencies is not applicable to proceedings under Ch. 88, 1973 Code of Iowa. (Voorhees to Addy, Commissioner of Labor, 10-25-73) #73-10-22

Mr. Jerry L. Addy, Commissioner of Labor: Reference is made to your letter of September 6, 1973, wherein you asked for an opinion on the following question:

"The question is whether the Bureau of Labor can proceed with its enforcement under Chapter 88 of the Code on an administrative department of the State. A governmental agency has denied the jurisdiction of the Bureau of Labor to proceed with enforcement because Chapter 88 provides for a judicial review of enforcement procedures. The contention of the contesting agency is that possible judicial review is litigation which is prohibited by §679.19 of the Code."

Section 679.19, 1973 Code of Iowa, provides:

"Any litigation between administrative departments, commissions or boards of the state government is prohibited. All disputes between said governmental agencies shall be submitted to a board of arbitration of three members to be composed of two members to be appointed by the departments involved in the dispute and a third member to be appointed by the governor. The decision of the board shall be final."

Various sections of Chapter 88, 1973 Code of Iowa, authorize the Bureau of Labor to conduct inspections, propose penalties, issue citations, and otherwise enforce the act with respect to covered employees and employers. "Employer" is defined by §88.3(4):

"'Employer' means a person engaged in a business who has one or more employees and *also includes the state of Iowa, its various departments and agencies, and political subdivision of the state.*" (Emphasis added).

Other sections of Chapter 88 set out procedures for administrative review of proposed penalties and citations (§88.8), and for judicial review of the administrative proceedings (§88.9). In addition, §88.21 provides:

"The provisions of this chapter will prevail wherever the same conflicts with any other chapter of the Code."

We believe that the specific provision of Chapter 88 prevails over the general provision of §679.19. Chapter 88 specifically includes in its purview the various departments and agencies of the state of Iowa, and specifically provides that its provisions prevail when in conflict with other provisions of the Code. Even if this was not the case, we do not believe that the prohibition against "litigation" would apply to administrative proceedings. Section 679.19, if it were applicable, would not be applicable until there was actually some judicial proceedings between state agencies.

Accordingly, it is our opinion that the Bureau of Labor can enforce the provisions of Chapter 88 with regard to state agencies or departments, and that such agencies or departments are subject to the administrative proceedings under §88.8 and judicial review under §88.9.

October 25, 1973

STATE OFFICERS AND DEPARTMENTS: Agriculture Department; meat inspection license, grocery stores. Chapters 170 and 189A, Code of Iowa, 1973. The $25.00 licensing provision of Chapter 189A does not apply to grocery stores irrespective of the volume of meat and poultry products processed. (Haesemeyer to Lounsberry, Secretary of Agriculture, 10-25-73) #73-10-23

The Honorable R. H. Lounsberry, Secretary of Agriculture: Reference is made to your letter of August 1, 1973, in which you request an opinion from this office interpreting the licensing provisions of §189A.3 of the Code, and the applicability of such provisions to grocery stores which sell meat on a "custom" basis. In your letter you define custom work as the sale of a full quarter or half of beef to a customer at one time, and you ask if grocery stores which do custom work may be required to pay a $25.00 license fee.

It is our opinion that an establishment which operates primarily as a retail grocery store cannot be brought within the $25.00 license fee requirement of §189A.3(1). Section 189A.3, Code of Iowa, 1973:

"No person shall operate an establishment without first obtaining a license from the department . . ."

Section 189A.2(32), Code of Iowa, 1973:

"'Establishment' means all premises where animals or poultry are slaughtered or otherwise prepared, either for custom, resale or retail . . . restaurants, grocery stores . . . and similar places."

Section 189A.2(14), Code of Iowa, 1973:

"'Prepared' means slaughtered, canned, salted, stuffed, rendered, boned, cut up, or otherwise manufactured or processed."

Section 189A.3, Code of Iowa, 1973:

". . . The license fee for each establishment, *excluding restaurants and grocery stores*, per year or any part of a year shall be: (1) For all meat and

poultry slaughtered or otherwise prepared not exceeding 20,000 lbs. per year for sale, resale, or custom, twenty five dollars. (2) For all meat and poultry slaughtered or otherwise prepared in excess of 20,000 lbs. per year for sale or resale, fifty dollars.

"The license fee for each restaurant selling 20 lbs. or more of meat or meat products annually *and for each grocery store* per year or any part of a year shall be five dollars." (emphasis added)

The clear language of the statute precludes the Department from charging any grocery store under any circumstances more than $5.00 for its meat inspection license. While all other establishments are charged in accordance with whether or not their output exceeds 20,000 lbs., and while all restaurants are charged the flat $5.00 fee providing they sell more than 20 lbs., the language is conspicuously free of any reference to fee determinative criterion to be used in relation to grocery stores.

It may well be that in the four years since the amendment to this section, rising meat prices have caused grocery stores to experience an increasing demand for custom sale of quarters and halves of beef. Such increased demand would require that a store keep on hand a greater number of large sections of beef than it had in the past, which would impose an increased burden of time and expense on the Department's meat inspectors. And, obviously, not all grocery stores are alike either in the amount of meat which they sell, or in the percentage of their volume which is constituted by custom sales. The mere existence of these disparities would, perhaps, be sufficient reason for the legislature to amend §189A.3 so that grocery stores could be licensed according to: (1) the volume of meat which they prepare, (2) the percentage of this volume which is sold as quarters or halves of beef which are pre-cut and pre-wrapped as per a customer's demand.

However, unless and until such time as the legislature changes the statute we must be guided by the law as we find it. It is a proposition too well established to require citation of supportive authority that an administrative body may merely execute the law within the limits of the discretion granted to it; it may not legislate as to what the law shall be.

In conjunction with the opinions expressed above, it must be noted that no strict construction of §189A.3 would prohibit the Department from assessing grocery stores and restaurants a $5.00 meat inspection fee *in addition* to the $5.00 food establishment inspection license fee required under Chapter 170.

Section 170.46, Code of Iowa, 1973:

"The department shall cause to be inspected at least once each calendar year, every hotel, restaurant, and food establishment in the state . . ."

Section 170.1(6), Code of Iowa, 1973:

" 'Food establishment' shall include any . . . retail grocery, meat market, or other place in which food is kept, produced, prepared, or distributed for commercial purposes for all the premises consumption . . ."

Section 170.2, Code of Iowa, 1973:

". . . This section shall not be construed to require the licensing of . . . establishments *exclusively* engaged in the processing of meat and poultry licensed as required under §189A.3." (emphasis added)

Those establishments which do not engage exclusively in the processing of meat would be required to undergo two dissimilar inspections. First, an inspection as to the general health standards on the premises, as those standards are defined in Chapter 15 of the Department's rules. Second, a more specific inspection of the meat processing operations on the premises as per the guidelines of Chapter 17 of said rules.

October 26, 1973

BEER AND LIQUOR CONTROL DEPARTMENT: Sunday sale of liquor — Senate File 144, §1, Acts of the 65th G.A., First Session. When mix is sold in a mixed drink, it cannot be counted as "goods and services other than alcoholic or beer" in determining whether a licensee qualifies for Sunday sale of liquor. But when mix is sold separately to a patron who makes his own drink from alcohol sold to the patron by the licensee, it can be counted as "goods and services other than alcoholic liquor or beer". (Haskins to Gallagher, Director, Iowa Beer and Liquor Control Department, 10-26-73) #73-10-24

Mr. Rolland A. Gallagher, Director, Iowa Beer and Liquor Control Department: From your letter, it appears that several liquor licensees are attempting to meet the 50 percent ratio necessary to qualify for Sunday sale of liquor by counting the value of a mixed drink, as for example, 40 percent alcohol, and 60 percent other goods and services in the form of mix used in making the drink. You ask whether the mix can be counted as "goods and services other than alcoholic liquor or beer" in determining whether the licensee qualifies for Sunday sale of liquor. You also ask whether it makes a difference if the licensee sells the mix to a patron separately from the alcohol sold to the patron by the licensee and then has the patron make his own drink.

Senate File 144, §1, Acts of the 65th G.A., First Session, permits Sunday sale of liquor in a liquor establishment if 50 percent or more of its gross receipts are from goods and services other than alcoholic liquor or beer. Section 1 states in relevant part:

"Any club, hotel, motel, or commercial establishment holding a liquor control license for whom the sale of *goods and services other than alcoholic liquor or beer* constitutes fifty percent of more of the gross receipts from the licensed premises . . . may sell and dispense alcoholic liquor and beer to patrons on Sunday for consumption only." (Emphasis added).

The words "alcoholic liquor" have a special definition. Section 123.3(8), 1973 Code of Iowa, defines "alcoholic liquor" as follows:

"'Alcoholic Liquor', 'alcoholic beverage' or 'intoxicating liquor' includes . . . *every liquid* or solid, patented or not *containing alcohol,* spirits, or wine, *and susceptible of being consumed by a human being, for beverage purposes.*" (Emphasis added).

A mixed drink, at the time of its sale, is, in its entirety, a ". . . liquid . . . containing alcohol . . . and susceptible of being consumed by a human being, for beverage purposes." Thus, the value of the mixed drink cannot be broken down into, for example, 40 percent alcohol and 60 percent other goods and services, since the drink is, as a unit, "alcoholic liquor" and hence in no part "goods and services other than alcoholic liquor or beer." That is, when mix is sold mixed in a drink, it cannot be counted as "goods and services other than

alcoholic liquor or beer." But when the mix is sold separately to a patron who makes his own drink from alcohol sold to the patron by the licensee, it can be counted as "goods and services other than alcoholic liquor or beer", since, at the time of sale, the mix is separate and distinct from alcohol.

October 26, 1973

BEER AND LIQUOR CONTROL DEPARTMENT: Sunday sale of liquor and beer. §§1, 4, Senate File 144, Acts of the 65th G.A., First Session. The sales from such operations as seed corn businesses, farm operations, used car businesses, marinas, but not real estate agencies, may be counted as "goods and services other than alcoholic liquor or beer" in the case of a liquor licensee or as "goods and services other than beer" in the case of a beer permittee in determining whether the licensee or permittee qualifies for Sunday sale of liquor or beer, but only if the sales from these operations are made on the licensed premises. (Haskins to Gallagher, Director, Iowa Beer & Liquor Control Department, 10-26-73) #73-10-25

Mr. Rolland A. Gallagher, Director, Iowa Beer and Liquor Control Department: You ask whether sales from such operations as real estate agencies, seed corn businesses, farm operations, used car businesses, and marinas may be counted by a liquor licensee as "goods and services other than alcoholic liquor and beer" or by a beer permittee as "goods and services other than beer" in determining whether the licensee or permittee qualifies for Sunday sale of liquor or beer. It is our opinion that sales from such operations, other than real estate agencies, may be included, but only if the sales from these operations are made on the licensed premises.

The legislature, in Senate File 144, Acts of the 65th General Assembly, First Session, authorized Sunday sales of liquor and beer under a certain condition. This condition is when, in the case of a liquor licensee, the sale of "goods and services other than alcoholic liquor or beer", or, in the case of a beer permittee, the sale of "goods and services other than beer", is 50 percent or more of the gross receipts of the licensed premises. Section 1 of Senate File 144 states:

"Any club, hotel, motel, or commercial establishment holding a liquor control license from whom the sale of *goods and services other than alcoholic liquor or beer* constitutes fifty percent or more of the gross receipt from the licensed premises . . . may sell and dispense alcoholic liquor and beer to patrons on Sunday for consumption on the premises only." (Emphasis added).

Section 4 of Senate File 144 states:

"Any club, hotel, motel, or commercial establishment holding a class 'B' beer permit for whom the sale of *goods and services other than beer* constitutes fifty percent or more of the gross receipts from the licensed premises . . . may sell and dispense beer to patrons on Sunday for consumption on Sunday for consumption on the premises only." (Emphasis added).

The phrase "goods and services" is broad enough to encompass sales from such operations as seed corn businesses, farm operations, used car businesses, and marinas. Of course, the sales from these operations would have to be on the licensed premises. It should be noted that real estate is neither "goods" nor "services." The word "goods" contemplates personal property, *see* Black's Law Dictionary 832 (Rev. 4th ed.), and not real property, or real estate. Hence, the sales of a real estate agency cannot be counted as sales of "goods and services."

It is said that the legislature intended that only food and entertainment should be "goods and services other than alcoholic liquor or beer" or "goods and services other than beer." But if the legislature intended this, it could have used the specific words "food and entertainment" rather than the general words "goods and services." Legislative intent is determined by what the legislature actually said, rather than by what it should or might have said. *See* R.C.P. 344(f) (13). Judging by what the legislature actually said, it is our opinion that the sales of such operations as seed corn businesses, farm operations, used car businesses, and marinas, but not real estate agencies, may be counted as "goods and services other than alcoholic liquor or beer" in the case of a liquor licensee or as "goods and services other than beer" in the case of a beer permittee, but only if the sales from these operations are made on the licensed premises.

October 26, 1973

BEER AND LIQUOR CONTROL DEPARTMENT: Sunday liquor or beer sales privilege. Senate File 144, §§1 and 4, Acts of the 65th G.A., First Session, §§123.21 and 123.39, 1973 Code of Iowa. A violation of any of the provisions of Ch. 123, 1973 Code of Iowa, furnishes a cause for revocation or suspension of the Sunday sales privilege or permit as well as the regular liquor license or beer permit. When a liquor licensee or beer permittee who has a Sunday sales privilege or permit violates the "50% requirement" for Sunday sales, his regular liquor license or beer permit can be revoked or suspended. (Haskins to Gallagher, Director, Iowa Beer & Liquor Control Department, 10-26-73) #73-10-26

Mr. Rolland A. Gallagher, Director, Iowa Beer and Liquor Control Department: We have received your request for an Attorney General's Opinion on the following questions:

"1. After a Sunday Sales Permit has been issued, does it become a component part of a six-day license, and, does any violation of Chapter 123 of the 1973 Code affect both the Sunday sales privilege and the six-day license?

"2. Upon violation of the 50% requirement at the time the Sunday Sales Permit was granted, could the Sunday Sales Permit be suspended for a greater period of time and lesser suspension given for the six-day license?"

The legislature in Senate File 144, Acts of the 65th General Assembly, First Session, (referred to as the "Sunday sales act") authorized Sunday sales of liquor under a certain condition. That condition is, in the case of a liquor licensee, when the licensee's sales of goods and services other than liquor or beer are 50 percent or more of the gross receipt of the licensed premises. This condition is known as the "50% requirement" and is found in §1 of Senate File 144. Section 1 states:

"Section one hundred twenty-three point thirty-six (123.36), Code 1973 is amended by adding the following new subsection:

"Any club, hotel, motel, or commercial establishment holding a liquor control license for whom the sale of goods and services other than alcoholic liquor or beer constitutes fifty percent or more of the gross receipts from the licensed premises . . . may sell and dispense alcoholic liquor and beer to patrons on Sunday for consumption on the premises only.

A similar "50% requirement" applies to beer permittees who sell on Sunday. *See* Senate File 144, §1, Acts of the 65th G.A., First Session. It will be noted

that the Sunday sales privilege and the "50% requirement" are made a part of Chapter 123.

It is clear that a regular, or "six-day", liquor license or beer permit can be revoked or suspended for a violation of any of the provisions of Chapter 123. The authority to revoke or suspend is Section 123.39, 1973 Code of Iowa. The question is whether a Sunday sales privilege or permit can also be revoked or suspended for such a violation. We believe that it can. Section 123.39 states:

"*Any liquor control license or beer permit issued under this chapter* may, after notice in writing to the license or permit holder and reasonable opportunity for hearing, . . . be suspended for a period not to exceed one year or revoked by the local authority or the director for any of the following causes:

* * *

"2. Violation of any of the provisions of this chapter." (Emphasis added.)

It is our position that the words "(a)ny liquor control license or beer permit issued under this chapter" includes the Sunday sale privilege or permit. As indicated, the Sunday sales privilege or permit is a part of Chapter 123. Hence, a violation of any of the provisions of Chapter 123 would, under §123.39, furnish a cause for revocation or suspension of the Sunday sales privilege or permit. To opine otherwise would mean that licensee or permittee who had his regular liquor license or beer permit revoked or suspended for a violation of the provisions of Chapter 123 would still be able to continue selling liquor or beer on Sundays. Surely, the legislature did not intend this result when it enacted the Sunday sales act.

As to the second question, it will be recalled that a regular liquor license or beer permit can, under §§123.39, be revoked or suspended for violation of any of the provisions of Chapter 123. One such provision is §123.2, 1973 Code of Iowa, the general prohibition section, which states:

"*It shall be unlawful to* manufacture for sale, *sell,* offer or keep for sale, possess, or transport *alcoholic liquor or beer except upon the terms, conditions, limitations, and restrictions enumerated in this chapter.*" (Emphasis added.)

The "50% requirement" is a "term, condition, limitation, and restriction" of Chapter 123. Hence, to violate the "50% requirement" by selling liquor or beer on Sundays without satisfying the "50% requirement" is to violate §123.2. Accordingly, violation of the "50% requirement" is, under §123.39, a cause for revocation or suspension of the regular liquor license or beer permit. Significantly, no limitation exists in §123.39 that the violation of a provision of the chapter relate to the type of license or permit — Sunday sales or regular — to be revoked or suspended. Of course, only a licensee or permittee who has a Sunday sale privilege or permit could have his regular license or permit revoked for violation of the "50% requirement." It should be noted that the decision whether there is to be a revocation or suspension, or, if a suspension, the length of it under the one-year maximum, is within the discretion of the Director or the local authority subject only to a requirement that the decision be reasonable. The decision will depend on the facts of the particular case and the seriousness of the violation. We are not implying that a licensee or permittee should always have his regular license or permit revoked merely because he violated the "50% requirement." We are saying only that the power to revoke or suspend the regular license or permit for violation of the "50% requirement" does exist.

In conclusion, a violation of any of the provisions of Chapter 123 furnishes cause for revocation or suspension of the Sunday sales privilege or permit as well as the regular liquor license or beer permit. Moreover, when a liquor licensee or beer permittee who has a Sunday sales privilege or permit violates the "50% requirement," his regular liquor license or beer permit can be revoked or suspended.

October 26, 1973

STATE OFFICERS AND DEPARTMENTS: Iowa Department of Agriculture; Restaurant license — §§170.1(4), 170.1(5), and 170.2, 1973 Code of Iowa. A private country club which charges its members for food is a "restaurant" and must therefore obtain a license. (Haskins to Geddes, Iowa Department of Agriculture, 10-26-73) #73-10-27

Mr. Mark G. Geddes, Administrative Assistant, Iowa Department of Agriculture: You request an opinion of the Attorney General as to whether a country club which charges its members for food by a monthly bill or through annual dues and for alcoholic drinks on an individual basis at the time they are purchased or by a monthly bill must have a restaurant license. As will be seen, the fact that members pay by a monthly bill or through annual dues rather than after each meal or at the time a drink is purchased is of no significance. It will be assumed that the country club is a bona fide private club which does not hold out as serving food to the public.

Subject to certain exceptions not relevant here, no person shall maintain a "restaurant" unless he has obtained a license from the Iowa Department of Agriculture. *See* §170.2, 1973 Code of Iowa. The word "restaurant" is specifically defined in §170.1(4), 1973 Code of Iowa, as follows:

"'*Restaurant' shall mean any building* or structure equipped, *used,* advertised *as,* or held out to the public to be *a* restaurant, cafe, cafeteria, *dining hall,* lunch counter, tavern, cocktail lounge, lunch wagon, *or other like place where food is prepared or served for pay* or profit for on the premise consumption, except such places as are used by churches, fraternal societies, and civic organizations which engage in the serving of food less frequently than once a week." (Emphasis added).

It will be noted that alcoholic (and non-alcoholic drinks are considered as "food" under the above section. *See* §170.1(5), 1973 Code of Iowa. A private country club which charges its members for food is an ". . . other like place where food is prepared or served for pay . . ." The time and manner by which members are charged for food — be it by monthly bill, by annual dues, or after each meal or at the time a drink is purchased — is irrelevant. It is important only that members in some way pay for food and drinks. It might be argued that a private country club which charges its members for food is not a place "like" several of the prior enumerated places such as a restaurant, cafe, or tavern in that it is not held out as serving food to the public. However, such a country club is like a "dining hall," which is not necessarily held out as serving food to the public. It is unnecessary that an establishment be held out as serving food to the public in order to be a "restaurant." *See* 1944 O.A.G. 71 (Industrial cafeterias serving food at cost to employees opined to be "places where food is served for pay" and hence "restaurants" so as to be required to have a license). It should be pointed out that, under the above section, an establishment need not serve food for profit. It is enough that it serves food for pay. The section refers in the disjunctive to "pay *or* profit" and not in the conjunctive to "pay *and* profit." Thus, the addition of the words "or profit" by

the legislature in 1965 (Acts of the 61st General Assembly, Chapter 181, §1) has no operative effect with respect to the present case.

In light of the above, it is our opinion that a private country club which charges its members for food is a "restaurant" and must therefore obtain a license.

October 26, 1973

GENERAL ASSEMBLY: Member-elect, per diem not authorized. Article III, §25, Constitution of Iowa, §§2.10(1), 2.12, 2.14, Code of Iowa, 1973. There is no statutory authority for the payment of per diem to persons who have been elected to the general assembly prior to the time they are sworn in. (Haesemeyer to Rankin, Legislative Fiscal Bureau, 10-26-73) #73-10-28

Gerry D. Rankin, Director, Legislative Fiscal Bureau: Reference is made to your letter of October 15, 1973, in which you request an opinion of the Attorney General with respect to the following:

"The Legislative Fiscal Committee has been reviewing a report prepared by the National Legislative Conference. The report concerns ways to improve the Legislative Appropriations Process

"The Fiscal Committee is especially interested in ways to speed up the appropriations process without lengthening the regular sessions of the General Assembly.

"The Committee has asked me to obtain an opinion from you as to whether it would be legally possible to pay per diem and expenses to persons who have been elected to the General Assembly, but have not been sworn in. If it were possible to do this, the appropriation committees could become operative a month or so before the convening of the General Assembly."

Article III, §25, Constitution of Iowa, as amended November 5, 1968, provides:

"Each member of the General Assembly shall receive such compensation and allowances for expenses as shall be fixed by law but no General Assembly shall have the power to increase compensation and allowances effective prior to the convening of the next General Assembly following the session in which any increase is adopted."

To implement the grant of authority contained in the foregoing constitutional provision, the General Assembly has adopted a number of statutory provisions relative to their own pay and expenses and the expenses of their various committees, and such provisions are found in Chapter 2, Code of Iowa, 1973. Relevant to your inquiry is §2.10(6), which provides:

"In addition to the salaries and expenses herein authorized, *members of the general assembly* shall be paid forty dollars per day and necessary travel and actual expenses incurred in attending standing or interim committee meetings subject to the provisions of section 2.14, or when on official state business, when the general assembly is not in session. Such salaries or expenses shall be paid promptly from funds appropriated pursuant to section 2.12, unless otherwise provided by law." (emphasis added)

Also of some relevance is §2.12, which provides in part:

"* * *

"There is hereby appropriated out of any funds in the state treasury not otherwise appropriated, such sums as may be necessary for each house of the

general assembly for the payment of any unpaid expense . . . incurred in the interim between sessions of the general assembly, including but not limited to salaries of members and expenses of standing interim committees . . ."

Section 2.14 provides in part:

"* * *

"Nonlegislative members of study committees shall be paid their necessary travel and actual expenses incurred in attending committee or subcommittee meetings for the purposes of the study."

"* * *

"5. When the general assembly is not in session, a *member of the general assembly* shall be paid forty dollars per day and his necessary travel and actual expenses incurred in attending meetings of a standing committee or subcommittee of which he is a member in addition to his regular compensation. Such compensation and expenses shall be allowed only if the member attends a meeting of the committee or subcommittee for at least four hours. (emphasis added)

We do not think that a person who has been elected to the General Assembly but has not been sworn in can under any conceivable theory be considered a member of the General Assembly. This being so, there is no statutory authority for the payment of per diem to such individuals. While §2.14(3) provides only for the payment of travel and actual expenses of nonlegislative members of study committees, §2.14(5) provides that members of the General Assembly are entitled not only to their necessary travel expenses but also forty dollars per day.

October 30, 1973

ELECTIONS: Cities over 10,000 population; run-off where no candidate receives more than 50% of the vote. §363.16, Code of Iowa, 1973. Cities over 10,000 which do not hold a primary election should adopt an ordinance to hold a run-off election if no candidate receives a majority of the vote. (Haesemeyer to Schwieger, State Senator, 10-30-73) #73-10-29

The Honorable Barton L. Schwieger, State Senator: Reference is made to your letter of October 26, 1973, in which you state:

"A question has arisen in Waterloo concerning the upcoming City Elections and whether or not Waterloo may run into difficulties as a result of the way the elections are being conducted. I would like your opinion in regard to the questions which I will raise. The questions are as follows:

"1. Are cities in Iowa with a population of more than 10,000 required to have provisions for either a Primary Election or a Runoff Election when necessary because of more than two candidates for one elective office and no one candidate receiving a majority of the votes cast?

"2. If a city has no provision relating to Runoff Elections and the Primary Election has passed, is it too late to take corrective action and pass a Resolution relating to conducting a Runoff Election in the event necessary?

"I would like your opinion on these two questions and hope that if it is necessary for corrective action we will have enough time to do so."

Section 363.16, Code of Iowa, 1973, as amended by §296, H.F. 745, Acts, 65th G.A., First Session (1973) provides:

"1. In cities having a population of more than ten thousand, as shown by the latest federal census, the procedure shall be as follows:

"If the county commissioner of elections and mayor find that the number of candidates for any office, as shown by candidates' petitions filed with the county commissioner of elections, be not more than twice the number of persons that may be elected to said office, said candidates shall be found to be the nominees, and for said office no primary election shall be held. For any office or offices, for which the number of candidates, as shown by the candidates' petitions filed with the county commissioner of elections, is found to be more than twice the number of persons that may be elected to said office or offices, the nominees shall be determined by a municipal primary election, as hereinafter provided. The county commissioner of elections and mayor shall file a written report with the council, stating the nominees for such office or offices, if any, for which no municipal primary election is required, and also stating the office, or offices, if any, for which the nominees shall be determined by a municipal primary election. Any such city, under one hundred thousand population, may by ordinance provide that all candidates for all elective city offices shall be nominated under the provisions of chapter 44 and chapter 45. In such event nomination for all such offices by primary shall not be authorized.

"2. The council of any city having a population of more than ten thousand may by ordinance provide that subsection 1 of this section and sections 363.17 through 363.20, section 363.24, and section 363.25 shall not apply to such city if the ordinance provides for a run-off election as set forth in this subsection. Any such run-off election shall be held two weeks after the regular municipal election if the following conditions result:

"a. If no candidate for a single office receives a majority of the votes cast, the two candidates receiving the largest number of votes shall be placed upon the run-off ballot.

"b. Where candidates for council or other bodies run at large, the results shall be ranked in order of votes received. If any of the top candidates, to the number of positions to be filled, receive less than a majority of the votes cast at the election, those candidates receiving a majority of the votes cast shall be declared elected. Those candidates receiving the next highest number of votes but not having a majority, to the number of twice the number of unfilled positions, shall be placed on the run-off ballot.

"The provisions of chapters thirty-nine (39) through fifty-three (53) of the Code shall apply to the conduct of run-off elections except that there shall be no added voter registrations accepted for said election but transfers may be accepted until ten days before the election, as now provided under law."

It is to be noted that the last two sentences of §1 of such §363.16 permits a city under 100,000 population to by ordinance provide that all candidates for elective city office are to be nominated under the provisions of Chapter 44 and Chapter 45 and that if such an ordinance is adopted, no municipal primary election is to be held. Chapters 44 and 45 deal only with alternative methods of nominating candidates and contain no provisions with respect to the conduct of elections. The same is true of the primary election provisions of Chapter 363. In 1967 the 62nd General Assembly enacted Chapter 312, §1 of which added subsection 2 of what is now §363.16 of the Code. Chapter 312 was, as its title states:

"An act relating to municipal elections in cities over ten thousand population providing the option of run-off election in lieu of a primary."

Thus, since 1967 what the law has contemplated is that cities having a population over 10,000 may have a municipal primary under the provisions of Chapter 363 but if they do not wish to have a primary and in the general election it is determined that no candidate for a single office received a majority of the votes cast, or in the case of at large offices, not all of the top candidates, to the number of positions to be filled, received a majority of the votes cast then a run-off election must be held under the provisions of §363.16(2). The fact that a particular city may have by ordinance adopted the *nominating* provisions of Chapters 44 and 45 is irrelevant. The only affect of such option is to preclude a primary and mandate the holding of a run-off election where there is a failure of a candidate to receive a majority of the votes cast.

Turning to your second question, §363.16(2) imposes no time limitation on when a council may enact an ordinance providing for a run-off election and in our opinion, the City Council of Waterloo can and should still do so.

While your letter does not so state, we are informed that in some cities to which §363.16 is applicable, municipal officers may have been elected with less than majority of the votes cast. Nevertheless, they have been *de facto* in office and the law is well settled that their acts are not subject to collateral attack. *Appeal of Board of Directors of Grimes Independent School District* (1964), 257 Iowa 106, 131 N.W.2d 802 and cases collected at 14A Iowa Digest, *Officers,* §§43 and 104.

October 30, 1973

LABOR LAW: Agency shop checkoff — Title U.S.C. §§164(b), 186(c)(4); §§736A.5, 1973 Code of Iowa. The agency shop is prohibited in Iowa. Checkoff authorizations that are irrevocable for up to one year and provide the automatic renewal are legal in Iowa if there is a reasonable time during which the employee may revoke his authorization. (Voorhees to Gluba, State Senator, 10-30-73) #73-10-30

The Honorable William E. Gluba, State Senator: This letter is in response to your request for an opinion on the following question raised by one of your constituents:

"Is it true that once a person joins the union in Iowa and that firm has dues checkoff . . . and that the contract provides for the modified agency shop, is the member locked in as a member until the escape period?"

It should first be noted that the questions you raise are governed by both federal and state law: §§736A.3 and 736A.4, 1973 Code of Iowa (the Right-to-Work law) and Title 29 U.S.C. §§164(b), 186(c)(4) (the Taft-Hartley Act). Where there is conflict in state and federal law, federal law will prevail. However, if the federal provisions defer to state law, then the state law governs.

The question you asked raises two issues: (1) is the "modified agency shop" permitted in Iowa, and (2) can a member be "locked in" to pay dues under a checkoff authorization that provides for automatic renewal?

The first issue is governed by state law. Title 29 U.S.C. §164(b) defers to the states the power to enact "Right-to-work" laws. Iowa has enacted such a law — Chapter 736A, 1973 Code of Iowa.

Section 736A.3 provides:

"It shall be unlawful for any person, firm, association, corporation or labor organization to enter into any under standing, contract, or agreement,

whether written or oral, to exclude from employment members of a labor union, organization, or association, or persons who do not belong to, or who refuse to join, a labor union, organization or association, or because of resignation or withdrawal therefrom."

Section 736A.4 provides:

"It shall be unlawful for any person, firm, association, labor organization, or corporation, or political subdivision, either directly or indirectly, or in any manner or by any means as a prerequisite to or a condition of employment to require any person to pay dues, charges, fees, contributions, fines or assessments to any labor union, labor association or labor organization."

It is apparent from these provisions that an agency shop arrangement whereby an individual is required as a condition of employment to pay union dues is prohibited by Iowa law.

In the case of checkoff authorization there is a specific federal provision which prevails over a state statute to the contrary. *See SeaPak v. Industrial Technical and Pro. Emp., Div. of Nat. Mar. U.*, 300 F. Supp. 1197, (S.D. Ga. 1969), *affirmed* 423 F.2d 1229 (5th Cir. 1970), *affirmed* 400 U.S. 985, S.Ct. 63, 27 L.Ed.2d 434 (1971).

Section 736A.5 provides:

"It shall be unlawful for any person, firm, association, labor organization or corporation to deduct labor organization dues, charges, fees, contributions, fines or assessments from an employee's earnings, wages or compensation, unless the employer has first been presented with an individual written order therefor signed by the employee *which written order shall be terminable at any time by the employer giving at least thirty days' written notice of such termination to the employer.*" (Emphasis added).

However, this is inconsistent with Title 29 U.S.C.A. §186(c)(4). This section authorizes an employer to withhold union dues:

". . . *Provided,* that the employer has received from each employee, on whose account such deductions are made, a written assignment *which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner* . . ." (Emphasis added).

As was pointed out previously, this federal provision which provides that checkoff authorization may be irrevocable for up to one year or upon the anniversary of the contract prevails over the state provisions which provide such authorizations are revocable upon 30 days notice.

It has been further held that such checkoff authorization may be automatically renewable. *See Monroe Lodge No. 770, I.A. F.M. and A.W. v. Litton Bas. Sys., Inc.*, 334 F. Supp. 31 (W.D. Vir. 1971). However, any such provision for automatic renewal must contain an "escape period" within which the authorizations can be revoked.

To answer your question precisely, a member of a union who has executed a valid checkoff authorization can be "locked in" until the "escape period." However, a person cannot be forced to execute a checkoff authorization or otherwise join or pay any dues, charges, fees, contributions, fines or assessments to a union as a condition of employment.

October 30, 1973

CRIMINAL LAW: Uniform traffic citation and complaint — Article I, §11, Constitution of the State of Iowa; §§762.2, 754.1, 321.9, 78.1, 1973 Code of Iowa. Uniform traffic citation and complaint must be sworn to but need not be sworn to before a magistrate. Oath for purposes of swearing to citation may be administered by designated officers and employees of the Department of Public Safety, judges of the supreme and district courts, district associate judges, judicial magistrates, clerks and deputy clerks of the supreme and district courts, notaries public, and certified shorthand reporters. (Sullins to Price, Assistant Black Hawk County Attorney, 10-30-73) #73-10-31

Mr. David Price, Assistant Black County Attorney: On September 11, 1973, this office, per your request, issued an opinion in response to the following question:

"Must the uniform traffic complaint be sworn to when filed, pursuant to Code Section 762.2, or is a uniform traffic complaint exempt from oath by Section 754.1?"

It was the conclusion of this office that the uniform traffic citation and complaint need not be sworn to before a magistrate as it is specifically exempted therefrom by §754.1. This conclusion has been questioned in light of Article I, §11 of the Constitution of the State of Iowa which, in pertinent part, provides as follows:

"All offenses less than felony and in which the punishment does not exceed a fine of One Hundred dollars, or imprisonment for thirty days, shall be tried summarily before a Justice of the Peace, or other officer authorized by law, on information *under oath* . . ." (Emphasis added.)

It is apparent that uniform traffic citations must be sworn to. The import of the September 11, 1973, opinion is that the informing officer need not appear before a magistrate for purposes of an oath. He may swear to the uniform traffic complaint by affixing his signature thereto in subscription to a statement that he swears or affirms that the information contained in the citation is true and correct to the best of his knowledge. Such an oath may be administered by any officer or employee of the Department of Public Safety designated by the Commissioner of Public Safety pursuant to the power granted to the Commissioner in §321.9, 1973 Code of Iowa. Such an oath may also be administered by judges of the supreme and district courts, district associate judges, judicial magistrates, clerks and deputy clerks of the supreme and district courts, notaries public, and certified shorthand reporters. See §78.1, 1973 Code of Iowa.

October 30, 1973

TAXATION: Property tax — Personal property tax credit; Chapter 1020, Acts of 64th G.A., Second Session. Maximum personal property tax credit of $2700 is not increased fifty percent for period of the extended fiscal year. (Capotosto to Reiter, Marion County Attorney, 10-30-73) #73-10-32

Mr. Warren A. Reiter, Marion County Attorney: You have requested an opinion of the Attorney General with respect to the amount of personal property tax credit available to the taxpayer for the extended fiscal year, which will run from January 1, 1974 to June 30, 1975. Specifically, your inquiry is as follows:

"Since the taxpayer is to be assessed from January 1, 1974 to June 30, 1975, a period of 18 months, under Chapter 1020 of the Laws of the 64th General Assembly, Second Session, is the taxpayer limited to the $2700 credit for this period or does the taxpayer get credit of 1 ½ times this amount?"

Chapter 1020, Acts of the 64th G.A., Second Session, changes the budget year of Iowa's cities, counties and other political subdivisions from a calendar year to a fiscal year system. To implement the fiscal year system the legislature provided that the budget year beginning January 1, 1974, would be extended to end on June 30, 1975. Each budget year thereafter would thus run from July 1 to the following June 30. Thus the tax year which begins on January 1, 1974, will last eighteen months rather than the customary twelve. The question which arises then is whether property tax credits and exemptions normally available for the twelve month year should be increased fifty percent for purposes of the extended fiscal year, since the budget year is fifty percent longer.

The legislature did enact increases in certain tax credits. For example, in §6 of Chapter 1020 the homestead tax credit available under §425.1, 1973 Code of Iowa, is increased from twenty-five (25) mills to a maximum of thirty-seven and one half (37 ½) mills. And in §7 of Chapter 1020 the legislature increased the additional homestead credit for elderly and disabled persons available under §427.1(5), 1973 Code of Iowa, from $125 to a maximum of $187.50 for the eighteen month extended fiscal year. Thus it is apparent that the legislature did take certain property tax credits into account and increased them accordingly to correspond to the lengthened tax year. Conspicuously omitted from Chapter 1020 is a like increase in the personal property tax credit granted under §427A.2, 1973 Code of Iowa. Section 427A.2 grants a credit of up to $2700 from the assessed value of tangible personal property owned by the taxpayer and provides as follows:

". . . There is hereby granted a credit of not to exceed two thousand seven hundred dollars against the assessed value of tangible personal property as defined in section 427A.1, owned by a person or business enterprise."

The fact that the legislature left the §427A.2 credit out of Chapter 1020 brings into play the rule "expressio unius est exclusio alterius". Literally translated this means that the express mention of one thing implies the exclusion of others. *Holland v. State,* 1962, 253 Iowa 1006, 115 N.W.2d 161; *State v. Flack,* 1960, 251 Iowa 529, 101 N.W.2d 535.

Applying the rule of expressio unius est exclusio alterius to the instant statute, if the legislature had intended to give the taxpayer an additional fifty percent credit from assessed valuation for the extended fiscal year, it would have stated as such in the statute. Lacking such language in Chapter 1020, it is the opinion of the Attorney General that the taxpayer is still entitled to claim the personal property tax credit only to the extent of $2700 for the extended fiscal year.

For purposes of clarification it should be noted in this opinion that the credit provided for in §427A.2 is not a direct credit against the amount of tax owing by the taxpayer. Rather, it is a deduction from the assessed valuation of the taxpayer's taxable property. In computing the amount of money to be paid by the State of Iowa to local taxing districts as a result of the personal property tax credit, the millage rate for said taxing districts must be considered. Since under §3 of Chapter 1020 the local millage rate *will* be increased by fifty percent for the extended year, the amounts paid to the local taxing districts by the

state will also be so increased. Moreover, under §8 of Chapter 1020 remittance by the state will be made in three installments rather than two. But this does not affect the amount of credit from assessed valuation that is available to the individual taxpayer. He is still limited to a maximum credit of $2700 for the extended fiscal year.

October 30, 1973

TAXATION: Sales Tax — Casual sales exemption; §§422.42(12) and 422.45(6), 1973 Code of Iowa. An auctioneer selling goods as the agent of the owner of the goods can claim the casual sales exemption from sales tax on that sale if his principal fits within the statutory criteria qualifying said principal for the exemption. (Capotosto to Taylor, State Senator, 10-30-73) #73-10-33

Senator Ray Taylor: We are in receipt of your request for an opinion of the Attorney General regarding the Iowa sales tax and the application of the casual sales exemption found at §422.45(6), 1973 Code of Iowa, to certain sales by auctioneers. The substance of your inquiry is set out in a letter to you from Eagle Grove attorney William A. Long and reads as follows:

"I represent an auctioneer who, at the most, holds two or three consignment sales a year. Various individuals bring items to be sold, of which the auctioneer takes a certain commission. At no time does the auctioneer own the property, and none of the owners are engaged for profit in the business of selling tangible goods. Also, very seldom, if ever, do the same people bring items to the auction for the sale each time.

"Given these facts and applying them to [Section 422.45(6), 1973 Code of Iowa, it] would seem to exempt these sales from sales tax . . .

"In an Attorney General's Opinion of December 18, 1970, in the Taxation Division, an opinion was asked on a similar question, but not exactly in point. In that opinion on page 4, the Attorney General states: 'Until the fall of the hammer, your principal is the owner of the property sold, and assuming he meets the other requirements of Section 422.42(12), the "gross receipts" paid for the property are not subject to the sales tax.' This would appear to be the legislative intent, and I believe that the Sales Tax Division is construing that intent incorrectly."

You claim that the sales made by the auctioneer on behalf of a principal who offers property for sale on a nonrecurring basis is exempt from sales tax as a casual sale. Casual sales are specifically exempt under §422.45(6). At §422.42(12) casual sales are defined as:

"Sales of tangible personal property by the owner of a non-recurring nature, if the seller, at the time of sale, is not engaged for profit in the business of selling tangible goods or services taxed under Section 422.43."

The issue presented in this opinion is whether the casual sales exemption is available as to sales made by an auctioneer. It should be noted at the outset that tax exemption statutes are to be strictly construed against the taxpayer and in favor of the taxing authority. One claiming an exemption has the burden of proving clearly that he comes within its provisions. *In Re Estate of Waddington,* Iowa, 9172, 201 N.W.2d 77; *Goergen v. State Tax Commission,* Iowa, 1969, 165 N.W. 2d 782.

The position of the Iowa Department of Revenue has been that in all cases sales by auctioneers are not casual sales and that the exemption is not

available as to this class of seller. In so holding, the department relies upon the last provision of §422.42(5), 1973 Code of Iowa, which provides:

". . . provided, however, that when in the opinion of the director it is necessary for the efficient administration of this division to regard any salesmen, representatives, truckers, peddlers, or canvassers, as agents of the dealers, distributors, supervisors, employers, or persons under whom they operate or from whom they obtain tangible personal property sold by them irrespective of whether or not they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers, or persons, the director may so regard them, and may regard such dealers, distributors, supervisors, employers, or persons as retailers for the purposes of this division."

It is the opinion of the Attorney General that a nonrecurring sale made by one not in the business of selling tangible personal property can be exempt, whether or not the sale is made by the owner of the goods directly or whether it is made by an agent or auctioneer acting on behalf of the owner.

Whether a sale is a casual sale within the meaning of the exemption statute cannot be based solely on the status of the party who negotiates the sale, in this case an auctioneer. The status of an auctioneer has been defined at 7 C.J.S. Auctions and Auctioneers, §6 at 1247 (1937) as follows:

"An auctioneer, in making a sale, whether or personalty or realty is, by virtue of his employment to make the sale, primarily the agent of the seller, and has been declared to be the agent of the seller alone until the fall of the hammer;"

Thus the seller is the party who engages the services of the auctioneer, and not the auctioneer himself. Until the fall of the hammer, the principal is the owner of the goods, and to the extent that he meets the criteria of §422.42(12), the gross receipts paid for the goods are exempt from sales tax liability as a casual sale. Under §422.42(12) what characteristics must the seller possess to qualify for the casual sales exemption? He must not be engaged for profit in the business of selling tangible personal property, and the particular sale must be of a nonrecurring nature. *S & M Finance Co., Fort Dodge v. Iowa State Tax Commission,* Iowa, 1968, 162 N.W.2d 505; See also, 1970 O.A.G. 744.

The above-quoted portion of §422.42(5) does not constitute any exception to the casual sales rule. That statute simply authorizes the director of revenue to reach the true seller of the goods for purposes of imposing sales tax liability and designate him as the "retailer". Where an auctioneer is selling for a known principal the state can easily do this. By the same token, if an auctioneer's principal is not readily identifiable the first part of §422.42(5) can be applied to make the agent or auctioneer responsible for remitting the sales tax. The powers granted the director of revenue in §422.42(5) are expressly granted for the purpose of facilitating efficient administration of the sales tax laws. It gives him a subject whom he can designate as the retailer and consequently as the taxpayer. Taxpayer is defined at §422.42(8), 1973 Code of Iowa, as:

". . . any person within the meaning of subsection 1 hereof, who is subject to a tax imposed by this division whether acting for himself or as a fiduciary."

An auctioneer acting in a fiduciary capacity on behalf of his principal can thus be the taxpayer within the meaning of §422.42(8). As the taxpayer, the auctioneer is entitled to claim the casual sales exemption in the same manner as his principal would be if he had sold the goods himself.

If the taxpayer can show facts entitling the owner of the goods to the casual sales exemption, whether said taxpayer is selling as a principal on behalf of himself or as an agent on behalf of someone else, the exemption should be allowed. That is, if an auctioneer who has been designated the retailer can show entitlement of his principal to the casual sales exemption, he should get it. As the agent of the owner, the auctioneer's rights go no lower than those of his principal. If the owner of the goods could claim the exemption, his agent should likewise be able to claim it.

In view of the conclusions reached above, it follows that if the persons who engage the auctioneer's services in the instant fact situation can bring themselves within the statutory requirements of the casual sales exemption, the auctioneer is likewise entitled to claim it. Of course, if the auctioneer hopes to take advantage of the exemption, the burden is on him to bring forth the specific facts entitling him to it.

October 31, 1973

STATE OFFICERS AND DEPARTMENTS: §307.13 and 80.8, 1973 Code of Iowa, 1972 O.A.G. 517, 1970 O.A.G. p. 78. Longevity Pay, Transfer from Highway Patrol to Highway Commission. Entitlement to longevity pay earned as highway patrol officer not transferable when officer transfers employment to Highway Commission. (Tangeman to Joseph R. Coupal, Jr., 10-31-73) #73-10-34

Mr. Joseph R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: Reference is made to your request for an opinion of the Attorney General. The request is as follows:

"Effective July 16, 1973, Charles Elliott, a former Highway Patrol Officer who had been in the Highway Patrol in excess of 20 years, transferred to our Traffic Weight Operations Department to work in the capacity of Traffic Weight Officer I. In an effort to keep his benefits intact, Mr. Elliott left the Patrol on July 15 and assumed his duties with our agency on July 16, thus providing for continuation of service. Under Chapter 79.1 of the Code of Iowa, his vacation and sick leave benefits were transferred to our agency intact.

"In addition to vacation and sick leave benefits, Mr. Elliott also received longevity payments at the rate of $100 per month while serving as a Highway Patrol Officer. While Chapter 79.1 of the Code provides for transfer of vacation and sick leave benefits for all state employees, Chapter 307.13 states that 'no employee of the State Highway Commission subject to the provision of Chapter 19A who is hired on or after July 1, 1971, shall be entitled to longevity pay'. The latter section seems to preclude continuation of Mr. Elliott's longevity payments. Yet the Highway Patrol is authorized to pay its officers longevity pay in a manner similar to our program, and as a result, employees of the Highway Commission who transfer to the Highway Patrol do receive credit for longevity pay earned previously with our agency.

"With the above paragraphs in mind, I am requesting an official opinion from your office as to whether or not longevity pay benefits earned as a result of previous service with another state agency are transferable to employment with the Highway Commission subsequent to July 1, 1971."

Section 307.13 Code of Iowa, 1973, reads as follows:

Longevity pay prohibited. "No employee of the state highway commission subject to the provisions of chapter 19A who is hired on or after July 1, 1971,

shall be entitled to longevity pay. The provisions of this section shall not apply to any employee of the state highway commission subject to chapter 19A who has been employed prior to July 1, 1971, and whose employment continues after June 30, 1971. Any employee of the state highway commission subject to chapter 19A whose employment is terminated on or after July 1, 1971, shall, if re-employed by the state highway commission, forfeit any right he may have to longevity pay."

Section 80.8 of the Iowa Code states in part, "Patrolmen and employees — salaries *** The compensation of the members of the Highway Patrol shall be fixed according to grades as to rank and length of service by the commissioner with the approval of the governor. The members of the Highway Patrol shall be paid additional compensation in accordance with the following formula:***" (The formula provides for $25 monthly increases in compensation effective upon completion of the 5th, 10th, 15th, and 20th years of service, thereby comprising a maximum total longevity increase in compensation in the amount of $100).

Section 307.13 specifically forbids payment of longevity pay to any employee of the Highway Commission hired on or after July 1, 1971. This is true even though the employee may have formerly been a Highway Commission employee and entitled to longevity in such previous period of employment.

Continuity of payment of longevity benefits to Highway Commission employees who transfer to the Highway Patrol would presumably be effected through the provisions of the above quoted portion of Section 80.8 which authorizes the Public Safety Commissioner with the approval of the governor to fix compensation of members of the Highway Patrol. The legislature has specifically forbidden payment of longevity benefits to Highway Commission employees employed after July 1, 1971. No such prohibition is found in the statute governing compensation of members of the Highway Patrol.

It is our opinion that said Section 307.13 forbids payment of longevity benefits to a Highway Commission employee employed subsequent to July 1, 1971, even though such employee may have previously been entitled to such benefits while serving with another state agency, and even though there is continuity of state service.

October 31, 1973

GENERAL ASSEMBLY: Lobbyists, registration and reporting. Article I, §7, Constitution of Iowa. (1) Either house of the General Assembly may require a lobbyist to file a report every month of the year; (2) If the lobbyist is required to so file, his registration card must be valid for the entire calendar year beginning with the convening of the regular session and ending with the convening of the next regular session; (3) If a lobbyist's registration is cancelled, he may be prevented from engaging in further lobbying until such registration is renewed. However, he may not be prevented from engaging in an undefined category of activities described as "legislative activity", for this would effectively prevent one from petitioning his government. (Haesemeyer to Welden, State Representative, 10-31-73) #73-10-35

The Honorable Richard W. Welden, State Representative: Reference is made to your letter of September 25, 1973, in which you request an opinion from this office on the following issues:

"First, the present Senate rules require the lobbyist to file a report every month of the year. This includes months when the legislature is not in session,

in fact after the adjournment of the second session there is no legislation proposed. Does either house of the General Assembly have power to enforce such rules when they are not in session?

"Second, the lobbyists registration card carries the following statement. 'Good only for the 1973 session.' Does this mean it would be void when that session adjourns?

"Third, the form furnished for cancellation of registration requires the lobbyist to declare 'I will engage in no further lobbying activity in the Iowa Senate.' A memorandum sent to all lobbyists on Aug. 30, 1973, went even further and stated, 'If you choose to cancel your registration you must engage in no legislative activity thereafter. Any evidence of such activity would be a ground for the filing of a complaint with the Ethics committee against you.' I am at a loss to understand what the parameters of the Senate rules are. Is it possible as a result of a lobbyist cancelling his registration, to require him to refrain from an undefined action 'legislative activity' for an indefinite period of time described as 'thereafter'.

"If both houses attempt to enforce directives such as this would we possibly be in violation of the first amendment of the U.S. Constitution which guarantees the right of one to petition his government?"

In accordance with the opinions expressed below, it is our conclusion that: (1) Either house of the General Assembly may require a lobbyist to file a report every month of the year; (2) If the lobbyist is required to so file, his registration card must be valid for the entire calendar year beginning with the convening of the regular session and ending with the convening of the next regular session; (3) If a lobbyist's registration is cancelled, he may be prevented from engaging in further lobbying until such registration is renewed. However, he may not be prevented from engaging in an undefined category of activities described as "legislative activity", for this would effectively prevent one from petitioning his government. Lobbyists are not by reason of their calling made into some sort of pariahs entitled to something less than the full spectrum of first amendment rights accorded other citizens.

Although some states require lobbyists to file only in months when the legislature is in sesstion, 3 Wisc. Stat. Ann. §13.67 (1972), the rule adopted by the United States and California is that the lobbyist must file a report each month during which his lobbying activity continues. 2 U.S.C. §267 (1972); 32A Ann. Cal. Codes §9906 (1972). The latter type of filing requirement tacitly makes the assumption, which we feel is too obviously valid to require further comment, that a lobbyist may approach a legislator for the purpose of encouraging the passage, defeat or modification of prospective legislation in months when the legislature is not actually in session. If he engages in no lobbying activity during non-session months, the filing of a report so stating does not seem to be an unduly burdensome or prohibitorially expensive imposition upon the lobbyist.

However, problems arise if the lobbyist is required to file a report every month of the year, but his registration card is only valid during that year's session. We have defined "session" as meaning the sitting or convention of the General Assembly; this definition naturally includes the regular session and in addition any special sessions. 1970 O.A.G. p. 66. Thus, a registration card which states on its face that it is valid for "the 1973 session" would entitle the

holder to engage in lobbying activity at any time during 1973 in which the General Assembly is actually convened, but not during periods when the legislature is adjourned. It is only logical then, that if the lobbyist is to be required to file a report during each month of the calendar year, his registration card should state that it is valid for that entire calendar year or, in the alternative, that it expires upon the convening of the next regular session. If the registration is not valid for the entire year, he may not be required to report during the period of invalidity. But, of course, by the same token he may not lobby during this period since the rules prohibit lobbying without being registered.

In our opinion the rules of the Senate, including the lobbying rules, continue in effect during the interim between sessions. As stated in the Journal of the Senate for February 14, 1973 (p. 314):

"On motion of Senator Andersen, the Temporary Rules of the Senate as amended were adopted as the Permanent Rules of the Senate *for the Sixty-fifth General Assembly.*" (emphasis added)

Thus, the rules continue in effect during the entire time the 65th General Assembly is in existence and not merely when it is in session. Moreover, the rules themselves provide that "the organization and committee of the senate shall carry over from the first to the second session of the same general assembly." Senate Rule 4, Rules of Procedure-Iowa-1973-74, Sixty-Fifth General Assembly.

Finally, we reach the question of whether a lobbyist whose registration is cancelled may be required to refrain from any "legislative activity thereafter". Since we have already impliedly accepted the constitutionality of the rule that one who lobbys may be required to register, it requires no mental gymnastics to accept the logical converse — that one who is not registered may not lobby. However, there can be no logical basis for a requirement that a former lobbyist may no longer engage in "legislative activity"; for in the absence of any definitive qualifications such a broad requirement would constitute an effective constraint upon his right as a citizen to petition his government and, ergo, would be a patent violation of his First Amendment rights.

This is not to say that such a constraint could not be imposed as a penalty for violation of a jurisdiction's lobbying statute. Both the United States and California codes provide that one who violates the statutory provisions pertaining to lobbying is guilty of a misdemeanor, and in addition to being liable for a fine and imprisonment, ". . . is prohibited for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation . . ." 2 U.S.C. §269 (1972); 32A Ann. Cal. Codes §9908 (1972).

However, this type of a criminal sanction must be distinguished from a proscription which could lawfully be imposed subsequent to a voluntary cancellation of a lobbyist's registration. A registered lobbyist who decides to cancel his registration can be put in no worse position vis-a-vis his constitutional rights, than he was before he registered. The cancellation form

which you alluded to is valid, since the courts have found that "lobbying activities" includes only those activities which constitute ". . . lobbying in its commonly accepted sense . . ." *U.S. v. Rumely* (1952) 345 U.S. 41, 97 L.Ed. 770; *U.S. v. Harris,* (1954) 347 U.S. 612, 98 L.Ed. 989.[1] But a memo which states that lobbyists who choose to cancel their registration must refrain from further legislative activity is far too broad, and is void unless there exists concurrently a set of parameters which delimit the phrase "legislative activity" to those acts which are commonly considered to be "lobbying".

[1] The cited cases define lobbying to be *direct* communication or representation to members of a legislative body on pending or proposed legislation.

In conclusion, we might observe that the problems caused by issuing a registration valid only for the session while requiring reports for the entire year could be overcome by issuing new registrations valid for the entire calendar year.

November 5, 1973

STATE OFFICERS AND DEPARTMENTS: IPERS, investment in pension investment contracts. §§97B.7(2)(b) and 511.8(5), Code of Iowa, 1973. The Employment Security Commission may invest IPERS funds in a pension investment contract. (Haesemeyer to Bittle, State Representative, 11-5-73) #73-11-1

The Honorable Ed Bittle, State Representative: Reference is made to your letter of September 10, 1973, in which you request an opinion from this office as to whether the State Treasurer, as trustee of the IPERS investment fund, is legally empowered to invest some portion of the system's funds in a pension investment contract. While the Treasurer is, as you point out, the trustee of the fund and the officer who actually makes the investments, the decision as to what to invest in is made by the Employment Security Commission. In accordance with the opinions expressed below, we find that investments may be made in either the regular account or separate account portions of such a contract, subject to the restrictions of the Code as to when, and to what extent investments may be made.

Section 97B.7(2)(b), Code of Iowa, 1973, specifies the manner in which IPERS funds may be invested, and includes, ". . . investments authorized for life insurance companies in this state including common stocks issued or guaranteed by a corporation. . . ."

Section 511.8(5), Code of Iowa, 1973, provides that insurance companies may invest in ". . . bonds or other evidence of indebtedness issued, assumed or guaranteed by a corporation. . ." including both "fixed interest bearing obligations" [§511.85(5)(a)] and "adjustment, income or other contingent interest obligations". [§511.8(5)(b)].

The sample pension insurance contract form which you furnished us allows the insured to deposit money in either a regular account portion which offers a minimum annual return of 3½%; or in a separate account portion, in which money is invested at the discretion of the board of directors and the annual return is computed with the market value of these investments as it's base.

Since the regular account portion evidences an obligation on the part of the corporation to pay a minimum annual return, it is considered to be a fixed in-

terest bearing obligation, and investments may be made in such regular account of the pension insurance contract provided the corporation meets the qualifications of §511.8(5)(a). Also, we find that the separate account portion of the pension insurance contract is to be considered a contingent interest obligation, and investments may be made therein, if the corporation additionally meets the qualifications of §511.8(5)(b).

We do not, by this opinion, advocate investment in pension insurance contracts, nor do we comment on the merits of any issuing corporations. We merely feel that it is not our province to summarily preclude the Employment Security Commission from any manner of investment which can be reasonable inference be found to be sanctioned under the provisions of the Code, since to do so would be to commend one form of investment over another. That means of investment are available, alternative to the pension insurance contract yet offering the same results, i.e. buffer against loss provided by guaranty and diversity of investments, does not alter our conclusion that the Employment Security Commission should decide the comparitive merits of the investment opportunities available to them, and that any such opportunities should not be pre-empted from their consideration by this office unless clearly required by statute.

November 5, 1973

STATE OFFICERS AND DEPARTMENTS: Public Safety Department; railway special agents; criminal history and intelligence data. §80.7, Code of Iowa, 1973, §§2 and 3, Senate File 115, Acts, 65th G.A., First Session (1973). Railway special agents appointed by the Commissioner of Public Safety under §80.7 of the Code are as much a part of the Department of Public Safety as other special agents except that they are not paid by the State and have a narrower function. As such and subject to the internal rules of the Department, they may be given access to criminal history and intelligence data in the files of the Department. However, any dissemination or redissemination to others would have to be in strict compliance with Senate File 115. (Haesemeyer to Bidler, Deputy Commissioner of Public Safety, 11-5-73) #73-11-2

Carroll L. Bidler, Deputy Commissioner, Department of Public Safety: Reference is made to your letter of October 5, 1973, in which you request an opinion of the Attorney General with respect to the following:

"1. Can the Department of Public Safety provide criminal history and intelligence data to Special Agents appointed under the provisions of Section 80.7 of the Code?

"2. If you rule that the Department may not furnish this information, can the Confidential Records Council authorize access to criminal history data by the above mentioned Special Agents?"

Section 80.7, Code of Iowa, 1973, provides:

"The commissioner may appoint as special agent any person who is regularly employed by a common carrier by rail to protect the property of said common carrier, its patrons, and employees. Such special agents shall not receive any compensation from the state."

Such railway special agents are required to furnish a five thousand dollar bond as required by the Commissioner of Public Safety, §80.16, and they are peace officers. §748.3.

Sections 2 and 3 of Senate File 115, Acts, 65th G.A., First Session (1973) provide:

"Sec. 2. DISSEMINATION OF CRIMINAL HISTORY DATA. The department and bureau may provide copies or communicate information from criminal history data only to criminal justice agencies, or such other public agencies as are authorized by the confidential records council. The bureau shall maintain a list showing the individual or agency to whom the data is disseminated and the date of dissemination.

"Authorized agencies and criminal justice agencies shall request and may receive criminal history data only when:

"1. The data is for official purposes in connection with prescribed duties; and

"2. The request for data is based upon name, fingerprints, or other individual identifying characteristics.

"The provisions of this section and section three (3) of this Act which relate to the requiring of an individually identified request prior to the dissemination or redissemination of criminal history data shall not apply to the furnishing of criminal history data to the federal bureau of investigation or to the dissemination or redissemination of information that an arrest warrant has been or will be issued, and other relevant information including but not limited to, the offense and the date and place of alleged commission, individually identifying characteristics of the person to be arrested, and the court or jurisdiction issuing the warrant.

"Sec. 3. REDISSEMINATION. A peace officer, criminal justice agency, or state or federal regulatory agency shall not redisseminate criminal history data, within or without the agency, received from the department or bureau, unless:

"1. The data is for official purposes in connection with prescribed duties of a criminal justice agency, and

"2. The agency maintains a list of the persons receiving the data and the date and purpose of the dissemination, and

"3. The request for data is based upon name, fingerprints, or other individual identification characteristics.

"A peace officer, criminal justice agency, or state or federal regulatory agency shall not redisseminate intelligence data, within or without the agency, received from the department or bureau or from any other source, except as provided in subsections one (1) and two (2) of this section."

It is to be observed that these statutory restrictions on the dissemination and redissemination of criminal history data and intelligence data are aimed only at dissemination by the Department of Public Safety or Bureau of Criminal Investigation to outside agencies and the redissemination by such outside agencies of data received from the department and bureau. The statute does not purport to regulate or prohibit the use of such data within the department or bureau and we must therefore conclude that the authors of the measure felt this was an internal matter which could safely be left to the discretion of the Commissioner of Public Safety.

Special agents appointed under §80.7 are as much a part of the Department of Public Safety as other special agents of the Department except they are not paid by the State and have a narrower function. Of course, they would be sub-

ject to the rules of the Department with respect to internal use of the information and the strictures of the statute with respect to dissemination of data to outside sources.

November 5, 1973

SCHOOLS: Teachers' contracts. §§279.13, 279.8, Code of Iowa, 1973. Board of directors of a school district lacks authority to make a binding master contract with a teachers' organization, but may include similar provisions in a contract with an individual teacher or adopt them in proper legislative manner. (Nolan to Benton, Superintendent of Public Instruction, 11-5-73) #73-11-3

Dr. Robert D. Benton, State Superintendent of Public Instruction: You transmitted to this office for an opinion, a proposed collective bargaining agreement submitted by the Davenport School Board, together with certain questions from the Superintendent of the Davenport Community School District.

After examining the proposed contract, I am of the opinion that the Board of Directors lacks authority to make a binding contract such as this with the Davenport Education Association. Public employers have no authority to enter into collective bargaining contracts in the sense recognized in private industry without specific legislation to that effect. *State Board of Regents v. United Packing House Food and Allied Workers Local No. 1258,* 1970, 175 N.W.2d 110.

The Superintendent requested a review of the various items covered by such contract. It is our view that the provisions thereof may be included either in a contract with an individual teacher in addition to what is required by §279.13, Code of Iowa, 1973, or may be adopted in proper legislative manner (§279.8).

November 5, 1973

AUDITOR: Savings and Loans. §534.2(5) which defines "regular lending area" may be interpreted to include an area within one hundred miles of an approved branch office of a state savings and loan association, since branch offices are not prohibited and the statute does not specify that the area limitation refers to a given distance from the home office. (Nolan to Smith, State Auditor, 11-5-73) #73-11-4

Honorable Lloyd R. Smith, Auditor of the State: This is written in response to your request for an opinion as to whether or not a savings and loan association organized under Chapter 534 of the Code of Iowa may establish a branch office that is within the regular lending area as defined by §534.2(5) of the Code, but which branch location is beyond the lending area of the association's home office.

There is no statutory prohibition against branching by savings and loan associations. However, §2.2 of the regulations issued by the Auditor (1973 IDR 68-69) states that no application will be considered if, at the date on which it is filed, the "location of the proposed branch office is outside the regular lending area or outside the State of Iowa".

Code §534.2(5) defines "regular lending area" as "an area within one hundred miles from any approved office, whether within or without the state". We interpret the words "any approved office" to include branch offices as well as the home office. The language of this section was enacted by the 64th

General Assembly in 1971 (Ch. 250, §1, Acts of the 64th G.A., First Session), and replaces the definition which previously limited the regular lending area to the county in which the home office is located and the county, state or an adjoining state, immediately adjoining and abutting on such county, or any additional area within one hundred miles from the home office, whether within or without the state. It may be assumed that the legislature was aware of the administrative practice of approving saving and loan branch offices prior to the amendment of the statute in question. Therefore, since the legislature did not limit the lending area to one hundred miles from the home office, it is our view that the establishment of approved offices of a savings and loan institution may actually serve to expand the institution's "regular lending area" as defined by §534.2(5) of the Code. Accordingly, branches are not necessarily confined to a distance of 100 miles from the home office.

November 7, 1973

STATE OFFICERS AND EMPLOYEES: Regional library employees are not state employees. S.F. 271, Acts, 65th G.A., First Session (1973). Regional library employees under S.F. 271 are to be considered employees of the region in which they serve, rather than employees of the State. (Haesemeyer to Porter, State Librarian, 11-7-73) #73-11-5

Barry L. Porter, State Librarian: Reference is made to your letter of September 19, 1973, requesting an opinion from this office on whether employees under S.F. 271, Acts, 65th G.A., First Session (1973) are State employees and bound by the State Code. In accordance with the opinions expressed below, we find that employees under S.F. 271 are to be considered employees of the region in which they serve, rather than employees of the State.

Senate File 271 is an act creating the Iowa Regional Library System which divides the state into seven library regions, with each region to be supervised by a board of seven elected trustees. Each board is authorized to appoint a regional administrator, but no other personnel are expressly provided for by the terms of the act. However, the hiring of any bookkeeping or clerical staff reasonably necessary to facilitate the smooth operation of the regional system is to be implied within the act's grant of authority.

56 C.J.S. *Master and Servant,* §1 (1948) in speaking of the terms employer and employee provide that:

". . .except where superceded by statutory definitions, the common law definitions of these terms still obtain.

* * *

"The word 'employee' imports some sort of continuous service rendered for wages or salary, and subject to the direction of the 'employer' as to how the work shall be done."

30 C.J.S. *Employee,* pp. 672-79 (1965) notes that the most important common law elements of the employment relationship are the payment of consideration for the services rendered and control by the employer over the manner in which the work is done. The Iowa case law comports with this skeletal definition of what constitutes an employment relationship. "The right of control is the principal test for determining whether an employer and employee relationship exists." *Bengford v. Carlem Corp.,* 156 N.W.2d 855

(Iowa, 1968); *State, ex rel. Bierring v. Ritholz,* 226 Iowa 70, 283 N.W. 268 (1939). In *Uhe v. Central States Theatre Corp.,* 258 Iowa 580, 139 N.W.2d 538 (1966) the Court held that the employer's responsibility for the payment of wages is a necessary element in an employer-employee relationship.

A more recent line of cases has held that in addition to the right to control the manner in which the work is performed and the responsibility for the payment of wages, the employment relationship may be determined by the right to employ and discharge at will, and by determination of whether the party sought to be held as employer is the party in charge of the work *or for whose benefit the work is performed. McClure v. Union, Counties,* 188 N.W.2d 283 (Iowa, 1971); *Henderson v. Jennie Edmundson Hospital,* 178 N.W.2d 429 (Iowa, 1970); *Nelson v. Cities Service Oil Co.,* 259 Iowa 1209, 146 N.W.2d 261 (1966); *Prokop v. Frank's Plastering Co.,* 257 Iowa 766, 133 N.W.2d 878 (1965).

In *Hjerleid v. State,* 295 N.W. 139, the court found that even though Hjerleid, qua county investigator, was classified by statute as ". . .an employee of the county board of social welfare. . . ." he was nevertheless to be deemed an employee of the State since the State retained power over said county board to approve hirings and discharges, and to control the manner in which Hjerleid's work was done.

Fenton v. Downing, 155 N.W.2d 517 (Iowa, 1968) is a complimentary case in which the court held that by removing the statutory provisions which reserved to the State the power to hire, discharge and control the manner in which work is done, the legislature evidenced it's intent to return such control to the county, thus making the county the employer of the county director of social welfare.

It is generally argued that elected officials, especially those who serve in the capacity of a trustee rather than an administrator, are not to be considered employees within the terms of the definitions outlined above. Therefore, the regional trustees will not be treated as coming within the purview of this opinion, and it will suffice to say that they are officers who serve the region to which they are elected.

Senate File 271, §8 provides:

"A regional board shall appoint an administrator who shall be a practicing librarian and who shall serve at the pleasure of the board. The administrator shall act as the executive secretary of the regional board and shall administer the public library system of the region in accordance with the objectives and policies adopted by the regional board."

By the terms of this section, the regional board has absolute power to hire or discharge an administrator, and to control (via the objectives and policies which it adopts) the manner in which he does his work. It is presumed that the legislature intended for the administrator to receive from the region's allocated funds, a salary commensurate with the duties which he must perform.

Likewise, it cannot logically be adduced that authority to hire bookkeeping and clerical staff to facilitate the efficient, coordinated operation of the regional system was not contemplated by the legislature as naturally inhering in the broad grant of power which establishes the system. However, due to the differing requirements of the various areas, the exact nature and size of the

staff which any given region might require could not be realistically computed *ante facto.* The regional board, or possibly the board via the administrator, would be in charge of hiring, discharging and supervising any such employees. Their salaries, as that of the administrator, would derive from the funds allocated to the region.

Applying the foregoing facts to the tests outlined in *McClure, et al., supra,* can only lead to the conclusion that the respective library regions must be deemed to be the employers of the administrator and other staff which serve therein.

November 14, 1973

VETERANS: Relief. Ch. 250, Code, 1973. Payment of money to indigent veteran to be used by him for the payment of rent on an installment on a real estate purchase contract is direct relief authorized under Ch. 250. (Nolan to Kauffman, Executive Secretary, Bonus Board, 11-14-73) #73-11-6

Mr. Ray J. Kauffman, Executive Secretary, State of Iowa Bonus Board: This is written in response to your request for an interpretation of rights under Chapter 250, Code of Iowa, 1973. Your letter states:

"Under Chapter 250 of the Iowa Code may a County Commission of Veteran Affairs, with the approval of the County Board of Supervisors, authorize the payment of rent for housing for a veteran or payment of an installment on a contract for the purchase of real estate for a veteran?"

Code §250.1 creates a fund "for the relief of" honorably discharged, indigent men and women of the United States who served in the military or naval forces of the United States in any war or in the Korean or Viet Nam conflict. The fund is to be expended for such purposes by the joint action and control of the board of supervisors and the Commission of Veteran Affairs (§250.2).

In an opinion dated July 12, 1963 (461 O.A.G. 1964) this office, referring to a 1930 O.A.G. 234, advised that the word "relief" was primarily intended to mean temporary relief from financial distress. The opinion further stated that the Soldiers and Sailors Relief Fund and the County Poor Fund are not interchangeable funds, and accordingly, only those charges that are approved by the Commission can be made against the fund created by Chapter 250.1. In a 1968 O.A.G. at page 883 it was stated that "the relief contemplated by the statute is direct 'relief' of 'indigent' veterans, not services of a collateral nature to veterans, whether indigent or not".

It is our view that the payment of a sum of money directly to a veteran in need to be used by him for the payment of rent or an installment on a real estate purchase contract is direct relief which is authorized under Chapter 250 of the Code.

November 14, 1973

SCHOOLS: Exemption from school standards. §299.24. Any school which qualifies for exemption from school standards pursuant to §299.24, Code of Iowa, 1973, should be given consideration for such purpose since the statute as enacted is not limited to one religious group or denomination. (Nolan to Benton, Superintendent, Department of Public Instruction, 11-14-73) #73-11-7

Superintendent Robert D. Benton, Department of Public Instruction: This responds to your request for an opinion as to the scope of the applicability of §299.24, Code of Iowa, 1973. Your letter states that this section of the Code was enacted in 1967 for the purpose of giving relief to the old-order Amish in connection with certain widely-publicized events that had taken place in Buchanan County. The provisions of this section have been used subsequently by several congregations of old-order Amish and Mennonites in Buchanan County and Washington County. Now, you state, an application on behalf of a congregation styled the "Fellowship Baptist Church" requests an exemption for a school known as the "Central Iowa Christian Academy" located in Marshalltown, Iowa. The question you present is as follows:

"In addition to your opinion as to whether we are correct in thinking that section 299.24 is applicable to any religious group, Amish-related or not, fitting the description set forth by the quoted words [local congregation of a church or religious denomination established for ten years or more within the state of Iowa prior to July 1, 1967, which professes principles or tenets that differ substantially from the objective goals, and philosophy of education embodied in standards set forth in section 257.25, and rules adopted in implementation thereof], we would appreciate your opinion as to whether or not the qualifying 'principles or tenets' professed by such group must have been continuously professed for ten years prior to July 1, 1967, and extending down to the time of filing for exemption, or whether such principles or tenets can be adopted at *any* time by such local congregation, church, or religious denomination, if it has been in existence as a congregation, church or denomination from a point in time at least ten years prior to July 1, 1967."

Section 299.24, Code of Iowa, 1973 provides:

"When members or representatives of a local congregation of a recognized church or religious denomination established for ten years or more within the state of Iowa prior to July 1, 1967, which professes principles or tenets that differ substantially from the objectives, goals, and philosophy of education embodied in standards set forth in section 257.25, and rules adopted in implementation thereof, file with the state superintendent of public instruction proof of the existence of such conflicting tenets or principles, together with a list of the names, ages, and post-office addresses of all persons of compulsory school age desiring to be exempted from the compulsory education law and the educational standards law, whose parents or guardians are members of the congregation or religious denomination, the state superintendent, subject to the approval of the state board of public instruction, may exempt the members of the congregation or religious denomination from compliance with any or all requirements of the compulsory education law and the educationsl standards law for two school years. When the exemption has once been granted, renewal of such exemptions for each succeeding school year may be conditioned by the state superintendent, with the approval of the board, upon proof of achievement in the basic skills of arithmetic, the communicative arts of reading, writing, grammar, and spelling, and an understanding of United States history, history of Iowa, and the principles of American government, by persons of compulsory school age exempted in the preceding year, which shall be determined on the basis of tests or other means of evaluation selected by the state superintendent with approval of the board. The testing or evaluation, if required, shall be accomplished prior to submission of the request for renewal of the exemption. Renewal requests shall be filed with the state superintendent on or before April 15 of the school year preceding the school year for which the applicants desire exemption."

It is the opinion of this office that the statutory language set out above is not directed to nor limited exclusively to the Amish, but must be considered

applicable to any and all recognized church congregations or religious denominations qualifying under the statute.

It is necessary for a qualifying religious group to have been established for ten years or more within the State of Iowa prior to July 1, 1967. It may be assumed that there is a core of constancy in the doctrines and beliefs of a religious group which has had identifiable existence for a period of ten years. Accordingly, if a religious group can show that it is qualified, from the point of having been established in this State for the required length of time, and further that its presently held tenets and beliefs are inconsistent with and in conflict with the educational standards for public schools in this State, it may be considered under §299.24 for purposes of statutory exemption from such school standards.

November 14, 1973

COUNTIES: Planning services. §28E.5, §332.3. A county may agree to work jointly with a private agency or expend funds as authorized by §332.3 to obtain services of such private agency in developing a plan for implementing recommendations for welfare services. (Nolan to Fenton, Polk County Attorney, 11-14-73) #73-11-8

Mr. Ray A. Fenton, Polk County Attorney: You have requested an opinion on the following:

"A couple years ago the Polk County Board of Supervisors, and others, hired the Community Survey, Inc., a Corporation organized for the purpose of surveying health, recreation and social needs and services, to conduct a survey in Polk County. The survey covered the over-lapping of services offered by different organizations, both public and private. At the conclusion of the survey, the Corporation submitted an overall plan for the welfare of the citizens of Polk County.

"There has now been a proposal submitted to the Board of Supervisors to employ the same Corporation, Community Survey, Inc., to develop a plan for the implementation of the prior recommendations wherever possible.

"Can the Board of Supervisors allocate tax funds to a private organization for such a purpose?"

Chapter 28E, Code of Iowa, 1973 provides authority for the State and local governments to enter into agreements with one or more public or private agencies for joint or cooperative action pursuant to the provisions of that chapter of the Code. Assuming that the original survey referred to in your letter was made pursuant to the "28E agreement" it would appear that the same authority might be utilized for the development of a plan for implementation of the recommendations previously made.

It is, therefore, the view of this office that the supervisors may allocate tax funds for such purpose. Section 28E.5(4) then requires that any agreement entered into pursuant to the authority of Chapter 28E shall state, among other things, the "manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefore".

Additional authority may be found under §332.3 of the Code and your attention is particularly directed to subsections 25 and 26 thereof.

November 14, 1973

CITIES AND TOWNS: Special Assessments. §391A.36, Code of Iowa, 1973. A city council may not alter or amend a final schedule of special

assessments, unless such assessments are invalid or illegal. (Blumberg to TeKippe, Chickasaw County Attorney, 11-14-73) #73-11-9

Mr. Richard P. TeKippe, Chickasaw County Attorney: We are in receipt of your opinion request of October 24, 1973 in which you asked:

"When an Iowa municipality has made a public street improvement under authority of Chapter 391A of the 1973 Code of Iowa, and in furtherance of such improvement project, has established a final schedule of special assessments for the improvement, which schedule of special assessments has been transmitted to the County Auditor for inclusion in the County tax rolls as a lien against the assessed property, pursuant to Code Section 391A.25, does the municipality retain any jurisdiction to alter or amend the final assessment schedule so transmitted, or is the entire assessment authority of the municipality exhausted when transmission has taken place?"

We understand that the fact situation prompting this request is the desire of a new city council to retroactively reassess a street paving program in order to lower the proportionate share paid by abutting land owners and raising the proportion paid by the city as a whole.

Section 391A.36 of the Code provides that relevy may be accomplished only for nonconformity to a law or resolution, or for reason of an omission, informality, or irregularity which would cause the council to determine that the assessment was invalid or illegal:

"When by reason of *nonconformity to any law or resolution,* or by reason of *any omission, informality, or irregularity,* any special tax or assessment levied is determined by the council to be *invalid* or is adjudged *illegal,* the council shall have power to correct the same by resolution, and may reassess and relevy the same, with the same force and effect as if done at the proper time and in the manner provided by law or by the resolution relating thereto." [Emphasis added]

Your fact situation does not fall within the purview of section 391A.36.

Accordingly, we are of the opinion that the city council in question may not alter or amend the final special assessment schedule under the existing facts.

November 14, 1973

STATE OFFICERS AND DEPARTMENTS: Board of Regents, Merit Employment Department. §§19A.3 and 19A.9, Code of Iowa, 1973. Persons employed by the Board of Regents properly determined to be professional or scientific are exempt from the merit system irrespective of whether or not they are employed in teaching or research capacities. Compensation and classification plans of the Board of Regents need not rigidly adhere to corresponding plans adopted by the Merit Employment Commission so long as they fairly and reasonably may be said to be not inconsistent with objectives of Chapter 19A. However, any Regents plans are still subject to approval of the director of the Merit Employment Department and the Merit Employment Commission. (Haesemeyer to Keating, Director, Iowa Merit Employment Department, 11-14-73) #73-11-10

Mr. W. L. Keating, Director, Iowa Merit Employment Department: Reference is made to your request for an opinion of the Attorney General in which you state:

"The Iowa Merit Employment Commission respectfully requests the Attorney General's opinion for clarification of two sections of Section 19A3,

Chapter 19 A, Code, 1971, as related to the Regents' merit system. Specifically:

"Subsection 6:

'All presidents, deans, directors, teachers, professional and scientific personnel, and student employees under the jurisdiction of the state board of regents.'

"And, paragraph 3, after subsection 16:

'The state board of regents******shall adopt rules and regulations for their employees, which rules shall not be inconsistent with the objective of this chapter and which shall be subject to approval of the Iowa Merit Employment Commission.*****'

"Reference is also made to the Attorney General's opinion dated June 15, 1970, by Elizabeth A. Nolan, providing clarification relative to procedural aspects of the Board of Regents' merit system."

* * *

"This is planned to be ready around September 1, 1972. The question arises as to coverage of employees under the classification plan for the Board of Regents in relation to subsection 6, 19A3. There is no question as to clerical personnel, subprofessional, technical, crafts, manual, semi-skilled and skilled manual classes being covered, nor to the exclusion of presidents, deans, directors, teachers, physicians, psychiatrists or student employees. But the terms 'professional and scientific personnel' lend themselves to two interpretations. Representative Grassley has indicated it was the legislative authors intention to provide coverage for classes of position comparable to those covered under the State merit system, but to exclude those 'professional and scientific personnel' engaged in teaching and research per se. Accountants, data processing analysts, social workers, nurses and similar classifications could fall within the definition of 'professional or scientific personnel', but are covered within the State merit system.

"Your interpretation and clarification would be appreciated to expedite the finalization of the Regents' classification and pay plan."

In our opinion the language of the exemption provision, §19A.3(6) is plain, clear and unambiguous. Both professional and scientific personnel are exempt irrespective of whether or not they are employed in a teaching or research capacity. If the legislature had intended to make the distinction urged upon you by Representative Grassley, it could have done so by the inclusion of appropriate language to that effect. Since no such distinction is made in the words of the statute we must conclude that if employees of the Board of Regents can be properly classified as professional or scientific then their positions are exempt. Moreover, if the words professional and scientific were to be limited to teaching positions for example, then the word "teachers" would also include professional and scientific personnel and the latter terms would become superfluous.

Your letter does raise an additional question which is appropriate to consider in the context of this opinion; namely, the latitude and discretion vested in the Board of Regents in classifying its employees and adopting pay plans for them and the extent to which the Merit Employment Department may require uniformity of such plans with plans adopted by it for other state departments. Section 19A.3 provides in relevant part:

"The state board of regents. . .shall adopt rules and regulations for their employees, which rules and regulations shall not be inconsistent with the *objectives of this chapter,* and which shall be subject to approval of the Iowa Merit Employment Commission. If at any time the director determines that the board of regents' merit system. . .does not comply with the intent of this chapter, he, subject to the approval of the commission, shall have authority to direct correction thereof and the rules and regulations of the board shall not be in compliance until the corrections are made." (emphasis added)

The authority and duties of the Merit Employment Commission and the Director of the Merit Employment Department with respect to the adoption of rules with respect to classification and pay plans for persons covered by the merit system are found in §19A.9, Code of Iowa, 1973. Such §19A.9 provides in part:

"The merit employment commission shall adopt and may amend rules for the administration and implementation of this chapter in accordance with chapter 17A. The director shall prepare and submit proposed rules to the commission. The rules shall provide:

"1. For the preparation, maintenance, and revision of a position classification plan from a schedule by separate department for each position and type of employment *not otherwise provided by law in state government* as approved by the executive council for all positions in the merit system, based upon duties performed and the responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class, in the same geographical area.

* * *

"2. For a pay plan within the purview of an appropriation made by the general assembly and not otherwise provided by law for all employees in the merit system, after consultation with appointing authorities and after a public hearing held by the commission. Such pay plan shall become effective only after it has been approved by the executive council after submission from the commission."

It seems to us that the power and authority given to the Board of Regents to adopt rules and regulations for their employees, which is set forth in §19A.3, operates as an exception to the rule making power conferred upon the Merit Employment Commission under §19A.9. Any rules and regulations adopted by the Regents would still be subject to approval by the Iowa Merit Employment Commission but in exercising its approval authority, the Merit Employment Commission and the Director of the Merit Employment Department should be mindful of the admonition of §19A.3 that rules and regulations adopted by the Regents are to be consistent with the objectives of Chapter 19A and the intent thereof. This is not the same as saying that the Director and the Commission can arbitrarily require absolute adherence by the Board of Regents to classification and pay plans adopted by them for other state agencies and departments. All that is required of the Regents is that their rules and regulations be in conformity with the objectives and intent of Chapter 19A and not the minutiae of plans and rules and regulations adopted by the Merit Employment Commission. For example, one of the objectives of Chapter 19A, as stated in §19A.9(1) is that:

"The same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class, in the same geographical area."

Thus, a Regents' pay plan which established differential pay for different geographical areas would be consistent with the stated objectives of Chapter 19A even though pay plans adopted by the Merit Employment Commission for other state employees might make no geographical distinctions. The same would be true for position classification plans and the Regents' classification plan would not necessarily have to coincide with the Merit Employment Department's classification plans, so long as there was adherance to the broad objective and principle of Chapter 19A.

It should be noted that our previous opinion of June 15, 1970, recognized that geographical factors could properly be considered in the formulation of pay plans and that it was not necessary for a single uniform plan to be adopted for all Regents institutions. The other conclusion reached in the June 15, 1970 opinion with respect to executive council and Chapter 17A approval and the requirement of public hearings would still apply as this is necessary in order for rules and regulations of the Regents to conform to the objectives and intent of Chapter 19A and in order to harmonize §§19A.3 and 19A.9.

November 15, 1973

GOVERNOR: Executive Order: Art. IV, Const. of Iowa. Governor Ray's Executive Order No. 17, imposing 50 mph speed limit, according to its terms applies only to motor vehicles owned by the State of Iowa and its departments, and not to political subdivisions such as a community school district. (Turner to Anderson, Winneshiek County Attorney, 11-15-73) #73-11-11

Mr. Calvin R. Anderson, Winneshiek County Attorney: In response to your inquiry as to whether the Governor's Executive Order placing a 50 mile per hour speed limit on all motor vehicles owned by the State of Iowa in its various departments is applicable to the Decorah Community School District, its vehicles and employees, the answer is no.

Executive Order No. 17, in question, is, according to its terms, applicable only to vehicles owned by the State and its departments, not to political subdivisions of the State.

Of course, as public spirited citizens, interested in the welfare of the government, the Decorah Community School District will doubtless want to voluntarily comply rather than to waste gasoline, which is in short supply.

November 15, 1973

SCHOOLS: Drivers Training for Special Education Students. §321.178, Code of Iowa, 1973. (1) A county board of education may provide an approved course of drivers' training for children in a special education program. (2) Under §321.178, Code of Iowa, 1973, "private or commercial" school facilities are "non-public" sites. (3) Neither county board of education nor an area school should be licensed as a "private or commercial school". (Nolan to Smith, Deputy State Superintendent, Department of Public Instruction, 11-15-73) #73-11-12

Dr. Richard N. Smith, Deputy State Superintendent, Department of Public Instruction: In a recent letter you stated that you would like an interpretation of the following questions:

"1. Is it legal for a county board of education to provide an approved driver education program as defined in Section 321.178, *Code of Iowa,* for

special education students from one or more public school districts in the county? If the answer is yes, how would the driver education reimbursement apply?

"2. Section 321.178, *Code of Iowa,* provides that driver education courses may be offered at sites other than at the public school including non-public school facilities within the public school districts. Are "private or commercial" school facilities considered to be "non-public" under the provisions of this Section?

"3. May either a county board of education or an area school be licensed as a private or commercial school for offering an approved driver education program? If the answer is yes, can a public school district contract for their services? How would the driver education reimbursement apply?"

There appears to be no legal prohibition against a county board of education providing approved drivers education program as defined in §321.178, 1973 Code of Iowa, to special education students from one or more public schools in the county. Under the section of the Code cited, every public school district in the State of Iowa is required to "offer or make available to all students residing in the school district an approved course in driver education". Should the school district make such driver training program available to pupils in special education programs provided by the county, the school district would be entitled to reimbursement in an amount not to exceed $30 per student pursuant to the provisions of §321.178. It is assumed in such case that a Chapter 28E contract is the basis of the agreement between the local school district and the county board of education for the administration of such a program. On the other hand, if the special education children are trained entirely under a county school program in which reimbursement is paid for the cost of instruction of such pupils, the basis of such reimbursement may be determined under §281.9 of the Code.

It is my opinion that your second question should be answered affirmatively. Private or commercial school facilities are, in my opinion, considered to be "non-public" under the provisions of §321.178. The statute states:

". . . Said courses may be offered at sites other than at the public school, including nonpublic school facilities within the public school districts. . .

* * *

"Any person who successfully completes an approved driver education course at a private or commercial driver education school licensed by the department of public safety, shall likewise be eligible for an operator's license at the age of sixteen years, providing the instructor in charge of the student's training has satisfied the educational requirements for a teaching certificate at the secondary level and holds a valid certificate to teach driver education in the public schools of Iowa."

Your third question must be answered negatively. Neither a county board of education or an area school should be licensed as a private or commercial school for offering an approved driver education program, for they are neither "private" (non-public) nor "commercial" (designed for profit) in the approved usage of the language. The Code of Iowa recognizes as a public body, any municipality or corporation that has the power to levy or certify a tax or a sum of money to be collected by taxation (§24.2, Code of Iowa, 1973). We believe that the answer to the other questions presented by your letter is contained in this answer to question number three.

November 15, 1973

SCHOOLS: Teachers' retirement — School districts adopting a mandatory retirement policy pursuant to Chapter 150, Acts of the 65th G.A., First Session, should follow notification procedures set forth in §279.13. (Nolan to Smith, Deputy State Superintendent, Department of Public Instruction, 11-15-73) #73-11-13

Dr. Richard N. Smith, Deputy State Superintendent, Department of Public Instruction: You have requested the opinion of this office on the following questions:

"1. Under House File 206, 1973 Session of the 65th General Assembly, may a board adopt a retirement policy with retirement becoming *automatically* effective at the end of the school year in which the teacher attains a specific age, not less than 65, without reference to or use of the termination procedure provided in section 279.13 of the Code?

2. When termination procedure has been initiated but the private conference has been postponed, by mutual agreement of the board and teacher, so that it becomes impossible for the board to send the notice of termination, by certified mail, until a later date than April 10, is the termination procedure thereby vitiated and the teacher's contract automatically continued for another year? In this connection it is noted that the statute provides termination may take place at any time by mutual agreement of the board and teacher. Thus, part of our question is whether such "mutual agreement" may go to *part* of a termination proceeding, as well as to termination in and of itself?

"3. Section 279.13 provides that the notice of termination shall be *mailed* by certified mail on or before April 10 but that the 20 days in which the teacher may request a public hearing do not commence to run until the notice is *received.* Where the teacher refuses delivery of the notice by certified mail, is service of a copy of the notice upon the teacher, by the sheriff or his deputy, an effective method, in your opinion, for commencing the running of the 20 days?"

Since the enactment of Chapter 150, Acts of the 65th G.A., 1st Session (H.F. 206), a school board may adopt a policy whereby teachers are automatically retired from the school system at a specified age (not less than 65). The board adopting a new policy pursuant to this law should notify each teacher to be so retired on or before the date for offering contracts for the ensuing year. The notification should be by certified mail and should inform the teacher, in writing that (1) the board is considering termination of the teacher's services under contract at the end of the current school year and that (2) the teacher has the right to a private conference with the board if a request is filed with the president or secretary of the board within five days.

Under the continuing contract statute, the teacher has a right to insist upon a notice of termination by April 10, and every effort should be made to comply with the statutory provisions. However, under §279.13 the teacher's right to protest the action of the board and to have a hearing on such action does not postpone the effectiveness of the board action so as to stay the proceedings of the board. Should a teacher refuse to accept the delivery of notice of termination by certified mail, his right to protest and to have a public hearing on the board's action is cut off. Due process requires notice and opportunity to be heard. Where the statute prescribes a particular mode of service, that mode must be followed. *In re Sioux City Stockyards Co.,* 222 Iowa 323, 268 N.W. 18. Since the statute provides that such notice be sent by certified mail, the service

of a notice to quit or a notice of termination by the sheriff is not required to effectuate the board action. Accordingly, it is the opinion of this office that none of the questions presented above should be given an affirmative reply.

November 15, 1973

SCHOOLS: Superintendent. §§277.27, 279.13, 279.14, 257.11, 257.15, 273.16. A school superintendent is not required to be a qualified voter of the district at the time of his employment. (Nolan to Mayer, Citizens' Aide, 11-15-73) #73-11-14

Mr. Thomas R. Mayer, Citizens' Aide: This is written in response to your request for advice on whether a school superintendent is considered a school officer and therefore, required to be a qualified voter within the school district pursuant to §277.27 of the 1973 Code of Iowa.

Section 277.27 provides:

"A school officer or member of the board shall, at the time of election or appointment, be a qualified voter of the corporation or subdistrict. Notwithstanding any contrary provision of the Code, no member of the board of directors of any school district, or his or her spouse, shall receive compensation directly from the school board. No director or spouse affected by this provision on July 1, 1973, 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 date of the contract for which employed."

This section has been held to apply to the treasurer, 1928 O.A.G. 350 and to the secretary, 1956 O.A.G. 194. There is no indication that this office has previously applied it to the Superintendent.

The superintendent is hired by the board and his position is that of an employee of the school district. Under §279.13 the following language indicates that superintendents may be discharged for cause:

". . . The foregoing provisions for termination shall not affect the power of the board of directors to discharge a teacher for cause under the provisions of section 279.24. The term 'teacher' as used in this section shall include all certified school employees, *including superintendents.*" [emphasized]

Unlike the county superintendent, he is not required to qualify for office by subscribing to an officer's oath and filing a bond. (§273.16) Section 279.14 specifically provides that superintendents may be employed by more than one school board acting jointly with the result that the superintendent may concurrently serve in two or more school districts. This section of the Code also directs the superintendent to "be the executive officer of the board". An executive officer is generally regarded as being a position of limited delegated authority in a chain of command. Therefore, although the duties and responsibilities of the superintendent are significant, this alone does not make the superintendent an officer of the district within the meaning of §277.27. (The State Superintendent of Public Instruction is designated executive officer of the State Board under §257.15 but he becomes a state officer by virtue of §257.11 and §257.13.)

It might be immensely desirable to require the superintendent to live in the community of his employment and to be available to oversee the well being of the school district at all times. In this connection, it may be noted that §296.1 authorizes the voters of a school district to provide homes for teachers and the

superintendent. However, except as his contract of employment may require, he need not be present in the district. Accordingly, it is our view that the requirement of §277.27 that a school officer be a qualified voter of the corporation at the time of appointment does not apply to the school superintendent.

November 15, 1973

ELECTIONS: Public Service Franchise. Affidavit of posting of results of public service election held prior to July 1, 1973 may be filed with clerk of court under §622.96. Chapter 136, Acts, 65th G.A., First Session provides for the reporting of results of such elections to mayor and council thus will be public record for such elections held after July 1, 1973. (Nolan to Williams, Humboldt County Attorney, 11-15-73) #73-11-15

Mr. Richard A. Williams, Humboldt County Attorney: This is written in response to your request for an Attorney General's opinion on the necessity of filing an affidavit of the results of a franchise election held in the community of Hardy. Since the community does not have a newspaper, the results were posted and Iowa Public Service Company now seeks an affidavit of posting to be filed as provided in §622.96 of the 1973 Code of Iowa. Your questions are as follows:

"1. Is the Clerk of Court required to file this type of affidavit under Section 622.96 or any other statute of the Code of Iowa?

"2. If the answer to the above question is 'Yes', where should the Clerk file this affidavit in her records and how should it be indexed?"

Code §622.96 provides:

"How perpetuated — presumption of fact. Proof so made may be perpetuated and preserved for future use by filing the papers above mentioned in the office of the clerk of the district court of the county where the act is done. The original affidavit appended to the notice or paper, if there is one, and, if not, the affidavit by itself is presumptive evidence of the facts stated therein, but does not preclude other modes of proof now held sufficient."

As I understand the questions you submitted, the utility has no action filed in the district court to which an affidavit of publication of election results could relate. However, the pendency of litigation is not necessary and evidence may be perpetuated under §622.96, regardless of whether or not an action may have been brought. *City of Emmetsburg v. Central Iowa Telephone Co.*, 1959, 250 Iowa 768, 96 N.W.2d 445. The clerk should accept such affidavit for filing as if a declaratory judgment action were contemplated. Otherwise, filing with miscellaneous documents would appear to be an alternative.

Assuming that there was substantial compliance with the requirements of §386.4 by publishing the required notice in a county newspaper having general circulation in the town of Hardy prior to the election, it would seem that the results of the election could also be published in the same official newspaper. However, a recent amendment to §386.3 indicates the recognition of a lack of such procedural requirement. Accordingly, the results of franchise elections conducted subsequent to July 1, 1973 are to be reported by the county commissioner of elections to the council and mayor; §30.4, Chapter 136, Acts of the 65th G.A., 1st Session. Such report would be an official document of the Commissioner and a record thereof should appear in that office as well as in the office of the city clerk.

November 16, 1973

STATE OFFICERS AND DEPARTMENTS: Secretary Iowa State Fair, Inspection of Amusement Rides—Chapters 88A, 173, Code of Iowa, 1973. Only concession booths that provide an amusement device, ride or booth must comply with the insurance provisions of §88A.9, Code of Iowa, 1973. (Haesemeyer to Fulk, Secretary, Fair Board, 11-16-73) #73-11-16

Mr. Kenneth R. Fulk, Secretary, Iowa State Fair Board: This letter is in response to your opinion request of August 14, 1973, concerning Chapter 88A, Code of Iowa, 1973. In your letter you ask the following questions:

Referring to Chapter 88A "Safety Inspection of Amusement Rides", 64th G.A. and the amending S.F. 522, 65th G.A., we are requesting interpretation and formal opinion from the office of Attorney General on the following sections and subsections:

88A.1(7) *Concession booth.* As defined in this Chapter would be any food sales booth, or any other booth making sales to the public of products or services—which under normal definition are not considered to be for entertainment, amusement, or the giving of pleasure, thrills, or excitement—be held to be an "Amusement Concession"?

88A.1(9) *Operator.* "includes an agency of the state or any of its political subdivisions". If the State Fair does not own and operate any concession in its own right, can it be called an operator—as regards the "control or duty to control—related electrical equipment—"? Conversely, if the State Fair does not own and operate a concession (the "Ole Mill," acquired two years ago), what is the position of responsibility by the Fair as a concession owner-operator; and is there any connecting relation or responsibility to "—related electrical equipment. . ." either for the "Ole Mill" or the State Fairground as a whole?

88.2 *Permit Required.* Also 88A.4 *Permit and Inspection Fee:* Is the State of Iowa, dba Iowa State Fair, subject to the referred permit and inspection fees cited? Also, can the State Fair obtain a "blanket" permit to cover all private enterprise concessionaries, as an 'association' (excepting the midway) as a common good or convenience? (This might remove need for many individual permits).

88.9 *Insurance.* The Iowa State Fair Board has liability insurance coverage in force up to a million dollars. Can the Iowa State Fair, in addition, apply for and obtain adequate insurance to cover all concessionaries (private enterprises), again as a common good or convenience to concessionaries?

88.11(1) *Exemptions.* Does ". . .playground equipment owned, maintained and operated by any political subdivision of this state" provide exemption from permit fee and inspection on the "children's playground?" . . . on the "Ole Mill"?

Your first questions concern §88A.1(7), Code of Iowa, 1973. It is the opinion of this office that food sales booths or other booths making sales of services do not fall within the definition of "concession booth". Section 88A.1(7) defines concession booth as meaning:

". . .A structure, or enclosure, located at a fair or carnival from which amusements are offered to the public."

The word amusement or the verb to amuse is defined in Webster's Seventh Dictionary as meaning to entertain, or occupy in a light, playful or pleasant

manner, to appeal to the sense of humor. Section 88A.1(3) defines "amusement device" in part as meaning "any equipment. . .intended to entertain or amuse a person." Section 88A.1(4) provides:

"'Amusement ride' means any mechanized device or combination of devices which carries passengers along, around, or over a fixed or restricted course for the purpose of giving its passengers amusement, pleasure, thrills, or excitement."

Food stands are not intended to amuse one, but rather are intended to provide an individual with sustenance. Service booths also do not provide amusement or entertainment, but rather provide a benefit or useable commodity to the consumer or are for the purpose of the dissemination of information. The normal sale of any service or food stuff is not generally intended for amusement purposes, but rather it is intended for the personal use or consumption of the individual purchaser. Therefore, in most circumstances a food stand or the sale of services would not be considered to be an "amusement concession".

Your second question concerns §88A.1(9). Section 88A.1(9) defines "operator" as follows:

"'Operator' means a person, or the agent of a person, who owns or controls or has the duty to control the operation of an amusement device or ride, a concession booth, or related electrical equipment at a carnival or fair. 'Operator' includes an agency of the state or any of its political subdivisions."

Unless the Fair Board owns, rents, or itself operates an amusement device, ride or booth it is the opinion of this office that the Fair Board would not fall within the definition of "operator". The word operator should be construed narrowly, applying to only those individuals or agents who are in direct control or ownership with a fair amusement device, ride or booth. It is the class of persons who have a duty to supervise and control their own specific amusement. If the Fair Board owns or controls the operation of an amusement such as the "Ole Mill" the Fair Board would be considered an operator, since they are the person or agent who owns or has the duty to control the operation of the amusement. The Fair Board as a concession owner-operator has the same responsibility as any other concession owner-operator under Chapter 88A, Code of Iowa, 1973.

The next group of questions posed concerns §88A.2. The Iowa State Fair will only be required to obtain a permit if they operate an amusement device, ride or booth. Chapter 88A.2 is directed only toward those persons who operate an amusement at a fair. The Fair Board would not have to obtain a permit if they did not operate a specific amusement. This Chapter of the Code is entitled *Safety Inspection of Amusement Rides* and one of the purposes of the act is to insure that each individual amusement operator provides a safe amusement for the public. If the Fair Board operates its own amusement it too would have to comply with the safety inspection procedures described in Chapter 88A, Code of Iowa, 1973.

As to your question concerning blanket coverage for concessionaries, Chapter 88A does not provide any authorization for the State of Iowa or the Iowa State Fair Board to purchase a blanket policy for concessionaries. Furthermore, under Chapter 173, Code of Iowa, 1973, which is entitled *State Fair and Exposition,* there are no provisions allowing the Fair Board to undertake such an act. Therefore, it is the opinion of this office that the Fair Board

has neither the duty, nor the specific power to purchase blanket insurance for concessionaries.

The manifest purpose of §88A.9 is to insure that any person who operates an amusement provides adequate insurance in case of injury on an individual amusement at a fair. This code section is directed only toward the individual amusement operators and not the State Fair Board or County fair supervisory personnel unless that entity also chooses to operate an amusement. Accordingly, it is our opinion that there is no duty on the part of the Iowa State Fair Board to provide insurance to cover all concessionaries. It is the duty and obligation of the individual concessionaries to provide this insurance in order to obtain a permit and not the State of Iowa or its agents.

Your last group of questions concerns the exemption provisions of §88A.11. Section 88A.11(1) states that certain amusements such as playground equipment are exempt from the provisions of this chapter if no admission fee is charged for its usage or at the equipment location. It is the opinion of this office that the "children's playground" at the State Fair falls within this exemption. Since no admission fee is charged at the location of the "children's playground" or for the use of the equipment, this office feels that this allows the "children's playground" to fall within the exemption provisions. It may be argued that since a general admission fee is charged to enter the Fair, that it would negate this exemption. However, the primary users of the children's playground are admitted into the State Fair without charge due to age. Moreover, no fee is charged specifically for usage of the equipment and the facilities of the "children's playground.

Lastly, under §88A.11(4), there is no exemption provision provided to the Iowa State Fair Board because of an allegation that the Fair Board is a political subdivision and therefore entitled to the exemption. The State Fair Board is an agency of the state; it is not a political subdivision. A political subdivision is a body such as county zoning commissions, school boards or county supervisors, but an agency is not a political subdivision. Therefore, the State Fair Board, as a state agency, does not fall within the provisions of §88A.11(4).

November 16, 1973

CITIES AND TOWNS. Library fund; library fines. §378.10(8), Code of Iowa, 1973. Money collected as fines belongs to the library fund and is under the exclusive control of the library's board of trustees. (Haesemeyer to Porter, State Librarian, 11-16-73) #73-11-17

Mr. Barry L. Porter, State Librarian: Reference is made to your letter of October 29, 1973, in which you request an opinion from this office interpreting §378.10(8) of the Iowa Code. You specifically ask that we determine who controls money which is collected in the form of library fines.

Section 378.10(8), Code of Iowa, 1973, provides:

"To have exclusive control of the expenditures of all portions of the municipal enterprises fund allocated for library purposes by the council, and of the expenditure of all moneys available by gift or otherwise for the erection of library buildings, and for all other moneys belonging to the library fund, including fines and rentals collected under the rules of the board of trustees."

The language of this section is clear and unambiguous. Money collected as fines belongs to that library's fund and is under the exclusive control of that

library's board of trustees. They determine the manner in which it will be disbursed. However, any such fines must be deposited in the library accounts and a proper record and accounting thereof must be maintained.

November 20, 1973

OMBUDSMAN: Investigations — the Iowa State Bar Association is not a public agency within the meaning of §601G, Code of Iowa, 1973. (Nolan to Potter, State Senator, 11-20-73) #73-11-18

Honorable Ralph W. Potter, State Senator: In response to your request for an opinion on the question of whether the Iowa State Bar Association is a public agency subject to investigation by the State Ombudsman Office, I can advise that the answer is no. The Iowa State Bar Association is a nonprofit corporation chartered under §504A of the Code of Iowa.

The authority of the Citizens' Aide (Ombudsman) is directed to the investigation of complaints against public agencies. Under the provisions of §601G.1(2), agency means:

". . .all governmental entities, departments, boards, commissions, councils or institutions, and any officer, employee or member thereof acting or purporting to act in the exercise of his official duties, but it does not include:

a. Any court or judge or appurtenant judicial staff.

b. The members, committees, or permanent or temporary staffs of the Iowa general assembly.

c. The governor of Iowa or his personal staff.

d. Any instrumentality formed pursuant to an interstate compact and answerable to more than one state."

November 20, 1973

STATE OFFICES AND DEPARTMENTS: Beer and Liquor Control Department—§33.1, Code of Iowa, 1973; S.F. 512, Acts of the 65th G.A., First Session. A state employee can be required to work on the Friday after Thanksgiving, and the only remedy that employee has is that he or she shall be given an alternative day off from work. (Coriden to Gallagher, Director, Iowa Beer & Liquor Control Department, 11-20-73) #73-11-19

Mr. Rolland A. Gallagher, Director, Iowa Beer & Liquor Control Department: You have requested an opinion as to whether your employees must be given the Friday after Thanksgiving off as a holiday. It is our opinion that the Friday after Thanksgiving is not a legal holiday as defined in §33.1, 1973 Code of Iowa. Senate File 512, passed by the 65th General Assembly, First Session, does include the Friday after Thanksgiving as one of eight paid holidays which are to be given to state employees. However, Senate File 512 goes on to say that:

". . . In most cases, where by nature of the employment a state employee must be required to work on a holiday the provisions of unnumbered paragraph one (1) of this section shall not apply, however he shall be compensated by an alternative day off from employment with pay."

Thus, the holidays listed are not mandatory. A state employee can be required to work on the Friday after Thanksgiving, and the only remedy that employee has is that he or she shall be given an alternative day off from work.

November 26, 1973

BEER AND LIQUOR CONTROL DEPARTMENT: Sunday sales privilege—§§123.36, 123.38, 123.34 and 123.43, 1973 Code of Iowa; S.F. 144, §§1,2,4, and 6, Acts of the 65th G.A., First Session. The portion of the fees for a Sunday liquor sales privilege which are remitted to the local authorities cannot be refunded to the holder of the privilege when he voluntarily surrenders it. However, the portion of the fees for a Sunday liquor sales privilege which are retained by the Iowa Beer and Liquor Control Department can be refunded upon voluntary surrender. No refund of the fees for a Sunday beer sales privilege to the privilege holder is possible. (Haskins to Gallagher, Iowa Beer and Liquor Control Department, 11-26-73) #73-11-20

Mr. Rolland A. Gallagher, Director, Iowa Beer and Liquor Control Department: You ask whether the fees paid for a Sunday sales privilege may be refunded to the liquor licensee or beer permitee when he voluntarily surrenders his Sunday sales privilege. It is our opinion that the portion of the fees for a Sunday liquor sales privilege which are remitted to the local authorities cannot be refunded. However, the portion of the fees for a Sunday liquor sales privilege which are retained by the Iowa Beer and Liquor Control Department ("the department") can be refunded. But no refund of the fees for a Sunday beer sales privilege to the privilege holder is possible.

Fees are paid for the regular, or "six day" liquor license or beer permit. *See* §§123.36, 123.134, 1973 Code of Iowa. Fees are also paid for the Sunday sales privilege. *See* Senate File 144, §§1 and 4, Acts of the 65th General Assembly, First Session. A refund of a part of the fees for a regular liquor license or beer permit is authorized when the license or permit is voluntarily surrendered. Section 123.38, 1973 Code of Iowa, in relevant part:

"Any such licensee or permittee, or his executor, administrator, or any person duly appointed by the court to take charge of and administer the property or assets of the licensee or permittee for the benefit of his creditors, may voluntarily surrender such license or permit to the department and when so surrendered the department shall notify the local authority, and the department and such local authority or the local authority by itself in the case of a retail beer permit, shall refund to the person so surrendering the license or permit a proportionate amount of the fee paid for such license or permit as follows: If surrendered during the first three months of the period for which said license or permit was issued the refund shall be three-fourths of the amount of the fee; if surrendered more than three months but not more than six months after issuance the refund shall be one-half of the amount of the fee; if surrendered more than six months but not more than nine months after issuance the refund shall be one-fourth of the amount of the fee. No refund shall be made, however, for any special liquor permit, nor for a liquor control license or beer permit surrendered more than nine months after issuance."

It will be noted that for a liquor license, refund is to be made by both the department and the local authorities, while for a beer permit, refund is to be made only by the local authorities. The question is to what extent the above quoted section is applicable to the refund of fees for Sunday liquor or beer sales privileges.

Section 123.36, 1973 Code of Iowa, pertains to fees for liquor licenses. Section 123.36 states in relevant part:

"The department shall credit all fees to the beer and liquor control fund and shall remit to the appropriate local authority, a sum equal to sixty-five percent

of the fees collected for each class 'A', class 'B', or class 'C' license covering premises located within their respective jurisdictions. *However, that amount remitted to the appropriate local authority out of the fee collected for the privilege authorized under section one (1) of this Act (the Sunday sales act) shall be deposited in the county mental health and institutions fund to be used only for the care and treatment of persons admitted or committed to the alcoholic treatment center at Oakdale or any facilities as provided in chapter one hundred twenty-three B (123B) of the Code."*

The above was added by Senate File 144, §2, Acts of the 65th G.A., First Session. Because the portion of the fees for a Sunday liquor sales privilege which is remitted to the local authorities can be used *only* for the care and treatment of alcoholics, we believe that such portion of the fees cannot be refunded. However, the portion of the fees for a Sunday liquor sales privilege which are retained by the department (thirty-five percent of the fees) can be refunded.

Section 123.143(1), 1973 Code of Iowa, pertains to fees for beer permits. Section 123.143(1) states:

"All retail beer permit fees collected by any local authority at the time application for the permit is made, and remitted with the permit application to the department, shall be refunded by the department to the local authority at the time the permit is issued. *Those amounts refunded to the appropriate local authority out of the fee collected for the privilege authorized under section (4) of this Act (the Sunday sales act) shall be deposited in the county mental health and institutions fund to be used only for the care and treatment of persons admitted or committed to the alcoholic treatment center at Oakdale or any facilities as provided in chapter one hundred twenty-three B (123B) of the Code."*

The above was added by Senate File 144, §6, Acts of the 65th G.A., First Session. Because the fees for a Sunday beer sales privilege which are refunded to the local authorities by the department are to be used *only* for the care and treatment of alcoholics, we believe that the fees cannot be refunded to the privilege holder when he surrenders his privilege. Since refund of the fees for a beer permit are made only by the local authorities and not be the department, no refund of the fees for a Sunday beer sales privilege to the privilege holder is possible.

In conclusion, the portion of the fees for a Sunday liquor sales privilege which are remitted to the local authorities cannot be refunded to the holder of the privilege when he voluntarily surrenders it. However, the portion of the fees for a Sunday liquor sales privilege which are retained by the Iowa Beer and Liquor Control Department can be refunded upon voluntary surrender. No refund of the fees for a Sunday beer sales privilege to the privilege holder is possible.

November 29, 1973

MUNICIPAL CORPORATIONS: Officers holding other office or employment. §363C.10, Code of Iowa, 1973. A city councilman may not hold any office in or be employed in any department of the city in which he is elected. (Haesemeyer to Kelly, State Senator, 11-29-73) #73-11-21

The Honorable E. Kevin Kelly, State Senator: In your letter of November 13, 1973, you ask for an Attorney General's opinion as to whether a Sioux City fireman who is elected to the city council of that city may retain his position on the fire department during his tenure as a councilman. The answer to this question is clearly presented in §363C.10, Code of Iowa, 1973:

"No councilman elected under the provisions of this chapter shall be appointed by the manager to any office of the city in which he is elected, or employed in any department thereof; and any councilman or manager who shall violate the provisions of this section shall be guilty of a misdemeanor. . . ."

In our opinion, a city councilman may hold no other position in that city's civil service. Although we find no objections to a fireman taking a leave of absence from the fire department during his incumbancy as a councilman, the final determination of that issue should properly be relegated to his immediate supervisors to be determined in accordance with the department's policy.

December 12, 1973

CITIES AND TOWNS: Change in Compensation for City Councilmen. §§1 and 2, Chapter 235, Acts of the 65th General Assembly, First Session. A change in compensation of the mayor, councilmen, city clerk and treasurer may be made at any time prior to the commencement of a new term, providing that all are starting new terms. (Blumberg to Gluba, State Senator, 12-12-73) #73-12-1

Honorable William E. Gluba, State Senator: We are in receipt of your opinion request of November 21, 1973. Your question is whether a salary increase for the councilmen, mayor, clerk and treasurer of Davenport, if made by ordinance in December, 1973 to take effect January, 1974, is valid.

Section 368A.21 of the 1973 Code, as amended by Chapter 235, §1, Acts of the 65th General Assembly, provides in part:

"No member of any city or town council shall, during the time for which he has been elected, be appointed to any municipal office which has been created or the emoluments of which have been increased during the term for which he was elected, *nor shall the emoluments of any city or town officer be changed during the term for which he has been elected, except that an increase in compensation of councilmen shall become effective for all councilmen at the beginning of the term of the councilmen elected at the election next following the increase in compensation.*" [Emphasis added]

The original section did not include the exception, and was interpreted to mean that a change in emoluments could be made at any time *before* the new term commenced in January. See, *Schanke, v. Mendon,* 1958, 250 Iowa 303, 93 N.W.2d 749. The amendment to this section is an exception to the rule that emoluments cannot be changed during a term. It states that a councilman's emoluments may be changed during his term, but only if a new term of a councilman has commenced (and that new term carries with it a change in emoluments) and the ordinance changing the emoluments precedes the election. The purpose of this amendment was obviously to equalize the pay of councilmen, especially where there were staggered terms. Accordingly, for a new term, the change only has to precede the new term. This can be contrasted to the New Home Rule Act, specifically §59(8), Chapter 1088, Acts of the 64th General Assembly, as amended by §2, Chapter 235, Acts of the 65th General Assembly which provides that the council shall not increase its or the mayor's compensation during the months of November and December immediately following a regular city election.

Under your fact situation, it appears that the mayor and all the Councilmen, including the Treasurer and Clerk will begin new terms on January 1,

1974. If this is true, then the change in emoluments need only be made before the new terms begin. However, if any councilmen will still be in their current term on January 1, 1974, they could not receive a change in compensation unless said change was made prior to the election. In any event, the Clerk and Treasurer and any councilmen beginning new terms can receive a change in compensation as long as it is prior to the commencement of their new terms. If the city has adopted the New Home Rule Act, the compensation of the mayor and councilmen could not be increased if done after the election. The fact that Davenport is a special charter city does not change these results. See section 420.41.

December 13, 1973

COUNTY OFFICERS: Salary. Chapter 224 (S.F. 441) 65th G.A., First Session, is to be interpreted so as to provide salary increases for the county officers enumerated therein on a prospective basis for the balance of the year 1973 and there is no justification in the language of the Act for a retrospective payment to some officers to cover the period prior to the effective date of the Act. (Nolan to Goetz, 12-13-73) #73-12-2

Mr. Carl J. Goetz, Johnson County Attorney: This is written in response to your request for an opinion interpreting Chapter 224 of the 65th General Assembly, First Session (Senate File 441). Essentially, this Act provides a ten percent increase in the salary of the board of supervisors and an annual increase of $1,800 in the compensation of the auditor, treasurer, recorder and clerk. It also established the minimum annual salary of the county attorney and fixes the annual salary of the sheriff at not less than two thousand dollars more than the sheriff was entitled to on January 1, 1973. You ask whether all or some of these county officers are to receive the total amount of the annual increase in 1973 or whether they, or some of them, are only to receive an amount representing the increased compensation for the last half of the year in which the law was changed. Apparently, a problem arises from language appearing in Section 3 of the Act:

"In addition to the annual compensation to which each county auditor, county treasurer, county recorder, and clerk of the district court is entitled as of January 1, 1973, each such county officer shall receive as salary compensation, the sum of one thousand eight hundred dollars annually."

Because of the language quoted above, it appears that the county auditor has paid the auditor, treasurer, clerk and recorder the entire $1,800 salary increase, but is paying the sheriff and county attorney fifty percent of the salary as stated in Senate File 441 for the balance of 1973.

There appears to be no argument that the Act became effective July 1, 1973.

A statute is presumed to be prospective in its operation unless expressly made retrospective, §4.5, Code of Iowa, 1973. The reference to January 1, 1973 in Senate File 441 merely reflected the salaries set by supervisors' resolution pursuant to §340.3 and thereby eliminated the necessity for the supervisors to make a recomputation when the law became effective *"for salaries paid for the remainder of said year* from the effective date of the new law". (§340.3) Consequently, all county officers under Senate File 441 are entitled to the salary increase for the balance of the year after July 1, 1973. We find no ambiguity in Senate File 441 to justify making the payment to some county officers retroactive.

The term annual compensation means that compensation payable during the fiscal year. Until 1974 the county fiscal year remains the calendar year. Accordingly, for the balance of the calendar year, 1973, the auditor, treasurer, clerk and recorder are entitled to one-half of the increase in pay, and the sheriff, county attorney and supervisors will be entitled to the salaries at the new rates prescribed by §§1, 4 and 5 of the Act.

December 17, 1973

JUVENILE COURT: Procedures. Section 231.3, 232.1 and 232.3, 1973 Code of Iowa. A Judge of the Juvenile Court may appoint more than one referee; a Juvenile Court referee may direct pre-docketing investigation of cases, utilizing community agencies to facilitate such investigation; a referee may authorize the filing of a petition and after docketing, the matter may proceed in accordance with Section 323.3. (Williams to Fenton, Polk County Attorney, 12-17-73) #73-12-3

Mr. Ray A. Fenton, Polk County Attorney: We are in receipt of your request for an opinion of the Attorney General regarding the Juvenile Court. Specifically you ask first whether the Judge of the local Juvenile Court can appoint more than one referee pursuant to §231.3, Code of Iowa, 1973, and second, whether the Judge can direct a referee to review cases at the point of referral to Juvenile Court and divert cases to the other agencies, without establishing an official Juvenile Court "record".

In your request, you state that the Honorable Don L. Tidrick, Judge for the Polk County Juvenile Court, proposes to appoint two referees to review cases at the point of referral to the juvenile court and to divert as many cases as possible to other agencies. As you indicate the purpose of such diversion is to both avoid the stigma which may attach from having a formal court record and to insure that the needs of each child referred to the court are better served through community programs and agencies better equipped to provide youth services. You state that this is in keeping with the nationwide trend to establish new procedures designed to divert children from the court system.

With regard to your first question, the relevant Code provision reads in pertinent part:

"231.3 Designation of judge — referee.

"* * *

"The judge of the juvenile court may appoint a referee in juvenile court proceedings. The referee shall be qualified for his duties by training and experience and shall hold office at the pleasure of the judge. . . . The judge may direct that any case or class of cases arising under Chapter 232 shall be heard in the first instance by the referee in the manner provided for the hearing of cases by the court.

* * *

"In counties having a population of more than two hundred and fifty thousand, the judge of the juvenile court may appoint a director of court services. . . ."

Of course, a plain and grammatically correct reading of this provision indicates that "a referee" may be appointed, implying the singular. However, the statute is permissive and the context indicates that appointment is discretionary with the judge according to the needs of the particular juvenile court.

The legislature itself has provided much guidance in the interpretation of statutory provisions, in Chapter 4 of the 1973 Code of Iowa. Specifically, Section 4.1 of that chapter provides as follows:

"4.1 Rules

"In the construction of statutes, the following rules shall be observed unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute:

"* * *

"3. Unless otherwise specifically provided by law, the singular includes the plural.

* * *"

(As amended by Acts of the 64th General Assembly, Ch. 77, §12).

This provision is somewhat more mandatory or presumptive than the former section which it amended, which read, "words importing the singular may be extended to several persons or things. . ." That former provision was interpreted twice by the Iowa Supreme Court in school consolidation cases, one case upholding the reading of a plural to include the singular, *Zilske v. Albers,* 238 Iowa 1050, 29 N.W.2d 189 (1947), and the other upholding a refusal by the lower court to read a singular to include the plural. *State v. McChesney,* 190 Iowa 731, 180 N.W.2d 857 (1921). Both cases emphasized that the purpose of the particular statute was crucial in the application of this rule of construction to alter the plain language of a statute.

Even applying the former rule of §4.1(3), interpretation of §231.3 would seem to allow the appointment of more than one referee if the needs of the particular court justify it. Section 231.3 could even be read to allow the judge to appoint one referee for one case or class of cases and other referees for other cases or classes of cases.

In any event, it can only be presumed that change in the language of a statute indicates a legislative intent to change the law. *State ex rel. Fenton v. Downing,* 261 Iowa 965, 155 N.W.2d 517 (1968). It seems clear that the 1971 amendment of section 4.1(3) imposes a presumption that the singular includes the plural, in the absence of specific language, manifest legislative intent, or contextual import to the contrary.

With regard to your second question, the relevant Code provisions read in pertinent part:

"231.3 Designation of judge — referee

"* * *

". . . The judge may direct that any case or class of cases arising under Chapter 232 shall be heard in the first instance by the referee in the manner provided for hearing of cases by the court.

"* * *

"232.3 Information — investigation — petition. Whenever the court or any of its officers are informed by a competent person that a minor is within the purview of this chapter an inquiry shall be made of the facts presented which bring the minor under this chapter to determine whether the interests of the

public or of the minor require that further action be taken. After such an inquiry the judge, probation officer, or county attorney may authorize the filing of a petition with the clerk of the court by an informed person. . . . If the facts pleaded are admitted by the minor and consent is obtained from the parents, or guardian of the minor, the Court may make whatever informal adjustment is practical without holding a formal hearing. Efforts to affect informal adjustment may be continued not longer than three months without review by the judge."

"* * *

"232.1 Rule of construction.
This chapter shall be liberally construed to the end that each child coming within the jurisdiction of the juvenile court shall receive preferably in his home, the care, guidance, and control that will conduce to his welfare and the best interests of the state, and that when he is removed from the control of his parents, the court shall secure for him care as nearly as possible equivalent to that which he should have been given."

The plain meaning of §231.3 is that the judge may order a referee to hear in the first instance any class of cases under Chapter 232. Although the words "cases" and "heard" might suggest a limited function of conducting formal hearings, and indeed the rest of this section spells out the procedures and safeguards for such formal hearings when conducted by a referee, it seems clear that the informal adjustment function authorized by §232.3 would constitute a "class of cases" which may be delegated to the referee.

Therefore, it is the opinion of the Attorney General, that, subject to the statutory requirements of admission, consent, and the three-month limitation on adjustment efforts without court review, and subject to evolving constitutional requirements regarding due process guarantees in juvenile "proceedings", a juvenile court referee may handle the informal adjustment process in cases arising under Chapter 232 of the 1973 Code of Iowa.

Your question, however, is whether cases may be diverted by the referee at the point of referral, before an official court record is established. Section 232.3 reads that where the facts *pleaded* are admitted, informal adjustment may occur, and this authorization read in context implies that this informal adjustment may take place only after a petition is filed, but without a formal hearing. Thus it appears that the child would be spared stigma of having a formal dispositional record, but would still have a record of a petition being filed, whatever significance this has.

Section 232.3 also requires the juvenile court to initially investigate the facts to determine whether further action should be taken. Presumedly, the Court may utilize community agencies to aid in the investigation and determination of what the child's needs are in the particular case. Where it is determined that the court should not take further action, the court may drop the case and another agency might independently provide its services to the child. In this sense, the child may be "diverted" at the point of referral, and again, the referee may become involved in this investigative function. It must be emphasized, however, that in this type of situation, the juvenile court is not actually taking and retaining jurisdiction as in the case of informal adjustment.

It is therefore the opinion of the Attorney General that the juvenile court referee may direct the investigation of a case at the point of referral, decide whether or not to proceed within the court system, in which event the further

provisions of section 232.3 would be applicable. Absent more specific legislative authorization of procedures for diverting children from the court system to appropriate community programs or agencies, however, the juvenile court, and therefore the referee, is limited as stated above.

December 18, 1973

SCHOOLS: County Board of Education. §273.4. The remaining members of the county board of education must fill any vacancies which occur. There is no statutory authority for a special election to fill such vacancy. (Nolan to Eich, Carroll County Attorney, 12-18-73) #73-12-4

Mr. Ronal Eich, Carroll County Attorney: This is written in response to a request for an opinion concerning the procedure to be followed in filling a vacancy on the Carroll County school board.

The situation which exists in your county, as we understand it, is that a member of the board, who was elected at large, resigned and that two successive meetings of the board there has been a deadlock in the selection of a candidate to fill the vacancy. Consequently, the vacancy has remained unfilled for some time.

Under §273.4, Code of Iowa, 1973, as amended by Chapter 136, Acts of the 65th General Assembly, 1973, the following is provided:

"Vacancies on said board shall be filled at the next regular meeting of the board by appointment by the remaining members of the board until the next annual school election at which election a member shall be elected to fill the vacancy for the balance of the unexpired term. A vacancy shall be defined as in section 277.29."

It is the sole duty and responsibility of the members of the board to appoint someone to fill an existing vacancy. There is no alternative provision in the Code. It should be observed that the provisions of §279.7 authorizing the calling of a special election to fill a vacancy in a local school district has no application to the situation you describe which is governed by Chapter 273 of the Code.

Accordingly, it is our view that the remaining members of the county school board should proceed with the business of filling the vacancy as the statute directs them to do.

December 20, 1973

STATE DEPARTMENT OF SOCIAL SERVICES: Counties: Foster Care Payments: §§222.60, 232.33, 232.51, 232.53, 234.6, 234.11, 234.12, 235, 252.24, 444.1(f), 444.3(a), 444.12, 1973 Code of Iowa; Chapter 65, §1, 64th G.A.; Chapter 105, §1, Chapter 105, §6, Chapter 175, §1, Chapter 175, §4, Chapter 175, §6, Chapter 186, §12, Chapter 186, §13, Chapter 186, §15, Chapter 186, §16, 65th G.A.; 1968 OAG 331 (Oct. 9, 1967). The 65th G.A. did not change the practice and procedure of the State Department making proportionate reimbursement to counties for a portion of their voluntary or involuntary foster care expenditures, nor the responsibility of the State Department to provide foster care services to children in their custody, nor the responsibility of the personnel working at the county level for the social services department from serving the Court as custodian of children committed to the County Department of Social Welfare pursuant to §232.33, 1973 Code of Iowa. The provisions in Chapter 175, §4, 65th G.A., and

Chapter 235, 1973 Code of Iowa, are not pertinent and do not alter this conclusion. (Williams to Burns, Commissioner, Iowa Department of Social Services, 12-20-73) #73-12-5

Mr. Kevin Burns, Commissioner, Iowa Department of Social Services: In your recent request for the opinion of the office of the Attorney General regarding the division of cost between the state and county for children in foster care, you state that the State Department of Social Services has, for the past few years, reimbursed the county to the extent of 40% of their foster care expenditures. This reimbursement to counties for the biennium ending June 30, 1973, has been from the legislative appropriations to the State Department from the "line item" designated in the 64th G.A., Chapter 65, Section 1, subsection 5, reading in part:

"Section 1. There is appropriated from the general fund of the state . . . to be used in the manner designated:

* * *

"5 . . . Contractual services — other, including group homes and child welfare foster care: . . ."

The 65th G.A. in Section 1 of Chapter 105 [S.F. 604] used the identical language in making an appropriation for the biennium beginning July 1, 1973 and ending June 30, 1975.

Your question then, is, may the State Department of Social Services pay foster parents directly in view of the enactment of Chapter 175, Section 4, paragraph 2.a, 65th General Assembly [S.F. 570] (County Poor Fund Levy) or must it make proportionate reimbursement to the counties for child foster care as it has in the past when a child is in foster care under Chapter 252 (Support of the Poor), Chapter 232 (Neglected, Dependent and Delinquent Children), Chapter 222 (Mentally Retarded) or Section 444.12 (County Mental Health and Institution Fund), 1973 Code of Iowa?

The answer is no, the State Department is not authorized to pay directly to the parents the 100% cost of foster care furnished to children under any of the statutes cited in the above questions. The reasoning for this conclusion follows.

There was no change in the statutes making the county of legal settlement liable for children placed in foster homes or institutions under the provisions of the 1973 Code of Iowa referred to in the question; and, on the contrary, in Section 6 of Chapter 105 of the 65th G.A., the legislature expressly re-enacted Section 232.53 (Neglected, Dependent and Delinquent Children) which provides the procedure for a county to recover its costs from the county of legal settlement of the child.

The pertinent part of Section 6 of Chapter 105, 65th G.A., reads in part as follows:

"232.53 RECOVERY OF COSTS — FROM ANOTHER COUNTY OR FROM THE STATE. The county charged with the cost and expenses under sections 232.51 and 232.52 may recover the costs and expenses from the county where the child has legal settlement by filing verified claims which shall be payable as are other claims against the county. A detailed statement of the facts upon which the claim is based shall accompany the claim. Any dispute

involving the legal settlement of a child for which the court has ordered payment under authority of this section shall be settled in accordance with section 252.22 and 252.23. . . ."

The pertinent parts of the 1973 Code sections requiring counties to pay for child foster care are as follows:

Chapter 444, 1973 Code of Iowa, "Tax Levies"

"444.12 County mental health and institutions fund. The board of supervisors of each county shall establish a county mental health and institutions funds, from which shall be paid:

* * *

"f. Care of children admitted or committed to the Iowa juvenile home at Toledo or the Iowa Annie Wittenmyer home, or placed in a foster home from either of such institutions . . .

* * *

"3. The cost of care and treatment of persons placed in . . . a health care facility . . . or . . . public or private facility:

"a. In lieu of admission or commitment to a state mental health institute, hospital-school or other facility established pursuant to chapter 222."

Chapter 222, 1973 Code of Iowa, "Mentally Retarded"

"222.60 Costs paid by county or state. All necessary and legal expenses for the cost of admission or commitment or for the treatment, . . . in a state hospital-school for the mentally retarded, or in a special unit, or any public or private facility . . . shall be paid by either:

"1. The county in which such person has legal settlement as defined in section 252.16;

"2. The state when such person has no legal settlement or when such settlement is unknown."

Chapter 252, 1973 Code of Iowa, "Support of the Poor"

"252.24 County of settlement liable. The county where the settlement is shall be liable to the county rendering relief for all reasonable charges and expenses incurred in the relief and care of a poor person.

* * *"

Chapter 232, 1973 Code of Iowa, "Neglected, Dependent and Delinquent Children"

"232.51 Expenses. Whenever legal custody of a minor is transferred by the court or whenever the minor is placed by the court with someone other than the parents . . . the costs shall be charged upon the funds of the county in which the proceedings are held upon certification of the judge to the board of supervisors. . . ."

Section 232.53, 1973 Code of Iowa, as re-enacted by Chapter 105, Section 6, 65th G.A., as above quoted, with the following changes made:

". . .The county shall make claim to the state department of social services which shall audit the same and forward it to the state treasurer *claim and certify it to the state comptroller* for payment."

It should be noted that the 65th General Assembly, in Chapter 105, Section 6, made no changes in the language concerning the procedure for counties to recover reimbursements from the county of legal settlement of the minor. Only the last sentence was changed pertaining the children for whose care is paid from the State treasury as defined in 1968 OAG 331 (October 9, 1967).

You also ask if the 65th General Assembly made any changes regarding the payment for foster care services to children whose parents have entered into a voluntary placement agreement with the county department of social services, stating that in those instances, the State Department has been reimbursing county funds to the extent of 40% of payments made by the county.

Section 15 of Chapter 186, 65th G.A., amended Section 234.6 of the 1973 Code of Iowa by adding a new subsection which reads in part as follows:

"[The state director shall] Have authority to use funds available to the department, *subject to any limitations placed on the use thereof by the legislation appropriating the funds,* to provide to or purchase for families and individuals eligible therefor, services including but not limited to the following:

* * *

"b. Foster care, including foster family care, group homes and institutions." [Underscoring supplied.]

A limitation is placed in the appropriation bill for foster care appearing in line item 10 of Section 1, Chapter 105 of the Acts of the 65th General Assembly which reads: "Contractual Services". There is no other express appropriation for foster care services other than for "contractual services".

Section 234.6, subparagraph 6, authorizes the State Department to "purchase services of all kinds from public or private agencies to provide for the needs of children, including . . . foster homes and institutional care."

From the language in the cited statutes and sections from the Acts of the 65th General Assembly, it is clear that the legislature intends for the State Department to make payments for the purchase of services or make payments under contractual arrangement to those furnishing foster care rather than to the foster parents directly. If the legislature intended payments to be made directly to the parents, it should have enacted a law authorizing such procedure. As stated in *State ex rel Fenton v. Downing,* 261 Iowa 965 (1968) at page 969:

"In the field of legislative interpretation it is not for us to rule according to what the legislature might have said. We must rule according to the meaning of what the legislature has said and done."

You state that payments have been made monthly to the counties under "purchase of service agreements" in connection with voluntary placements and under a "contractual arrangement" when claims are filed in accordance with departmental manual material VIII-6-40-42 in connection with involuntary foster care placements.

In view of *New York Life Ins. Co. v. Burbank,* 209 Iowa 199 (1929), *Whattoff v. U.S.,* 355 F.2d 473 (CA Iowa 1966) and *Wilson v. Iowa City,* 165 N.W.2d 813 (Iowa 1969), certain presumptions should be applied here in gleaning statutory construction. Here, the 65th General Assembly did not change the county's financial responsibility for foster care in involuntary placements but

in fact re-enacted one section in connection with such responsibility; and, here, the legislature did not change the wording of the statute regarding purchase of services for foster care [234.6(6)]; and, here, in the appropriation bill the legislature limited appropriations for contractual foster care arrangements (which would include payments for purchase of services to counties under contractual arrangements) but was silent concerning an appropriation for payments directly to foster parents.

In *Wilson v. Iowa City,* 165 N.W.2d 813 (Iowa 1969), at page 822 we read:

"To the contrary, the legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed, unless an intention to do so plainly appears by express declaration or necessary or unmistakable implication, and the language employed admits of no other reasonable construction . . ."

In *New York Life Ins. Co. v. Burbank,* 209 Iowa 199 (1929), at page 206, the Iowa Supreme Court said:

"It is a fair presumption that the legislature, by the re-enactment without change of language, was satisfied with such construction, and intended that it should continue. [citations]"

Therefore, the past practices and procedures (except as to the amount of reimbursements) relative to foster care payments from State Department appropriations remain the same. You state that, by reason of the provisions of Section 444.1(f) and Section 444.3(a), 1973 Code of Iowa, the children placed in the Annie Wittenmyer Home or the Iowa Juvenile Home at Toledo either by the Commissioner (or his designee) and in foster homes from such institutions, the counties have paid the cost from institution funds and received reimbursement in the same percentage as for other county foster care services from the State's appropriation. In other instances, the State Department has contracted for or purchased foster care services for other children whose custody was placed in the Commissioner (or his designee) from the State foster care appropriation. This procedure, under the Statutes and Acts of the 65th General Assembly should continue.

Also, consistent with the amount of the foster care appropriation to the State Department, the State Department should determine what amount (percentage) from that fund it should reimburse to the counties for either voluntary or involuntary foster care county expenditures. The request for reimbursement, however, should now be signed by the Board of Supervisors as the County Board of Welfare is now only an advisory board in view of Chapter 186, Section 16, 65th G.A.

You next ask who has custodian responsibility for children previously placed in the custody of the County Departments of Social Welfare under Section 232.33, paragraph 2 (Neglected, Dependent and Delinquent Children), 1973 Code of Iowa, in view of Chapter 186, Section 13, 65th G.A. (vesting authority in the State director to administer child welfare within a county) and in view of Chapter 175, Section 6, 65th G.A. [repealing §§234.11 and 234.12, 1973 Code of Iowa (duties of county board and county board employees respectively)] and Chapter 175, Section 1, and Chapter 186, Sections 12, paragraph 7, and 13, 65th G.A. (all personnel appointed by Commissioner instead of County Boards) and Chapter 186, Section 16, 65th G.A. (duty of County Board advisory in welfare)?

The 65th General Assembly made no change in Section 232.33, paragraph 2, 1973 Code of Iowa, reading:

"232 Disposition of case of neglect or dependency. If the court finds that the child is neglected or dependent, the court shall enter an order making any one or more of the following dispositions of the case:

* * *

"2. Place the child under the protective supervision of the county department of social welfare or a child placing agency in the home of the child under conditions prescribed by the court directed to the correction of the neglect or dependency of the child.

"3. Transfer legal custody of the child, subject to the continuing jurisdiction of the court to one of the following:
. . . The county department of social welfare or the state department of social services."

The 65th General Assembly did, however, change the employer status of the personnel working at the county level in discharging the function of the State Department of Social Services in Chapter 175, Section 1, and Chapter 186, Sections 12, paragraph 7, and 13.

Following are pertinent portions of those sections.

Section 1 of Chapter 175 reads in part:

"New Section. The commissioner of social services or his designee, shall employ such personnel as are necessary for the performance of the duties and responsibilities assigned to the department. . . ."

Section 12, paragraph 7, of Chapter 186 reads in part:

"7. . . .
"New Section. Where the department of social services assigns personnel to an office located in a county for the purpose of performing in that county designated duties and responsibilities assigned by law to the department, it shall be the responsibility of the county to provide and maintain the necessary office space and office supplies and equipment for the personnel so assigned in the same manner as if they were employees of the county . . ."

Section 13, Chapter 186 in this regard reads:

"13. The state director shall be vested with the authority. . .he may employ necessary personnel and fix their compensation."

The two pertinent sections, shifting the responsibility for administration of the welfare programs to the State instead of the counties and making the County Boards advisory boards only, follow.

Section 13, Chapter 186 of the 65th General Assembly (amending Section 234.6, paragraph 1, 1973 Code of Iowa) reads in part as follows:

"The state director shall be vested with the authority to administer aid to dependent children, child welfare. . . Subject to restrictions that may be imposed upon him by the commissioner of the department of social services and the council of social services, he shall have power to abolish, alter, consolidate or establish subdivisions and may abolish or change offices created in connection therewith. He may employ necessary personnel and fix their compensation. . . ."

Section 16, Chapter 186, 65th G.A., reads in part:

"Sec. 16. . .234.11 Duties of the county board. . .The board shall act in an advisory capacity on programs within the jurisdiction of the department of social services. . ."

Prior to the enactment of these statutes, the County Board directed the work of the social services within the county through its employees. [*State ex rel Fenton v. Downing,* 261 Iowa 965 (1968)] The appointment of the county department to perform duties for the court in the matter of disposition of neglected or dependent children pursuant to Section 232.33, 1973 Code of Iowa, is not changed by the departmental internal changes regarding employee-employer relationship and the responsibility for performing the duties imposed upon the State Department of Social Services by the Statutes and Acts of the 65th General Assembly, i.e., the court may still look to the administrative authority in each county to perform the duties imposed by said Section 232.33 until the court, upon proper application or upon its own motion, modifies the custodial order.

Nor does Section 4, Chapter 175 of the 65th General Assembly alter the conclusions drawn above. That section reads in part:

"SEC. 4. For the extended fiscal year beginning January 1, 1974 and ending June 30, 1975, and for that period only, the maximum levy for support of the poor in each county, expressed in mills, shall be computed by the state comptroller as prescribed by this section. This computation shall be in lieu of any other statutory limitation for the period January 1, 1974 through June 30, 1975.

"1. The tentative maximum poor fund millage levy for each county shall be equal. . .

"2. The reduction in the levy for the poor fund in each county, due to elimination of county responsibility for aid to dependent children, aid to the blind, aid to the disabled and for certain foster care expenditures, shall be established as follows:

"a. The amount charged the county by the department of social services during the calendar year 1972 as the county's share of payments made by the state for aid to dependent children, aid to the blind, aid to the disabled, and foster care for children who were under the custody, care or supervision of the state department of social services, or of a county department of social services, shall be determined. . . ."

This section merely relates to the mode of establishing a basis for a tax levy and for estimating the county budget. It does not purport to eliminate the county's responsibility for "certain foster care expenditures"; and as noted above there is nothing in the Acts of the 65th General Assembly which defines that "certain foster care expenditures" are to be shifted from county to state financial responsibility.

Chapter 235, 1973 Code of Iowa, captioned "Child Welfare", does not appear to be pertinent to the questions asked as it primarily deals with planning for, developing and supervising child welfare services within the State, and to receive federal or state appropriations in carrying out the "purposes of this chapter".

If the Acts of the 65th General Assembly as hereinbefore construed are unworkable or contrary to the intent of the legislature, remedial legislation should be enacted.

December 20, 1973

ADMINISTRATIVE LAW: Destruction of Institutes; Mental Health Institute; Clarinda; Legislative Prerogative. §§226.1, 217.11, 218.1, 217.2, 226.7, 226.9, Code of Iowa 1973, and Ch. 112, 65th G.A. (1st) 1973. When the legislature creates and designates a hospital as official Mental Health Institute, and directs its operation, and also directs the Department of Social Services to plan for the consolidation of Mental Health Institutes and to submit its recommendations to the General Assembly by a certain date, the Department of Social Services may not administratively destroy the Institute; that is the exclusive prerogative of the legislature. (Turner to Hultman and Briles, State Senators, 12/20/73) #73-12-6

Honorable Calvin O. Hultman, State Senator and Honorable James E. Briles, State Senator: Your request for an opinion on whether or not the Director of the Department of Social Services has authority to close the Mental Health Institute, Clarinda, Iowa, without further legislative direction has been received. By letter dated December 18, 1973, you state:

"I believe that the recent action by the Department of Social Services concerning the closing of the Clarinda Mental Health Institute warrants an Opinion of the Attorney General as to the legality of such action under present law.

"Does the Department of Social Services have authority under Section 217.11, 218.1 or any other sections of the Code pertaining to its powers, to close the Clarinda Mental Health Institute? Likewise, must action be taken by the General Assembly to change Section 226.1 of the 1973 Code of Iowa, which designates the Mental Health Institute, Clarinda, Iowa, as a hospital for the mentally ill?

"I would appreciate your Opinion on this question as soon as possible."

Chapter 112, Acts, 65th G.A., 1973 (H.F. 747) directs the Department of Social Services to develop a plan for operation of the mental health institutes and to report its findings and recommendations to the legislative council not later than December 15, 1973. The plan as contemplated by §6 of the act, supra, is to relate to the following:

"1. The consolidation of the operations of the present four mental health institutes and continuation of appropriate services to all citizens of the state.

"2. Indication as to arrangements that are necessary for providing appropriate services to areas affected by the proposed consolidation of the mental health institutes.

"3. Indication of the most efficient and economical future use of the mental health institutes."

The plan which was submitted stated "Effective 3-1-74 there will be no new admissions accepted at the Clarinda Mental Health Institute. The Clarinda service area will be reassigned. . . ." Public officers are "obliged to recognize existing agencies and the law creating them, and to support the execution of powers vested in the agency by the legislature." 1968, O.A.G. 132. The opinion cited, dealing with the Governor's power to administer funds for the treatment of alcoholics further states at page 138:

"Removal of the treatment of alcoholics from these hospitals [state mental institutions], which have historically been charged with this responsibility. . .is a policy matter for legislative determination."

The mental hospital at Clarinda was established by Chapter 201, Acts, 20th General Assembly in 1884, which expressly provided for the selection of commissioners to select and purchase a site

". . .which location shall be in the southwestern portion of the state and shall be selected with reference to its healthfulness and accessibility."

Appropriation for construction and operation of the hospital followed in 1888 (Acts, 22nd G.A., Ch. 75) when the hospital was designated the Iowa Hospital for the Insane as Clarinda. The name was subsequently changed in 1902 to Clarinda State Hospital (Acts, 29th G.A., Ch. 91) and again in 1951 to the designation now appearing in §226.1, Code of Iowa, 1973.

The law presently provides under §217.11 that:

"The director of the division of mental health shall be responsible for and in control of the administration of institutions and programs regarding the care, treatment and supervision of the mentally ill and the mentally retarded and in particular shall be in control of and administer and supervise the following state institutions. The Mount Pleasant Mental Health Institute, the Independence Mental Health Institute, the Cherokee Mental Health Institute, the Clarinda Mental Health Institute and the Glenwood and Woodward State Schools and Hospitals. He shall also carry out such other functions and duties as may be delegated to him by the commissioner of social services."

Code §217.12(1) further requires the director of division of mental health to "Establish psychiatric services for *all institutions under the control of the commissioner* of the department of social services *in order that patients in such institutions shall receive the psychiatric services that are necessary and proper.*" [emphasis added] The director of the mental health division is given the "primary authority and responsibility to control, manage, direct and operate" the Mental Health Institute, Clarinda, Iowa, under §218.3.

However, under Chapter 226 of the Code, the legislature has prescribed the order of preference of admitting patients to such hospital (§226.7) and has mandated the admission of patients sent to the hospital under a duly executed court order (§226.9).

It is so well settled as to require little comment that the powers of administrative officers must be executed in the manner prescribed by statute. If broader powers are desired, they must be conferred by the proper authority; they cannot be merely assumed. Where the legislature directs an agency to supply recommendations and does not direct the method by which such recommendations are to be implemented, the agency acts unconstitutionally if it usurps the legislative power to determine when the recommendations are to be put into effect. *Scott v. Clark,* 1855, 1 Iowa 70; *Pilkey v. Gleason,* 1856, 1 Iowa 521. The doctrine of implied powers includes only those powers which fairly lie within the scope of and are essential to the accomplishment of the main purpose underlying statutory authorization. The law does not support an officer who acts outside the scope of his authority.

In *Howell School Board District v. Hubbart,* 1955, 246 Iowa 1265, 70 N.W.2d 531, the Iowa Supreme Court holding that no other than the local school board has authority to determine where the pupils would attend, stated:

"It is stated in 67 C.J.S., Officers, §103, p. 371:

" 'Powers conferred on a public officer can be exercised only in the manner and under the circumstances prescribed by law, and any attempted exercise thereof in any other manner or under different circumstances is a nullity. . . .' "

In view of the express provisions of Chapters 218 and 226 of the Code, it is clear that the Department of Social Services is required to "operate" the institutions designated by the legislature. The plain meaning of the word "operate" is to perform a work, to make function. Obviously, the department does not fulfill a duty to "operate" the hospital at Clarinda by causing it to be closed.

In 1968 OAG 132, the question was whether the executive branch could create an agency of government and we decided there it could not. Here, the question is whether an administrative agency may destroy an Institute created or designated by the legislature, particularly when the legislature has directed the administrative agency to submit a plan and its recommendations for consolidating that Institute with others. We think, under such circumstances, the Institute may not be administratively destroyed.

If the Institute is to be eliminated or consolidated, and no longer designated as a mental health institute as provided in §226.1, the General Assembly must amend these statutes, including §§217.11 and 218.3 and no one else has the right to exercise this exclusive legislative prerogative. The answer to your first question is "No" and your second question is "Yes".

December 20, 1973

MOTOR VEHICLES: Investigating Officer's accident reports — §§68A.7 and 321.266, 1973 Code of Iowa. An investigating officer's accident report may not be disclosed to the news media. (Voorhees to Rolfe, Union County Attorney, 12-20-73) #73-12-7

Mr. Robert A. Rolfe, Union County Attorney: You have requested an opinion as to whether a local police department may disclose to the news media information contained in an investigating officer's accident report. A similar question was dealt with in a previous opinion (1970 O.A.G. 420). Therein we stated that the accident reports filed by motorists pursuant to what is now §321.266, 1973 Code of Iowa, may not be disclosed, except that the name and address of persons involved in the accident may be disclosed to a party to the accident, his insurance company or agent, or his attorney. We also stated that copies of the investigating officer's report must be furnished to any party to the accident, his insurance company or lawyer upon the payment of the $2.00 fee.

This does not mean, however, that these reports are for public viewing. §68A.7, 1973 Code of Iowa, provides in part:

"The following public records shall be kept confidential, unless otherwise ordered by a court, by the legal custodian of the records, or by another person duly authorized.

* * *

"5. Peace officers investigative reports, except where disclosure is authorized elsewhere in this Code."

As we stated in our previous opinion, §321.266 provides that these reports may be released to *certain* individuals. However, it is clear from §68A.7 that

access to these reports is limited to those situations specifically enumerated in the Code. Nowhere in Chapter 68A, §321.266, or anywhere else in the Code is release of these reports to the news media authorized.

December 27, 1973

LEGISLATURE: Passage of Bills — Iowa Constitution, Article III, §17. Either house of the General Assembly may place noncontroversial bills on a consent calendar and may take one vote on the aggregate of these bills, provided that before that final vote each bill is given a final reading. (Haesemeyer to Harbor, Chief Clerk of the House, 12-27-73) #73-12-8

Mr. William H. Harbor, Chief Clerk, House of Representatives: Reference is made to your letter of October 15, 1973, in which you request an opinion from this office regarding the legislative practice of placing noncontroversial bills on a so-called consent calendar. Specifically, you are interested in learning whether it would be permissible to vote on such bills in batches, thereby saving considerable legislative time.

Iowa Constitution, Article III, §17 provides:

"No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the General Assembly, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal."

A strict construction of this section would mandate a final vote immediately subsequent to a bill's final reading, and would not allow the reading of numerous *other* bills to intervene between the reading of that initial bill and the final vote. Thus, a batch vote practice would not be allowable. However, the Iowa courts have given due consideration to the reason behind §17 and have arrived at a more enlightened interpretation of that section — one which gives more weight to substance than form. In *Witmer v. Polk County,* 222 Iowa 1075, 270 N.W. 323 (1937), a bill was read to the senate, amendments were then proposed and considered, with certain being passed and certain being withdrawn. A senator then proposed that the prior reading (the reading given before the amendment proposals) be considered as the final reading and said motion prevailed. At which time the senate casts a majority of yeas on the question, "Shall the bill as amended pass?" The Court, in upholding the passage of this bill, said:

"This court will presume that the Legislature acted in accordance with the law. . . . It is all-important that, before a bill is passed upon in its final form, it be read after all debate and proposals of amendment have ceased. The framers of our Constitution had this in mind. For the protection of the citizens of Iowa they made a part of the Constitution a provision which guarantees that before each vote every voting member would at least hear every provision of the bill immediately before casting his vote. *The purpose, intent, and effect of that provision is to let every member of the Legislature know exactly what he is voting upon.* Upon the record presented to us in the case at bar, we hold that the vote was taken immediately after the last reading of the bill, and the yeas and nays were entered on the Journal, as required by our Constitution." [emphasis added]

In *Carlton v. Grimes,* 237 Iowa 912, 23 N.W.2d 883 (1946), the Court said:

"The practice of reading any proposed bill to legislative bodies has been followed since their inception. It has been a practice quite uniformly recognized that every bill should be read three times, usually on different days.

The Constitutions of some states require this. There is no such provision in Iowa Constitution. There is no express requirement that a bill be read any specified number of times before its enactment. The words "its last reading" in section 17, supra, may imply previous reading or readings, and yet a "last reading" may be a first, second, third, or other reading. *The purpose of any provisions for reading a bill is to inform the Legislature concerning the nature of the proposed enactment and to prevent hasty legislation.* Since all bills are promptly printed and copies are given to each member, and a file thereof is kept on his desk, the matter of reading bills to each assembly has become of less importance and is not so much stressed in Constitutions or assembly rules. . . . In the Legislature of Iowa and in many Legislatures a reading of the title is considered sufficient except for the last reading. [emphasis added]

In order, then, for the consent calendar batch vote practice to be constitutional, we must find not that it adheres strictly to the form of Article III, §17, but, rather, that it complies with the substantive requirements inherent in that section, i.e., that such practice provides sufficient notice to each legislator as to the matter upon which his vote is to be cast.

Initially, it must be noted that a bill could not be placed upon the consent calendar over the objection of any legislator. This is the first procedural safeguard against a bill being pushed through on a consent calendar. Second, as noted in *Carlton, supra,* legislators have, at all times, printed copies of each bill. This is merely some evidence of the fact that legislators today are more adequately apprised of the details of matter before them than they were in the past. Third, although a legislator may make a motion that a bill's last (preceeding) reading be considered its final reading (thus dispensing with the burdensome task of reaching in toto all bills on the consent calendar). This motion may, of course be voted down if enough legislators feel that they are unsure of the final form of the bill.

Concurrently, with the foregoing technical considerations we must give weight to the practical status of the legislative process today. Certainly much legislative material is controversial, and most is the subject of at least de minimis disagreement. However, there exists a body of legislation, albeit in some states small, which no member wishes to contest. If this legislation must be passed pro forma in the same manner as all other bills, considerable time and money is effectively wasted. We note that eighteen other states have adopted, formally or informally, a consent calendar, and many of these states pass consent calendar bills in the aggregate or by batch vote. *American State Legislatures: Their Structures and Procedures,* Council of State Governments (1971).

Therefore, we find that a consent calendar batch vote practice does not violate the Iowa Constitution provided that: (1) No bill be placed on the consent calendar over a legislator's objection; (2) All bills be given a final reading, except in the case of a motion passed that the preceeding reading be considered the final reading, in which case the reading of the title is sufficient; (3) The journal shall reflect that each bill was separately considered and voted upon, and the ayes and nays recorded therein. Whenever the legislative process can be made more efficient without sacrificing hearing and debate on the vital issues, a step forward has been taken in improving the efficiency and effectiveness of that process.

December 28, 1973

CITIES AND TOWNS: Municipal Airports — §§330.2, 330.4, 330.5 and 427.1(2), Code of Iowa, 1973; §13, Chapter 1088, Acts of the 64th G.A., Second Session. A municipality may own, operate and maintain an airport outside of its corporate limits. (Blumberg to Bergman, State Senator, 12-28-73 #73-12-9

Irvin L. Bergman, State Senator: We are in receipt of your opinion request of August 29, 1973. You asked:

"Does a municipality have legal right to own, operate and maintain an airport totally outside its own corporate limits and wholly or partially within the corporate limits of another municipality?

"Can a municipality own and maintain real property and improvements thereon and operate a business or commercial venture therefrom when the property, improvements and business are located in another municipality and another school district without paying the municipal and/or school district tax levies?"

Section 330.2, Code of Iowa, 1973 provides that municipalities "shall have the right to acquire, establish, improve, maintain and operate airports, *either within or without their corporate limits,* and *either within or without the territorial limits of this state.*" [Emphasis added]

Section 330.5 provides that a municipality may acquire by purchase, gift, condemnation, lease or otherwise real estate and personal property for airport purposes, either within or without its corporate limits of the territorial limits of this state. From the above two sections it is apparent that municipalities may operate and maintain airports located outside their corporate limits. Similarly, there is no prohibition against such an airport being located partially or wholly within the corporate limits of another municipality. We would like to point out, however, the provisions of Section 330.4 which allow for the joint exercise of powers for the operation, maintenance and acquisition of airport facilities.

Some attention must be given to the new Home Rule Act, Chapter 1088, Acts of the 64th G.A., Second Session, which goes into effect on July 1, 1974. That Act has amended Chapter 330 by removing most references to municipalities. However, section 13 of the Act provides that a city may acquire and hold property outside the city. Thus, the answer to your question would be the same.

Your second question is whether a municipality must pay municipal or school district tax levies on its property which is located in another municipality and school district. Section 427.1(2) provides:

"The following classes of property shall not be taxed:

* * *

"2. *Municipal and military property.* The property of a . . . city, town . . . when devoted to public use and not for pecuniary profit."

We are assuming that the property you are referring to here is an airport. If that is the case, then said property would be exempt from taxation under the above section. See 1968 O.A.G. 54 and 1966 O.A.G. 414, copies of which are enclosed, which contain an in-depth discussion of this topic. If the property is

for some other use, then it must be determined whether said property is devoted to public use or for pecuniary profit. In any event, it is a fact determination that must be made by the Assessor as to whether the property is used for pecuniary profit, and therefore whether it is exempt. It must be remembered that tax exemption statutes must be strictly construed, and all doubts must be resolved against the exemption and in favor of taxation. 1968 O.A.G. 54, citing to *Clarion Ready Mix Concrete Co. v. Iowa State Tax Commission,* 1961, 252 Iowa 500, 107 N.W.2d 553.

Accordingly, we are of the opinion that a municipality may own, operate and maintain an airport outside of its corporate limits.

December 28, 1973

CONSERVATION: Marine fuel tax fund — Article VII, §8, Constitution of Iowa; §§324.83 and 324.84, Code of Iowa, 1973. Transfer of revenues from excise tax on motor fuel used in watercraft to the marine fuel tax fund not prohibited by the Constitution. Amount transferred is determined by legislature after study by legislative service bureau, each on basis of total motor fuel tax collected. Neither refunds nor nonhighway use nor that portion of motor fuel tax collected on account of aviation gasoline may be deducted from the total amount of motor fuel tax collected in making the determination required by §324.84(1). (Peterson to Smith, State Auditor, 12-28-73) #73-12-10

The Honorable Lloyd R. Smith, Auditor of State: Receipt is hereby acknowledged of your request for an opinion of the Attorney General as follows:

"The 1942 Amendment to the Constitution of Iowa provides: 'All motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel, except cost of administration, shall be used exclusively for the construction, maintenance and supervision of the public highways exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds.'

"Thereafter, the Legislature of Iowa created the 'marine fuel tax fund', Section 324.79 of the Code of Iowa, which states in part: 'A separate fund is hereby created and designated as the 'marine fuel tax fund'. All moneys derived from the excise tax on the sale of motor fuel used in watercraft shall be deposited in the marine fuel tax fund. Moneys in such fund shall be subject to appropriation by the General Assembly to the state conservation commission for use in its recreational boating program, which may include but shall not be limited to . . .'

"Also Sections 324.83 and 324.84 of the Code of Iowa provide for determining the percentage of the amount of total motor fuel tax collected which is attributable to motor fuel used in watercraft and a formula for determining the amount to be transferred to the marine fuel tax fund.

"We request your opinion as to whether or not the statutory provisions of the Code with reference to the marine fuel tax fund, particularly the provisions of Sections 324.79, 324.83 and 324.84 of the Code of Iowa are in conflict with the 1942 Amendment to the Constitution of Iowa.

"We further request your opinion on the meaning of 'total' as used in 324.84(1). Currently the Motor Vehicle Fuel Tax Division is deducting the aviation gas tax collected on account of aviation gasoline provided in 324.82

but are not deducting the refunds made to non-highway users as provided in 324.17. Should the department deduct either or both before making the computation?"

The constitutionality of the diversion of funds from the motor fuel tax fund was considered at length in a prior opinion of this office (Peterson to Tieden, State Representative, March 13, 1970 — copy enclosed) dealing specifically with the transfer of funds therefrom to the marine fuel tax fund substantially as now provided in the Code sections cited. Without restating the rationale of that opinion, we confirm the conclusion reached therein that revenues from the tax on motor fuel used for non-highway purposes are subject to the legislative process and may be diverted to non-highway funds and purposes without violating §8, Article VII, Constitution of Iowa (1942 Amendment).

The means of determining the portion of motor fuel tax collected to be credited to the marine fuel tax fund is stated in §§324.83 and 324.84, Code of Iowa, 1973, as amended by Chapter 122, §19, Acts of the 65th General Assembly, as follows:

"324.83 Study by legislative service bureau. The legislative service bureau shall conduct a study to determine the percentage of *total* motor fuel tax collected which is attributable to motor fuel used in watercraft. The percentage determined by the study shall be used by the legislature in determining the amount of motor fuel tax which shall be credited to the marine fuel tax fund. . . . (Emphasis supplied)

* * *

"324.84 Transfer to marine fuel tax fund. Pursuant to section 324.83, there shall be transferred from the motor fuel tax fund to the marine fuel tax fund a portion of moneys collected under this chapter which is attributable to motor fuel used in watercraft which portion shall be computed as follows:

1. Determine monthly the *total* amount of motor fuel tax collected under this chapter and multiply such amount by nine-tenths of one percent. (Emphasis supplied)

2. Subtract from the figure computed pursuant to subsection 1 of this section three percent of such figure for administrative costs and further subtract from such figure the amounts refunded to commercial fishermen. All moneys remaining after all claims for refund and the cost of administration have been made shall be transferred to the marine fuel tax fund."

Ballentine's Law Dictionary, Third Edition, defines "total" (when used as an adjective, as here) as meaning "Constituting the whole of a thing. Complete; absolute; utter; entire." Black's Law Dictionary, Fourth Edition, indicates essentially the same meaning.

Thus, both the study conducted by the legislative service bureau pursuant to §324.83 and the legislative determination pursuant to §324.84 as to the percentage of motor fuel tax collected which is attributable to motor fuel used in watercraft, are based upon the "total" motor fuel tax collected. The amount to be credited each month to the marine fuel tax fund involves only the arithmetic function of multiplying the total amount of motor fuel tax collected during that month under Chapter 324 by nine-tenths of one percent and, after deducting three percent for cost of administration and refunds to commercial fishermen as provided in §324.84(2), transferring that amount to the marine fuel tax fund.

Thus, neither refunds for non-highway use nor that portion of motor fuel tax collected on account of aviation gasoline may be deducted from the total amount of motor fuel tax collected in making the determination required by §324.84(1).

December 28, 1973

CITIES AND TOWNS: City Councilmen — §363C.10, Code of Iowa, 1973. A fireman who is elected to the city council should resign his prior position, upon qualification to the office, in order to serve on the council. (Blumberg to Connors, State Representative, 12-28-73) #73-12-11

Honorable John H. Connors, State Representative: We are in receipt of your opinion request of December 20, 1973, concerning a member of a municipal fire department who has been elected as a city councilman. You specifically asked:

"a. Must he resign from the fire department in order to serve? or

"b. Can he be granted a leave of absence from the fire department in order to serve?"

We find no statute which mandates a leave of absence or a resignation under this situation. Your question concerns whether there is an incompatibility between the two positions. The general rule is that when an incompatibility exists, the taking of the second position automatically vacates the prior position. *State, ex rel Crawford v. Anderson,* 1912, 155 Iowa 271, 136 N.W. 128. The cases in Iowa on incompatibility seem to concern only public officers. See, e.g., *State, ex rel Crawford v. Anderson,* supra; *State, ex rel Banker v. Bobst,* 1928, 205 Iowa 608, 218 N.W. 253; *State v. Central States Electric Company,* 1947, 238 Iowa 801, 28 N.W.2d 457; *State, ex rel LeBuhn v. White,* 1965, 257 Iowa 606.

There are five essential elements of a public officer: (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 and powers must be defined, directly or impliedly, by the legislature or through legislative authority; (4) The duties must be performed independently and without control of a superior power other than the law; and (5) The position must have some permanency and continuity, and not be only temporary and occasional. *State v. Taylor,* 1967, 260 Iowa 634, 144 N.W. 2d 289. The position of fireman does not fall within this definition. Thus, the cases on incompatibility do not appear to apply.

Section 363C.10 of the Code, 1973, provides:

"No councilman elected under the provisions of this chapter shall be appointed by the manager to any office of the city in which he is elected, or employed in any department thereof; and any councilman or manager who shall violate the provisions of this section shall be guilty of a misdemeanor. . . ."

There can be no doubt that a councilman may not be employed in another department within the city. The term "leave of absence" connotes a continuity of the employment status during a period where work remuneration and other fringe benefits are suspended. It is temporary in nature with the intent of returning, thereto. *Gibbons v. Sioux City,* 1951, 242 Iowa 160, 45 N.W.2d 842; *Goodyear Tire & Rubber Company v. Employment Security Board of Review,*

203 Kan. 279, 469 P.2d 263; *Chenault v. Otis Engineering Corporation,* 423 S.W.2d 377 (Tex. Civ. App.) Section 363C.10 contemplates no other employment with the city outside of being on the council, whereas "leave of absence" connotes employments. The two are inconsistent.

Accordingly, we are of the opinion that a fireman elected to the city council should resign from his prior position upon qualifying for office in order to serve on the council. There being an apparent inconsistency between this opinion and a prior one of November 29, 1973, Haesemeyer to Kelly, the latter is thereby withdrawn.

December 31, 1973

INSURANCE: Reserves. §508.5. Surplus note agreement plan substantially complies with §508.5, Code of Iowa, 1973, where advance for the reserves of a stock life insurance company will be repaid only out of surplus earnings and with approval of the Commissioner of Insurance. (Nolan to Huff, Commissioner, Insurance Department, 12-31-73) #73-12-12

Honorable William H. Huff, III, Commissioner of Insurance: This is written in response to your request for an opinion on the question of whether stock companies may use guaranty fund certificates as a method of obtaining funds for surplus. Your letter states as follows:

"A question has arisen as to the use of guaranty fund certificates by stock insurance companies whereby the parent in lieu of purchasing more capital stock of the subsidiary or donating money to the surplus of the subsidiary, takes certificates in which both the principal and interest are payable out of the earnings of the subsidiary, and usually only upon approval of the Commissioner. Sections 515.19 and 515.20 statutorily allow the use of guaranty fund certificates by *mutual* companies, but the law is silent as to the utilization of guaranty fund certificates by stock insurance companies.

"The legal question raised by this issue is whether, by legislative action pertaining to use of guaranty fund certificates only by mutual companies (515.19 and 515.20), the legislature, by inaction relative to stock companies, has precluded this method of securing funds for additional surplus by stock insurance companies."

Under the provisions of §515.10, Code of Iowa, 1973, a stock casualty insurance company must have a surplus of at least $300,000 "in cash or invested in securities authorized by law". The investments authorized by law are those securities enumerated in §515.35 and no other. Life insurance companies under §508.5 are required to have at least $350, in paid up capital stock and a minimum of $400,000 surplus "paid in cash or invested as provided by law."

As I understand the suggested plan, the parent company will advance cash to be invested pursuant to §511.8 by the subsidiary stock life insurance company.

The plan in question here contemplates the use of a restricted surplus note to evidence the indebtedness to the parent company for the cash advance. A stock insurance company which is not prohibited by law from doing so may make a valid promissory note. 44 C.J.S. Insurance 100. The requirement that legal reserves consist of unimpaired capital is widely recognized. *Lloyd's America v. Julian,* 1938, 179 So. 524, 235 Ala. 465. To the extent that the cash advanced is available at all times for which regular policy reserves are needed

it may be considered "unimpaired". See *Leggett v. Missouri State Life Insurance Co.*, 1961, 342 S.W.2d 833.

It is well settled that policy reserves are the life blood of any legal reserve life insurance company. In the absence of a statute or contract provision giving the policyholder a right to the reserve, the reserve belongs to the company. 44 C.J.S. Ins. §102. A comparison of the sources of "reserves" of stock and mutual companies indicates that both are subject to the same legal safeguards and are carried on the balance sheets of both kinds of companies in the same way. *Atlantic Life Ins. Co. v. Moncure,* D.C. Va. 35 F.2d 360, 362, affd. 44 F.2d 167; cent. den. 51 S.Ct. 346, 283 U.S. 823, 75 L.Ed. 1438.

Under the surplus note agreement the sums advanced and interest thereon are to be repaid only out of surplus earnings (similar to the earnings of a guaranty fund) and then only upon the written approval of the Commissioner of Insurance of the State of Iowa. It is our opinion that the plan substantially complies with the requirements of §508.5 and may be approved.

January 2, 1974

CRIMINAL LAW: Offenses connected with unlawful occupation of a public building. (Ahrens to Larson, Commissioner, Department of Public Safety, 1-2-74) #74-1-1

Mr. Charles W. Larson, Commissioner, Department of Public Safety: In your letter of December 12, 1973, you asked:

"What statutes might be violated by the unauthorized occupation of a public building?"

"Unauthorized occupation" of a building may involve many different types of offenses against persons, property, and the public peace. This opinion lists the possible offenses alphabetically by subject to help reference to them and add specificity to the charges. For unauthorized occupation of public buildings in the city of Des Moines, the Municipal Code sections applicable are included in this opinion. For such occupations in other cities and towns in Iowa the municipal ordinances of the locality would have to be consulted.

ASSEMBLY — *Disorderly:* Sec. 32.4, Disorderly assembly. It shall be unlawful for three or more persons to assemble together for the purpose of or with the intent to injure or use unlawful force or violence against any person or property of individuals or to damage or destroy in any manner any public or private buildings or other property or disturb the public peace or quiet or to intimidate or wrongfully restrain or prevent any person from doing any lawful act. City of Des Moines.

ASSEMBLY — *Unlawful:* 743.1, Unlawful assembly. When three or more persons in a violent or tumultuous manner assemble together to do an unlawful act, or, when together, attempt to do an act, whether lawful or unlawful, in any unlawful, violent, or tumultuous manner, to the disturbance of others, they are guilty of an unlawful assembly, and shall be imprisoned in the county jail not more than thirty days, or be fined not exceeding one hundred dollars. "1973 Code of Iowa"

DEFACING — *Notices:* 714.20, Defacing or destroying proclamations or notices. If any person intentionally deface (obliterate, tear down, or destroy in

whole or in part any transcript or extract from or of any law of the United States or of this state, or any proclamation, advertisement, or notification, set up at any place within this state by authority of law or by order of any court, during the time for which the same is to remain set up, he shall be fined in a sum not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. "1973 Code of Iowa"

DISPERSE — *Refusal to:* Sec. 32-4.03., Command to leave or disperse. It shall be unlawful for any person in the near vicinity of a disorderly assembly or a riot, whether an active participant or not, and who has been commanded by any law enforcement officer to leave the vicinity or disperse, or fail or refuse to do so without justifiable cause. City of Des Moines.

DISTURBANCE — *Meetings and Assemblies:* 744.2, Disturbing congregations or other assemblies. If any person willfully disturb any assembly of persons met for religious worship by profane discourse or rude and indecent behavior, or by making a noise, either within the place of worship or so near as to disturb the order and solemnity of the assembly, or if any person willfully disturb or interrupt any school, school meeting, teachers institute, lyceum, literary society, or other lawful assembly of persons, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars. "1973 Code of Iowa"

DISTURBANCE — *Peace:* 744.1, Disturbance of Peace. If any person make or excite any disturbance in a tavern, store, or grocery, or at any election or public meeting, or other place where the citizens are peaceably and lawfully assembled, he shall be fined not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding thirty days. "1973 Code of Iowa"

DISTURBANCE — *Peace:* Sec. 32-6. Disturbing peace of quiet. It shall be unlawful for any person to disturb or aid in disturbing the peace, quiet or good order of, or to disrupt, or to aid in disrupting, any person, or assembly, place or meeting, public or private, by an act of violence or by any act likely to produce violence or engaging in fighting, threatening or tumultuous behavior, or by making any unreasonably loud noise, or by addressing abusive language or threats to any person present which creates a clear and present danger of violence. Nothing herein contained shall be held to prohibit peaceful picketing, public speaking, the ordinary conduct of a legitimate business, or other lawful expressions of opinion not in contravention of other laws. City of Des Moines.

DISTURBANCE — *Profanity:* 728.1, Using blasphemous or obscene language. If any person publicly use blasphemous or obscene language, to the disturbance of the public peace and quet, he shall be imprisoned in the county jail not exceeding thirty days, or be fined not exceeding one hundred dollars. "1973 Code of Iowa"

INDECENT EXPOSURE: Sec. 32-20. Indecency-dress or behavior. No person shall appear in any public place in a state of nudity, or in an indecent or lewd dress, nor shall any person make any indecent exposure of his person, or be guilty of any lewd or indecent act or behavior. (Code 1942, §106-13; Code 1954, §32-20.) City of Des Moines.

INJURY — *Buildings:* 714.1, Malicious injury to buildings and fixtures. If any person maliciously injure, deface, or destroy any building or fixture attached thereto, or willfully and maliciously destroy, injure, or secrete any

goods, chattels, or valuable papers of another, he shall be imprisoned in the penitentiary not more than five years, or shall be imprisoned in the county jail not more than one year, or be fined not exceeding five hundred dollars, and be liable to the party injured in a sum equal to three times the value of the property so destroyed or injured. "1973 Code of Iowa"

INJURY — *Gas, Waterlines:* Sec. 32-24. Same — Lamps, gas or water line, railings or fences. No person shall cut or in other manner intentionally damage any awning, lamppost, lamps, gas or water line, railing, fence or other property not owned by him. City of Des Moines.

INJURY — *Inhabitants of Buildings.* 714.2, Injuring or terrorizing inhabitants of dwelling. If any person, with intent to injure or terrorize the inhabitants of any dwelling house, or other building used as a dwelling, or any inhabited boat, vessel, or rate, or with intent to injure or deface any such structure, throws at, against, or into the same any brick, stone, billet of wood, or other missile, or shoots thereat, with such intent, any gun, pistol, or revolver, he shall be imprisoned in the penitentiary not more than three years, or in the county jail not more than one year, or be fined not more than one thousand dollars. "1973 Code of Iowa"

INJURY — *Library:* 714.16, Injury to public library books or property. Any person who shall willfully, maliciously, or wantonly tear, deface, mutilate, injure, or destroy, in whole or in part, any newspaper, periodical, books, map, pamphlet chart, picture, or other property belonging to any public library or reading room shall be deemed guilty of a misdemeanor and shall be fined not more than one hundred dollars, or imprisoned not more than thirty days. "1973 Code of Iowa"

INJURY — *Monuments:* 714.17, Injuries to monuments of state boundaries. If any person willfully dig up, pull down, break, or destroy, or in any other manner injure or remove, any of the cast-iron pillars or other evidences planted and fixed in and along any part of the boundaries of this state, he shall be fined not less than fifty nor more than two hundred dollars, or be imprisoned in the penitentiary for a term of not less than six months, or both. "1973 Code of Iowa"

INJURY — *Property (generally):* Sec. 32-23. Injuring property—generally. No person shall intentionally deface, injure, destroy or assist in defacing, injuring or destroying any public or private property, real or personal, without the consent of the owner. City of Des Moines. See, §714.1 "1973 Code of Iowa"

INJURY — *Signs:* 714.19, Injury to boundary marks, milestones, and signboards. If any person maliciously take down, injure, or destroy any monument erected or any tree marked as a boundary of any tract of land or city or town lot; or destroy, deface, or alter the marks of any such monument or tree made for the purpose of designating such boundary; or injure or deface any milestone, post or guideboard erected on any public way; or remove, deface, or injure any signboard; or break or remove any lamp or lamppost or extinguish any lamp on any bridge, way, street, or passage, he shall be fined not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding one year, or both, at the discretion of the court. "1973 Code of Iowa"

MOVEMENT — *Surveying Devices:* Sec. 32-25. Same — Grade stakes, etc. It shall be unlawful to remove, break or in any way injure any grade stake,

stone or other mark or monument set by or under the authority of the city engineer, or any of his assistants, to designate grades, corners, lines or bench marks, or to in any manner erase or deface any letters or figures thereon. City of Des Moines.

INJURY — *Tools of City Employees:* Sec. 32.26. Same — Tools, instruments, animals, etc., used by city or employees. It shall be unlawful for any person negligently or willfully to interfere with, injure, deface or remove any implement, tools, receptacles, utensils or animals while being used by the city, by any of its agents or employees in the service of the city. City of Des Moines.

INJURY — *Trees, etc.:* 714.8, Injury to fruit or ornamental tree. If any person maliciously or mischievously bruise, break, pull up, carry away, cut down, injure, destroy, or sever from the land any fruit, ornamental, or other tree, vine, or shrub standing or growing on the land of another for ornament or use, he shall upon conviction thereof be punished by imprisonment in the county jail not more than one year, or by fine of not more than five hundred dollars, or both. "1973 Code of Iowa"

INJURY — *Vehicles:* 714.11, Injury to vehicle or harness. If any person maliciously, willfully and feloniously cut, break, sever or unfasten any tug, strap, line or other part of the harness attached to any horse or team, or maliciously and feloniously remove, unfasten, or injure any part of any vehicle he shall be imprisoned in the penitentiary not to exceed one year or be imprisoned in the jail not to exceed six months, or be fined not to exceed five hundred dollars. "1973 Code of Iowa"

INTIMIDATION — 746.3, Intimidation or other misconduct. Any tramp who shall wantonly or maliciously, by means of violence, threats or otherwise, put in fear any inhabitant of this state, or shall enter any public building, or any house, barn, or outbuilding belonging to another, with intent to commit an unlawful act, or shall carry any firearm or other dangerous weapon, or indecently expose his person, or be found drunk and disorderly, or shall commit any offense against the laws of the state for which no greater punishment is provided, shall be guilty of a misdemeanor. "1973 Code of Iowa"

LOITERING — Sec. 32-28. Loafing, loitering and annoying persons. It shall be unlawful for any person to congregate, stand, loaf or loiter upon any sidewalk, bridge or crossing so as to obstruct the same, hinder, prevent or annoy persons passing or attempting or desiring to pass thereon; or to congregate, stand, loaf or loiter in or in front of any hall, lobby, doorway, passage or entrance of any public building, theatre, hotel, eating house, lodging house, office building, store, shop, office or factory or other like building so as to obstruct the same or hinger, prevent or annoy persons walking along or into or out of the same or attempting or desiring to do so; or by making remarks, gestures, noises, signs and the like to disturb, annoy or insult any person being upon or passing along any streeet, sidewalk, bridge or crossing or along, into or out of the hall, lobby, passage or entrance of any building, store, shop or factory or like building or any trackless trolley; or by setting upon or leaning upon or against any railing or other barrier about any area, entrance, basement or window to obstruct the light or prevent passage of persons or annoy the tenants or persons occupying the building to which such area, entrance, basement or window belongs. City of Des Moines.

LOITERING — *Public Property:* Sec. 32-28.01. Same — On public property. It shall be unlawful for persons to collect, assemble or group together and after being so collected, assembled or grouped together, to stand, or loiter, on any sidewalk, parking or any street corner, or at any other place in the city to the annoynance, hindrance or obstruction to free passage of any person or persons passing on or along any sidewalk or street in said city. City of Des Moines.

LOITERING — *Government Buildings:* Sec. 32-28.02. Same — Government buildings. It shall be unlawful for any person to congregate, stand, loaf or loiter in or in front of or around any school or other public building occupied in whole or in part by any governmental subdivision, including any agency, body, department, office, board of commission and the like thereof, so as to obstruct, hinder, prevent or disrupt, in any manner, the normal functions carried on therein or thereat, or so as to obstruct, hinder, prevent, disturb, in any manner, persons passing by or into or out of the same or attempting or desiring to do so. Nothing herein contained shall be held to prohibit peaceful picketing, public speaking, the ordinary conduct of a legitimate business, or other lawful expressions of opinion not in contravention of other laws. City of Des Moines.

OCCUPATION — *Building:* Sec. 32-32. Occupying building unlawfully. It shall be unlawful for any person to move into a room, house or building without authority or permission from the owner or his authorized agent. City of Des Moines.

OCCUPATION — *Nighttime:* 746.4, Entering unoccupied public building. If any tramp or vagrant, without permission, enter any schoolhouse or other public building in the nighttime, when the same is not occupied by another or others having proper authority to be there, or having entered the same in the daytime, remain in the same at night when not occupied as aforesaid, or at any time commit any nuisance, use, misuse, destroy, or partially destroy any private or public property therein, he shall be imprisoned in the penitentiary not more than three years, or be fined not exceeding one hundred dollars and imprisoned in the county jail not more than one year. "1973 Code of Iowa"

PANHANDLERS, etc.,: 746.2, "Tramp" defined. Any male person sixteen years of age or over, physically able to perform manual labor, who is wandering about, practicing common begging, or having no visible calling or business to maintain himself, and is unable to show reasonable efforts in good faith to secure employment, is a tramp, and any person convicted of being a tramp shall be punished by imprisonment at hard labor in the county jail not exceeding ten days, or by imprisonment in such jail in solitary confinement not exceeding five days. "1973 Code of Iowa"

REMOVAL — *Signs:* 714.19, Removal of safeguards or danger signals. Whoever shall, without the consent of the person in control thereof, willfully remove, throw down, destroy, or carry away from any highway, street, alley, avenue, or bridge, any lamp, obstruction, guard, or other article or things, or extinguish any lamp or other light, erected or placed thereon for the purpose of guarding or enclosing unsafe or dangerous places in said highway, street, alley, avenue, or bridge, shall be punished by a fine or not more than $500 or by imprisonment in the county jail not exceeding 1 year. "1973 Code of Iowa"

RIOT — *Definitions* 743.2, "Riot" defined. When three or more persons together and in a violent or tumultuous manner commit an unlawful act, or together do a lawful act in an unlawful, violent, or tumultuous manner, to the disturbance of others, they are guilty of a riot, and shall be punished as is provided in section 743.1, "1973 Code of Iowa". Sec. 32-4.01. "Riot" defined. When three or more persons together commit an unlawful act and injure or use force or violence against any person or property of individuals or damage or destroy in any manner any public or private building or other property or disturb the public peace or quiet or intimidate or wrongfully restrain or prevent any person from doing any lawful act, they are guilty of a riot and shall also be answerable to any person injured or the owner or person having control of any property damaged or destroyed to the full amount of the damages by him sustained. City of Des Moines.

RIOT — *Injury to Person, Property:* 743.9, Riotous conduct — injury to person or property. If any person or persons, unlawfully or riotously assembled, pull down, injure, or destroy, or begin to pull down, injure, or destroy, any dwelling house or other building; or destroy or attempt to injure or destroy any boat or vessel; or perpetrate any premeditated injury on the person of another, not being a felony, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not more than one year, and shall also be answerable to any person injured to the full amount of the damages by him sustained. "1973 Code of Iowa"

SOUND EQUIPMENT: Sec. 32-35. Regulation of sound amplifying equipment.

A. Sound Equipment.

No person, firm or corporation shall use, operate or cause to be used or operated, a radio, phonograph, loud speaker, amplifier, sound truck, or other device for producing, reproducing, or amplifying sounds on public streets or in any building or on any premises in the city whereby the sound therefrom be plainly audible upon the public streets or places of the city unless such person, firm, or corporation shall first obtain from the department of building a permit to operate such equipment or device. Provided, however, issuance of a parade permit by the proper authority shall relieve the recipient from compliance with the provisions of this section so long as the conditions of said permit are observed.

To obtain a permit as required by this section, the applicant must first file an application therefor in writing on a form provided by the department of building for that purpose. Such application shall be accompanied by a permit fee of five dollars and shall contain the following information:

1. Name and home address of the applicant.
2. Business address of applicant.
3. Names and addresses of all persons who will use or operate the sound equipment.
4. The purpose for which the sound equipment will be used.
5. A statement as to the section of sections of the city or the address if a single location, where the sound equipment will be used, and the zoning of such sections or address.

6. The proposed hours of operation of the sound equipment.

7. Number of days of proposed operation of the sound equipment, not to exceed thirty days.

8. A general description of the sound equipment to be used and, if located on a truck, the license number of that truck.

9. The maximum sound producing power of the sound equipment to be used. This information should include the following:

a. The wattage to be used.

b. The approximate maximum distance which the sound will be thrown from its source in audible form.

B. Application standards.

For the purpose of determining whether an applicant shall be issued a permit as set out in this section, the following criteria must be met:

1. No sound shall be permitted other than music or human speech.

2. No such sound equipment shall be permitted to operate between the hours of 2:00 o'clock P.M. and 5:00 o'clock P.M., and between the hours of 9:00 o'clock P.M. and 11:00 o'clock A.M., except for clock carillons which ring the hours of the day.

3. No such sound equipment, exclusive of church carillons, shall be permitted to operate in residential districts except when such equipment and the sound emitted therefrom is for public health and safety purposes.

4. No such sound equipment, shall be permitted to emit human speech or music which is profane, indecent or slanderous.

5. No such sound equipment shall be permitted to emit sounds which are audible for a distance more than one hundred feet therefrom, nor shall the sounds so emitted be unreasonably loud, raucous, disturbing or a nuisance to people within the area of audibility. This provision shall not apply to clock carillons.

6. No sound amplifying equipment shall be operated in excess of fifteen watts of power in the last stage of amplification.

7. No such sound equipment which is mounted on a sound truck shall be operated at a speed of less than ten miles per hour except when such trucks are impeded or stopped by traffic. When such truck is stopped by traffic the sound equipment mounted on that truck shall be operated for no longer than one minute for each stop.

C. Commercial Advertising.

No sound amplifying equipment shall be permitted to be used on public streets and places, or in any building or on any premises in the city whereby the sound therefrom may be heard upon the public streets or public places, for commercial advertising purposes or for the purpose of attracting the attention of the public to any building or structure. City of Des Moines.

STINK BOMBS: Sec. 32-39. Stench bombs, sneezing powders, tear gas, etc. — Placing in public assembly. It shall be unlawful for any person to place in

any theatre, school or public assembly of persons or public place any stench bombs, sneezing powders or tear gas or any substance obnoxious to the smell or any substance intended to create sneezing, tears or any bodily discomfort. §732.10 "1973 Code of Iowa"

Sec. 32-40. Same — Sale: possession. It shall be unlawful ro any person to sell, keep for sale or have in his possession any substance or material such as stench bombs, sneezing powder or tear gas, or any substance obnoxious or intended to create sneezing, tears or any bodily discomfort without permission of the police department to properly authorized agencies. City of Des Moines.

THREATS — *Holding Building Until Demands Met:* 720.1, Malicious threats to extort. If any person, either verbally or by any written or printed communication, maliciously threaten to accuse another of a crime or offense, or to do any injury to the person or property of another, with intent to extort any money or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall be imprisoned in the penitentiary not more than five years or be fined not exceeding one thousand dollars, or be imprisoned in the county jail not exceeding one year, or both such fine and imprisonment. "1973 Code of Iowa"

TRESPASS — *Criminal:* 729.1, Definitions.

1. The term "property" shall include any land, dwelling, building, conveyance, vehicle, or other temporary or permanent structure whether publicly or privately owned.

2. The term "trespass" shall mean one or more of the following acts:

a. Entering upon or in property without legal justification or without the implied or actual permission of the owner, lessee, or person in lawful possession with the intent to commit a public offense or to use, remove therefrom, alter, damage, harass, or place thereon or therein anything animate or inanimate, without the implied or actual permission of the owner, lessee, or person in lawful possession.

b. Entering or remaining upon or in property without legal justification after being notified or requested to abstain from entering or to remove or vacate therefrom by the owner, lessee, or person in lawful possession, or the agent or employee of the owner, lessee, or person in lawful possession, or by any peace officer, magistrate, or public employee whose duty it is to supervise the use or maintenance of the property.

c. Entering upon or in property for the purpose or with the effect of unduly interfering with the lawful use of the property by others.

d. Being upon or in property and using, removing therefrom, altering, damaging, harassing, or placing thereon or therein anything animate or inanimate, without the implied or actual permission of the owner, lessee, or person in lawful possession. "1973 Code of Iowa"

VAGRANTS: 746.1, "Vagrants" defined. The following persons are vagrants:

1. All common prostitutes and keepers of bawdyhouses or houses for the resort of common prostitutes.

2. All habitual drunkards, gamesters, or other disorderly persons.

3. All persons wandering about and lodging in barns, outbuildings, tents, wagons, or other vehicles, and having no visible calling or business to maintain themselves.

4. All persons begging in public places, or from house to house, or inducing children or others to do so.

5. All persons representing themselves as collectors of alms for charitable institutions under any false or fraudulent pretenses.

6. All persons playing or betting in any street or public or open place at any game, or pretended game, of chance, or at or with any table or other instrument of gaming. "1973 Code of Iowa"

WEAPONS: Sec. 32-43. Same — Singshots, blowguns, etc. No person shall use any sling or slingshot of any kind, blowgun or similar device, or throw any stone, stick or other substance in such a manner as to hit, injure or endanger any person, window or other property.

Sec. 32-44. Same — Concealed. It shall be unlawful for any person to carry under his clothes or concealed about his person, any pistol or other firearms, brass knuckles or knuckles of lead, brass or other metal or material, or any sand bag, air gun of any description, dagger, Bowie knife, dirk knife, or other knife or instrument for cutting, stabbing or striking, or other dangerous or deadly weapon, instrument or device; provided, that this section shall not be construed to prohibit any officer of the United States or of any state, any person having an authorized permit or any peace officer from wearing or carrying such weapons as may be convenient, necessary and proper for the discharge of his official duties. City of Des Moines. See §695.2 "1973 Code of Iowa"

Illegal occupations can create complicated factual situations. This list is a reference which will enable law enforcement authorities to focus on conduct which is clearly illegal and enable them to make arrests, if they consider them to be warranted, with precision.

January 2, 1974

GENERAL ASSEMBLY: Legislative Council—Powers. Iowa Constitution, Article III, §9; §§2.49-2.51, Code of Iowa, 1973; Senate Rule 23, 1973-74. The legislative council may arrange for the installation of voting machines in the Senate Chamber; such action is part of the council's duty to prepare and renovate the physical facilities to be used by the legislature and therefor it does not infringe upon the right of the Senate to determine its own rules of procedure. (Haesemeyer to Gallagher, State Senator, 1-2-74) #74-1-2

Honorable James V. Gallagher, State Senator: In your letter of December 21, 1973, you request an Attorney General's opinion regarding the decision by the Legislative Council to install voting machine equipment in the Senate Chamber; you specifically ask whether such decision violates the right of the Senate to determine its own rules of procedure.

Iowa Constitution, Article III, §9, provides that:

"Each house shall . . . determine its rules of proceedings . . . ."

and the present Senate rule 23 states:

"On voice vote, the question shall be distinctly put in this form: "Those in favor of (the question) say "aye". Those opposed to (the question) say "no".

Thus it could be adduced that the Senate has chosen to take its votes viva voce and that the council may not make a decision in contravention of this choice.

However, it could more logically be said that the voice vote was provided for simply because it was the most accurate and expeditious means available of polling the vote, and that it does not abrogate the Senate's discretionary powers to make available a yet more efficient means. We do not infer that the houses may to any extent have abridged in their right to determine their respective rules of procedure. We merely recognize the distinction between procedural matters which are a substantive part of the legislative process. (e.g. the form in which a question must be presented for vote, or the allowable responses to the question) and those matters which are merely the mechanics of the process (e.g. the manner in which the vote is cast, or the manner of tabulating the vote). Surely a legislative pronouncement is not required to install computer tabulation in favor of manual addition.

That the power to make such implementations in the interest of legislative efficiency is inherent in the legislative council is seen by §2.51, Code of Iowa, 1973, as amended by Chapter 121, Acts, 65th G.A., 1973: "XEROX".

Accordingly, it is our opinion that the legislative council may contract to install equipment for polling the vote since such action is intended to advantageously expedite a piece of legislative mechanics and therefore does not abrogate the Senate's right to decide all substantive procedural matters.

January 2, 1973

STATE OFFICERS AND DEPARTMENTS: Commission for the Blind, food service operations. §§601C.2 and 601C.3, Code of Iowa, 1973. The Waterloo Police Department may not operate cigarette, soft drink and candy vending machines in the city hall without first attempting in good faith to make an agreement with the Commission for the Blind to operate such food service. (Haesemeyer to Jernigan, Director, Iowa Commission for the Blind, 1-2-74) #74-1-3

Kenneth Jernigan, Director, Iowa Commission for the Blind: Reference is made to your letter of December 20, 1973, in which you request an opinion of the Attorney General and state:

"In 1969 the General Assembly of Iowa enacted legislation giving the Commission for the Blind the right to operate 'food service' in 'public buildings.' The statute defines 'food service' as including 'restaurant, cafeteria, snack bar, vending machines for food and beverages, and goods and services customarily offered in connection with any of the foregoing.' A blind person working under the Commission's 'food service' program has vending machines in the Waterloo City Hall. It has come to our attention that the Waterloo Police Department (also located in the City Hall) has installed vending machines for soft drinks, candy, and cigarettes. We wish to know whether this action on the part of the Waterloo Police Department violates the State law. The Waterloo City Attorney, Mr. Lybbert, has written a letter (copy attached) giving an opinion that the action of the Police Department is proper. We believe this opinion is erroneous.

"You will observe that Mr. Lybbert says: 'It is submitted that the statute prohibits governmental agencies granting a contract or concession to "any other party". Since the Police Department itself is operating the service in question and have not engaged any other party or concessionaire, there is a question as to whether or not the statute applies in this instance at all.'

"We note that Chapter 601C.3 of the 1973 Code of Iowa states: 'A governmental agency which proposes to operate or continue a food service in a public office building shall first attempt in good faith to make an agreement for the commission for the blind to operate the food service without payment of rent.' We have assumed that this means that a governmental agency itself may not operate a food service unless the Commission for the Blind has been consulted and either cannot or will not perform the work. If the statute were to be interpreted to apply only to contracts by government agencies with outside parties, much of its effect would be nullified. Therefore, our first question to you is whether the statute applies only to a food service operated by concessionaires having a contract with a government agency or (as we have assumed) it also applies to a food service operated by a government agency itself.

"Mr. Lybbert justifies the operation of the candy bar machine on the grounds that it is a continuation of the practice of selling candy bars out of a drawer prior to the enactment of the statute. The Commission for the Blind has always felt that the 'grandfather clause' applied only to contracts between government agencies and concessionaires, and that it did not cover any operation of a food service by a government agency itself. Is our interpretation correct?

"Mr. Lybbert further says: 'Cigarettes are not covered by the statute.' Since cigarettes would fall into the category of 'goods and services customarily offered in connection with' food service operation, we believe they are covered by the statute. Are we correct in this assumption?

"Mr. Lybbert says: 'The pop machine was only put in after a good faith determination that the Commission machine was not serviced during the night and presented a security and convenience problem.' To the best of my belief and knowledge the Waterloo Police Department has never indicated to the blind operator or to the Commission for the Blind any problem or dissatisfaction with our vending machine operation. Surely the requirement that they shall 'first attempt in good faith to make an agreement' with the Commission for the Blind would require that the Police Department discuss the matter with us. We are prepared to install and service machines at any reasonable place and time in the building upon request. What is meant by the requirement that a government agency 'shall first attempt in good faith to make an agreement for the Commission for the Blind to operate the food service?'

"Specifically, we would like to know whether the actions of the Waterloo Police Department described in Mr. Lybbert's letter violate the provisions of 601C.3 of the Iowa Code. We shall await your answers to these questions and shall be guided accordingly."

We have reviewed your letter, the opinion of the Waterloo City Attorney and the applicable law and have concluded that your contentions are correct.

Sections 601C.2 and 601C.3, Code of Iowa, 1973, provide:

"1. 'Public office building' means the state capitol, all county courthouses, all city or town halls, and all buildings used primarily for governmental offices of the state or any county, city, or town. It does not include public schools or buildings at institutions of the state board of regents or the state department of social services.

"2. 'Food service' includes restaurant, cafeteria, snack bar, vending machines for food and beverages, and goods and services customarily offered in connection with any of the foregoing. It does not include goods and services offered by a veteran's newsstand under section 19.16 or section 332.5.

"A governmental agency which proposes to operate or continue a food service in a public office building shall first attempt in good faith to make an agreement for the commission for the blind to operate the food service without payment of rent. The governmental agency shall not offer or grant to any other party a contract or concession to operate such food service unless the governmental agency determines in good faith that the commission for the blind is not willing to or cannot satisfactorily provide such food service. This chapter shall not impair any valid contract existing on July 1, 1969, and shall not preclude renegotiation of such contract on the same terms and with the same parties."

Turning to your first question, it is our opinion that Chapter 601C applies not only to food service operations operated by concessionaires having a contract with a government agency, but also to such operations carried on by the government agency itself. This is evident from the plain language of the first sentence of §601C.3. Moreover, we agree with your contention that the grandfather clause contained in the last sentence of §601C.3 applies only to contracts between concessionaires and government agencies in force on July 1, 1969, and not to food service operations being conducted on that date by government agencies on their own behalf. The language used is "shall not impair any valid contract existing on July 1, 1969". Plainly, if there is no contract the provision is inapplicable.

We must respectfully disagree with the Waterloo City Attorney's contention that cigarettes are not covered by the statute. Section 601C.2 (2) includes within the definition of "food service" goods and services customarily offered in connection with restaurant, cafeteria, snack bar and vending machines for food and beverages. It would be a rare restaurant or snack bar which did not offer cigarettes for sale.

Turning to your last question, we do not think it could ever be argued that there was an attempt in good faith to make an agreement for the Commission for the Blind to operate a food service establishment where the Commission was never even approached by the government agency.

January 3, 1974

CONSERVATION: Tile outlets into road ditches. §§314.7, 465.23, Code of Iowa, 1973. Owners of land may drain the same in the general course of natural drainage by constructing tile lines and may connect same to any drain or ditch along or across any public highway, such connections to be made in accordance with specifications furnished by the highway authorities having jurisdiction thereof. (Peterson to Greiner, Director, Department of Soil Conservation, 1-3-74) #74-1-4

Mr. William H. Greiner, Director, Department of Soil Conservation: Receipt is hereby acknowledged of your letter of September 26, 1973, where in you request the opinion of the Attorney General with respect to tile lines outletting into road ditches.

Your letter with enclosure further states that a county board of supervisors has issued an order to the effect that no tile lines are to outlet into county road ditches on the basis that applicable statutes relating thereto authorize such outlets with respect to "natural surface water", not including "sub-surface" or tile water.

Relevant statutes are Sections 465.22, 465.23 and 314.7, Code of Iowa, 1973, which, in pertinent part, state:

"465.22 Drainage in course of natural drainage-reconstruction-damages. Owners of land may drain the same in the general course of natural drainage by constructing or reconstructing open or covered drains, discharging the same in any natural water-course or depression whereby the water will be carried into some other natural water-course. . . .

"465.23 Drainage connection with highway when the course of natural drainage of any land runs to a public highway, the owner of such land shall have the right to enter upon such highway for the purpose of connecting his drain or ditch with any drain constructed along or across the said highway, but in making such connections, he shall do so in accordance with specifications furnished by the highway, authorities having jurisdiction thereof, which specifications shall be furnished to him on application. . . .

"314.7 Trees-ingress or egress-drainage. Officers, employees and contractors in charge of improvement or maintenance work on any highway shall not . . . turn the natural drainage of the surface water to the injury of adjoining owners. It shall be their duty to use strict diligence in draining the surface water from the public road in its natural channel."

The Iowa rule with respect to surface waters is that the owner of the upper or dominant estate has a legal and natural easement in the lower or servient estate for the drainage of surface waters, that the natural flow or passage of the waters cannot be interrupted or prevented by the servient owner to the detriment or injury of the estate of the dominant proprietor, and that the owner of the dominant estate may cast an additional quantity of surface waters upon the servient estate; if in so doing, he does not thereby do substantial damage to the servient estate. See *Witthauer v. City of Council Bluffs,* 1965, 257 Iowa 493, 133 N.W.2d 71, and authorities cited therein.

With respect to the rule enunciated above, there is no difference between surface water and water collected by tiling, and the rule also applies to the latter. The Iowa Supreme Court so stated in *Vannest v. Fleming,* 1890, 79 Iowa 638, 44 N.W. 906, in the following terms:

"It is insisted that plaintiff is violating law and right of defendant by collecting the water—'underground water', it is called in defendant's pleadings—by tiles, and conducting it to defendant's land at one place, which it is claimed, is not permitted by the law. It will be readily seen, upon a moment's reflection, by one having but a limited acquaintance with the subject, that upon the consideration of the facts developed in the evidence, that there is no difference between underground water, collected by tiling, and surface water. The first is water which would run off in a ditch, were one dug, without entering the earth. But it is permitted to enter the earth, and is then, by natural means, attracted and conducted to the tiles, and through them flows away."

We are, therefore, of the opinion that owners of land may drain the same in the general course of natural drainage by constructing tile lines and may connect same to any drain or ditch along or across any public highway in the natural course of drainage, such connections to be made in accordance with specifications furnished by the highway authorities having jurisdiction thereof.

January 3, 1974

GOVERNOR, EXECUTIVE POWERS; SPEED LIMITS; TRAFFIC REGULATIONS: Art. III, §1, Constitution of Iowa and §7.15, Code of Iowa, 1973. The legislative power of the state is vested in the General Assembly and the Governor has no power to amend the speed limit laws under §7.15 of the Code. (Turner to Governor Ray, 1-3-74) #74-1-5

The Honorable Robert D. Ray, Governor of the State of Iowa: You have requested an opinion of the Attorney General as to whether §7.15, Code of Iowa, 1973, authorizes you, as Governor, to impose a 55 mph speed limit on Iowa interstate or four lane divided highways, in order to obtain Federal funds which are apparently going to be withheld under a new Act of Congress, signed into law by the President, yesterday, unless that speed limit is adopted in every state within sixty days.

Section 7.15 provides:

"7.15 Federal funds for highway safety. The governor, in addition in other duties and responsibilities conferred upon him by the Constitution and laws of this state, is hereby empowered to contract for the benefits available to this state under any Act of Congress for highway safety, law enforcement, or other related programs, and in so doing, to cooperate with federal and state agencies, private and public organizations, and with individuals, to effectuate the purposes of these enactments. The governor shall be responsible for and is hereby empowered to administer, either through his office or through one or more state departments or agencies designated by him or any combination of the foregoing the highway safety, law enforcement and related programs of this state and those of its political subdivisions, all in accordance with said Acts and the Constitution of the state of Iowa, in implementation thereof."

Article III, §1, Constitution of the State of Iowa, divides the powers of the government of Iowa into three separate departments, the Legislative, the Executive and the Judicial, and says that no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, "except in cases hereinafter expressly directed or permitted." The governor's legislative powers are limited to exercising the veto (Art. III, §16, as amended), convening sessions of the General Assembly on *"extra-ordinary* occasions" (Art. IV, §11), making recommendations (Art. IV, §12) and adjourning the General Assembly when the two Houses cannot agree with respect to the time of adjournment (Art. IV, §13).

Article III, §1, pertaining to the legislative department, vests the legislative power in the General Assembly and Art. IV, §9, makes it the governor's duty to faithfully execute the laws made by that department.

I am unable to find any express direction or authorization in the Iowa Constitution, or indeed in the foregoing §7.15, which would permit you to adopt a speed limit. The speed limits applicable in Iowa have been enacted into law. See §§321.285, 321.286 and 321.287, et seq. The governor has no power to amend that law under any provision I am able to find. The power to contract, as provided in §7.15, is not a delegation of power to amend the law and, indeed, if it were, it would be violative of Article III, §1 of the Iowa Constitution.

While I have not had an opportunity to see the Act of Congress in question, I am assured that it does not grant law making powers to state governors, if, indeed, it could constitutionally do so.

January 4, 1974

STATE OFFICERS: Superintendent of Banking. It is appropriate to the supervisory powers of State Superintendent of Banking to discourage state banks from placing loan application forms in retail establishments (Nolan to Dunn, State Superintendent of Banking, 1-4-74) #74-1-6

Mr. Cecil Dunn, State Superintendent of Banking: You forwarded to this office for review, a letter from a president of one of the state banks under your supervision, which raises the question of the legality under present statutes of placing home loan improvement applications or other forms of motor vehicle loan or installment loan applications in retail establishments with the understanding that the dealer would help a purchaser complete the loan application form which would then be transmitted to the bank for approval by the appropriate loan officer prior to any commitment being made by the bank.

Loan production offices for banks have been the subject of discussion for some time and it has been the view of this office that establishment of such loan production stations constitutes a violation of §524.1201, Code of Iowa, 1973, which is the statute prohibiting branch banking. In our opinion, the mere presence of a given bank's loan application forms in a retail place of business gives rise to a reasonable public concern that the dealer is, in fact, acting as an agent of the bank and that the dealer's premises is a branch of such bank. Accordingly, it is appropriate to supervisory powers of the State Superintendent of Banking to discourage such practice on the grounds that the mere appearance of branch banking is detrimental to the maintenance of public confidence in state banks (§524.102).

January 4, 1974

PHYSICIANS AND SURGEONS: Trained Nurse Midwife — §§148B.1(6), 148B.2, 148B.3, 148B.4, 152.3, Code of Iowa, 1973. A trained nurse midwife could practice her skills under the rubric of physician's assistant if the trained nurse midwife program is approved by the Department of Health and if the nurse midwife and the physician who is to supervise her obtain approval from the Board of Medical Examiners. Otherwise, he or she would have to meet the qualifications for becoming a registered nurse. (Haskins to Doderer, State Senator, 1-4-74) #74-1-7

Honorable Minnette Doderer, State Senator: You request an opinion of the Attorney General as to the legal status of the trained nurse midwife. You received a letter from Dr. W. C. Keettel of the University of Iowa Hospitals describing the position of the trained nurse midwife. According to the letter, the trained nurse midwife is a graduate nurse, usually of a degree program. She completes a special nurse midwife program. In this program, she receives two years of training in obstetrics and gynecology. Her duties are in this area. She performs her duties in a doctor's office or hospital setting under the supervision of a physician. The nurse midwife does not function as an independent medical practitioner.

It is the opinions of the Attorney General that the trained nurse midwife could be considered as a physician's assistant under Chapter 148B, 1973 Code of Iowa, if the requirements therefor are met. These requirements essentially are that the trained nurse midwife program be approved by the Department of Health (this requirement can be waived by the Board of Medical Examiners with respect to a particular applicant for physician's assistant status) and that the nurse midwife, and the physician who is to supervise him or her, obtain approval from the Board of Medical Examiners.

Section 148B.1(6), 1973 Code of Iowa, defines "physician's assistant" as follows:

"148B.1(6) 'Physician's assistant' means a person who has successfully completed an approved program or is otherwise found to be qualified as a

physician's assistant and is approved by the board to perform medical services under the supervision of one or more physicians approved by the board to supervise such assistant. The term 'supervision' shall not be construed as requiring the personal presence of a supervising physician at the place where such services are rendered except insofar as the personal presence is required by the rules and regulations adopted pursuant to this chapter or as is expressly required in this chapter."

Section 148B.4, 1973 Code of Iowa, actually authorizes the physician's assistant to perform medical services. That section states:

"148B.4 Services performed by assistants. A physician's assistant may perform medical service when such services are rendered under the supervision of a licensed physician or physicians approved by the board. A trainee may perform medical services when such services are rendered within the scope of an approved program."

Approval for physician's assistant programs is by the Iowa Department of Health. Section 148B.2, 1973 Code of Iowa, states:

"148B.2 Approved programs. The department shall issue certificates of approval for programs for the education and training of physician's assistant which meet board standards. In developing criteria for program approval, the board shall give consideration to and encourage the utilization of equivalency and proficiency testing and other mechanisms whereby full credit is given to trainees for past education and experience in health fields. The board shall adopt and publish standards to insure that such programs operate in a manner which does not endanger the health and welfare of patients who receive services within the scope of the program. The board shall review the quality of curriculum, faculty, and the facilities of such programs and shall issue certificates of approval. The board may adopt such regulations as are reasonably necessary to carry out the purposes of this chapter.

"If the board determines that a person has sufficient knowledge and experience to qualify as a physician's assistant, the board may approve an application to supervise such person as a physician's assistant without requiring the completion of an approved program."

It will be noted that even though an applicant for physician's assistant status does not complete an approved program, he or she could become a physician's assistant if the Board of Medical Examiners specifically determines that he or she has sufficient knowledge and experience. The supervising physician is required to make application to the Board of Medical Examiners. Section 148B.3, 1973 Code of Iowa, states:

"148B.3 Application. The board shall formulate guidelines for the consideration of applications by a licensed physician to supervise physician's assistants. Each application made by a physician to the board shall include all of the following:

"1. The qualifications, including related experience, possessed by the proposed physician's assistant.

"2. The professional background and specialty of the physician.

"3. A description by the physician of his practice, and the way in which the assistant is to be utilized.

"The board shall not approve an application by any one physician to supervise more than two physician's assistants at any one time.

"The board shall approve an application by a licensed physician to supervise a physician's assistant when the board finds that the proposed assistant is a graduate of an approved program, and is fully qualified by reason of experience or education to perform medical services under the supervision of a licensed physician.

"The board may modify the proposed utilization of a physician's assistant as detailed in any application and then approve the application as modified. A physician's assistant shall perform only those services for which he is qualified by training, and shall not perform any service that is not permitted to be performed by the board. Approval of an application to supervise a physician's assistant may be revoked or suspended at any time upon such grounds and pursuant to such procedure as the board shall establish by regulation."

If the trained nurse midwife does not receive approval by the Board of Medical Examiners, there would be no legal authorization for him or her to practice his or her skills unless he or she could qualify as a registered nurse under Chapter 152, 1973 Code of Iowa. Of course, a registered nurse must hold a diploma issued by a school of nursing for registered nurses approved by the Board of Nursing Examiners and pass an examination prescribed by that board. *See* Section 152.3, 1973 Code of Iowa. We express no opinion as to whether a trained nurse midwife program would, in fact, be approved by the Department of Health or whether individual trained nurse midwives and their supervising physicians would in fact receive approval from the Board of Medical Examiners. The decision to grant approval lies largely within the discretion of the Department of Health and the Board of Medical Examiners, respectively. It is merely our opinion that if approval is obtained, trained nurse midwives could practice their skills under the rubric of being physician's assistants. Otherwise, they would have to meet the qualifications for becoming registered nurses.

January 4, 1974

COUNTIES: Group Insurance. §§340.4, 509A.1, 509A.2, 509A.7, Code of Iowa, 1973. Public funds may not be used to provide benefits for persons other than public employees; however, an employee may have and pay for such additional benefits under a group plan. Temporary employees and retired persons may not be included in a group plan but such coverage must be made available to a deputy receiving maximum compensation under §340.4 (Nolan to McQuire, Howard County Attorney, 1-4-74) #74-1-8

Mr. Kevin C. McQuire, Howard County Attorney: Reference is made to your request for an attorney general's opinion on the following question relating to group insurance for the public employees as it relates to Chapter 340.4, Code of Iowa, 1973:

1. Are part time clerks with four years or more of employment experience entitled to receive full-family hospital insurance coverage under the Howard County Employees Group Plan, effective March 1, 1973?

Under §509A.1, Code of Iowa, 1973, as amended by Chapter 224, laws of the 65th G.A., 1973 session, the board of supervisors is authorized to establish plans for and procure group insurance, health or medical service for the employees of the county, and to pay for the group insurance from funds created pursuant to the provisions of §509A.2. The word "employee" for purposes of Chapter 509A is defined in §509A.7 to specifically exclude temporary or retired employees.

The distinction between a part time clerk with four years of employment and a temporary employee requires clarification. If the clerk is assigned to work a given number of hours in every pay period rather than for a specific purpose from time to time as the occasion requires, the clerk should be regarded as a regular rather than a temporary employee, regardless of the fact that the number of hours worked is less than the number of hours worked by other employees. Such clerk, being regularly employed, is entitled to the benefits of group insurance.

2. Are retired employees eligible for group insurance for public employees and if so, at whose expense?

Retired employees are excluded from coverage under the plans authorized by Chapter 509A.1 and §509A.7. However, if a person participates in a group insurance plan while employed, such person is not prevented by the language of §509A.7 from voluntarily continuing, in force, an existing contract providing him coverage at his own expense.

3. Does Chapter 509A give authority to the governing body to provide group insurance wholly paid for by the governing body to persons other than public employees, in other words, can the governing body pay for group insurance plan for the public employee and members of his family — said family benefits wholly paid for by the governing body?

Public funds may be used for the payment of premiums for the employee only. Plans may be selected which provide additional family coverage to be paid for from contributions made by the employee.

4. Section 340.4 states that a deputy may be paid an amount not to exceed 80% of the amount of the annual salary of his or her principal. If the deputy is paid 80% of the principal, can the deputy also receive wholly paid group insurance and, in addition thereto, family benefits wholly paid by the governing body for members of the deputy's family?

As stated above, the county cannot pay for family benefit coverage from county funds. However, the county may pay for coverage of a deputy as a "employee" under §509A.7. In an opinion dated April 13, 1973, this office advised that group insurance plans must be made available uniformly to deputies, as well as other employees. 1970 O.A.G. 575.

January 4, 1974

STATE DEPARTMENTS: Banking. Within the limitations of §§524.212, 524.215 and 524.217 state bank examiners may testify and produce examination records upon court order when relevant in proceeding before the FDIC or where FDIC is a party to the litigation arising out of criminal provisions of the laws of this state or the United States, to recover money on an indemnity bond or where the proceedings are instituted by the Superintendent of Banking. (Nolan to Dunn, Superintendent of Banking, 1-4-74) #74-1-9

Honorable Cecil Dunn, State Superintendent of Banking: This is written pursuant to your request for an opinion in connection with a proposed pilot plan whereby the FDIC will withdraw its practice of regular examination of fifty percent of the banks in this state which it now examines. The proposed agreement contemplates that the State Banking Department will continue to furnish the FDIC with copies of examinations made by the State Banking examiners as is presently done, pursuant to the provisions of Chapter 524.217(4), Code of Iowa, 1973.

In this connection, you ask whether the provisions of Code §524.212 and §524.215 would prohibit an examiner or any other member of the State Banking Department from appearing as a witness in court proceedings or in administrative proceedings before the FDIC, should an appropriate occasion arise?

Code §524.212 provides:

"An examiner shall not disclose to any person, other than the superintendent, deputy superintendent, and the person examined, the name of any shareholder, member, partner, owner of, or borrower from, or disclose the nature of the collateral for any loan by any state bank or persons subject to chapters 533, 533A, 533B, 536, and 536A, or any affiliate of any state bank or of any such persons, or any other information relating to the business of any state bank or of any such persons or any affiliate of any state bank or of any such persons, except when ordered to do so by a court of competent jurisdiction and then only in those instances referred to in subsections 1, 2, and 3 of section 524.215."

Section 524.215 provides in pertinent part:

"All records of the department of banking shall be public records. . .except that all papers, documents, reports, reports of examinations and other writings relating specifically to the supervision and regulation of any state bank or other person by the superintendent pursuant to the laws of this state shall not be public records and shall not be open for examination . . .

"The superintendent, deputy superintendent, assistants or examiners shall not be subpoenaed in any cause or proceeding to give testimony concerning information relating specifically to the supervision and regulation of any state bank or other person by the superintendent pursuant to those laws of this state, nor shall the records of the department of banking which relate specifically to the supervision and regulation of any such state bank or other such person be offered in evidence in any court or subject to subpoena by any party except, where relevant:

"1. In such actions or proceedings as are brought by the superintendent.

* * *

"3. In any action or proceeding which arises out of the criminal provisions of the laws of this state or the United States.

* * *

"5. In any action brought to recover money or to recover upon an indemnity bond for embezzlement, misappropriation or misuse of state bank funds."

Within the limitations outlined above, the superintendent and examiners of the state department of banking may respond to a subpoena in a proceeding before the FDIC or any court proceeding in which the FDIC is a party. Relevant examination reports in the hands of the FDIC could be introduced into evidence in the same limited cases.

It should be further observed that the proposed Memorandum of Understanding does not place upon the state department of banking any additional duties which it does not now have, nor does it constitute a plan for the joint operation of governmental services. Consequently, this agreement is not required to be in a form prescribed by Chapter 28E, Code of Iowa, 1973.

January 7, 1974

HEALTH: Local and county boards. Employment practices. §§137.6(4), 19A.1, 365, Code of Iowa, 1973. Local boards of health must utilize acceptable employment practices, i.e., those outlined in §§19A.1 or 365 of the Code. (Haesemeyer to Norland, Worth County Attorney, 1-7-74) #74-1-10

Phillip N. Norland, Worth County Attorney: In your letter of November 2, 1973, you request an Attorney General's opinion interpreting §137.6(4) of the Code. You state,

"There is concern as to whether the term 'practices' embodies the pay plan adopted by the Iowa Merit System Council, or requires the employment of a commission parallel to the Iowa Merit Commission, or whether it requires the adoption of rules, and so on."

Section 137.6(4) provides:

"Employ such employees as are necessary for the efficient discharge of its duties. Employment practices shall meet the requirements of the Iowa merit system council or any civil service provision adopted under chapter 365."

The State Merit System (§19A) and the provisions of Chapter 365 are in essence no more than statutory insurance of equitable personnel administration practices. "The general purpose of this Chapter is to establish for the state of Iowa a system of personnel administration based on the merit principles and scientific methods governing the appointment, promotion, welfare, transfer, layoff, removal and discipline of its civil employees, and other incidents of state employment. All appointments and promotions to positions in the state service shall be made solely on the basis of merit and fitness, to be ascertained by competitive examinations. . . ." §19A.1, Code of Iowa, 1973.

Accordingly, §137.6(4) goes no farther than to require that local boards of health conform either to the rules adopted by the Merit Commission under §19A.9 of the Code, or to rules governing employment practices as outlined in Chapter 365. Thus, the hiring, transfer, promotion and removal of employees must be done according to one of these two sets of rules; the local board 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 one of the two sets of rules previously mentioned.

January 7, 1974

USURY; INTEREST: Chapter 535, Code of Iowa, 1973. Legal interest for the sale of personal property (except motor vehicles) on credit in Iowa is 5% per annum and does not commence to run until six months after the last item, if purchased on an open account, unless the buyer agrees in writing to pay not more than 9% per annun (3/4ths % or .75% per month) from date of purchase or later. "Interest" means simple interest per annum on the unpaid balance and includes, "time-price differential", "service charges", "finance charges", "gross charges", "late or delayed payment charges" and "penalties", all of which are the same thing. Greater interest is usurious and illegal and the buyer should refuse to pay usury, whether or not he has agreed in writing to do so. Nor can he be compelled to pay **any** interest on a usurious account. Although once paid, a buyer may not recover usurious interest, he is entitled to apply all payments of both principal an interest (past

and future) to the reduction of the principal of an existing usurious agreement. If sued on a usurious agreement, a buyer may have to pay the balance of principal, if any, plus a penalty equal to 8% of the remaining principal to the school fund. 8% of 0 is 0 if the balance of principal is paid before judgment. A merchant may not unilaterally convert a usurious agreement to an agreement calling for the maximum legal rate but may require a consumer to agree, again in writing to the legal rate before extending further credit. The Iowa Commerce Commission may not waive the usury law in approving tariffs of public utility companies. (Turner to Iowa Consumers, 1-7-74) #74-1-11

Refuse to Pay Usurious Interest!
§535.5, Code of Iowa, 1973

Dear Iowa Consumer: You are one of hundreds who have written me about credit problems in the more than three years since I started suit against Younker Brothers, Inc., department stores to stop them from charging greater than the legal 9% per annum simple interest on their revolving charge accounts and retail installment sales contracts. The case was not decided by the Iowa Supreme Court until September 19, 1973,[1] and the actual injunction was not finally ordered until December 26, 1973.

The Younkers case is significant to you if you make purchases on credit in Iowa. And while other laws may apply to purchases made outside Iowa, or to the loan of money or the installment purchases of motor vehicles in Iowa, you may benefit if you are an Iowa credit buyer of merchandise, consumer goods or personal property, including food, clothing, gas, water, electricity, oil and gasoline, furniture, appliances or hardware, (except vehicles required to be registered under Iowa law).

Business people quite properly insist that consumers should pay their bills promptly. They pay to borrow money and they believe consumers should pay for credit they extend on purchases of personal property. Sounds fair, doesn't it? Yet in recent years many of even the most reputable in the business world have charged their customers *twice* what the law allows for the extension of such credit, and in some instances, more than twice as much! Receiving more than the legal rate, whether in "interest", "time-price differential", "service charges", "finance charges", "gross charges", "late charges" or "penalties" (all of which are the same thing — interest — no matter what they may be dubbed by imaginative rationalizers) is usury and unlawful. You may, and properly should, refuse to pay usurious interest, though the law does not directly prohibit you from paying it and the Younkers case holds that once you have paid it you cannot recover it back. §535.4, Code of Iowa, 1973, says "No person shall, directly or indirectly, *receive*" more than the law allows. No citizen should aid or abet an illegal act.

What then is the legal rate the law allows in Iowa? *Unless you have agreed in writing,* the legal rate is 5% per annum (or .42% per month) simple interest on the unpaid balance of your debt or account. And the 5% interest does not even start to run until *six months* after the date of the last item on your open account! §535.2, Code of Iowa.

Even if you have agreed to pay more *in writing,* such as by note or contract, the legal rate is still only 9% per annum (¾% per month) and you cannot be compelled to pay more unless you are a corporation so agreeing. §§535.2 and 535.5.

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[1] *State ex rel Turner v. Younker Brothers, Inc.,* 1973 Iowa, 210 NW2d 550.

Incredible as it may seem, many Iowa merchants, corporations, businessmen, public utilities, credit card companies and collection agencies, for the last several years, have been charging consumers as much as 1½% per month (18% per annum), and even 2% per month (24% per annum), on revolving charge accounts and sales contracts, although usurious charges of 1% per month (12% per annum), are not uncommon. On the other hand, many have honored and obeyed the law, charging no more than 9% per annum.

Some gas and electric utility companies still attempt to collect a "gross charge" or "penalty" equivalent to an amount 5% (and in at least one instance, 10%) greater than the "net" bill, unless the bill is paid by a specified deadline. They also call this a "late charge" or "delayed payment charge." Utility companies argue that since this is only a one-time charge on a given bill and does not continue to mount no matter how long it remains unpaid, it is never more than a 5% charge. But it only gets down to a 5% *per annum* rate if it is not paid for a full year and long after the utility might shut off your service for failing to pay. Even assuming the company gives you a month in which to pay your bill, if you are one day late thereafter, you are paying the equivalent of *60%* per annum simple interest! The "net billing" reflects the true rate for gas or electricity permitted by the Iowa Commerce Commission and in my opinion, while I recognize arguments to the contrary, nothing in the law authorizes the Commission to waive or ignore the usury law in approving the tariffs filed by a utility. Northwestern Bell does not impose a penalty. Chapter 490A, Code of Iowa, 1973.

As I mentioned before, the Younkers case holds that usurious interest once paid cannot be recovered. Thus, if you have paid a usurious contract in full, forget it. But if you still owe or are paying on an *existing* usurious agreement (one which demands interest greater than 9% per annum or ¾% per month) you are entitled to apply all payments of both principal and interest (past as well as future) to payment of the principal without interest![2] The principal would include only the total of the purchase prices plus any taxes which the merchant must collect. If

". . . all sums paid as usury will be applied to the discharge of the principal."

you find the total of your payments of principal and interest on a usurious contract equals or exceeds the total of purchase prices plus those taxes, you should stop paying on it and refuse further payment. And you need pay no usurious interest in the future — only the balance of the principal. §§535.4 and 535.5.

Furthermore, a merchant who has been charging you usurious interest under an illegal contract can thereafter charge you the maximum legal rate only if you agree *again* in writing, but this time to the legal rate. Some merchants seem to have the mistaken notion that the Younkers case works a sort of magic, converting a usurious interest contract into a maximum legal interest contract. Thus the merchant may attempt, unilaterally (without your new written agreement) to reduce your illegal interest agreement to the maximum legal rate of 9% per annum and to convince you that you are being done a

[2] *Gilbert v. Clark*, 1919, 186 Iowa 904, 173 NW 104 holds at page 105 of 173 NW:

favor. The merchant is wrong.[3] He is not entitled to the maximum legal 9% per annum on a usurious contract — he is entitled to *no interest whatsoever!* He can collect 9% for future sales only if you agree in writing.

If you should be sued on a usurious contract or account, your creditor can recover the balance of principal remaining, but no more. §§535.4 and 535.5, Code of Iowa.[4] And, while you may be required by the court to pay, in addition to the balance of principal remaining, a *penalty of 8% of that amount* to the school fund, there is no reason why you should pay more in usurious interest to your creditor in order to avoid that possibility. While, ironically, the Iowa usury statute has been construed to penalize the consumer whom it does not prohibit from *paying* usury and not to penalize the merchant it prohibits from *receiving* it,[5] nevertheless, this 8% penalty, which goes to the school fund, cannot be levied against you except by the court in a suit on the contract and upon finding of usury. Then, being only 8% of the balance of principal remaining, there will still be no penalty if no principal is found remaining — or if the balance of principal is paid off before judgment is rendered therefor.

"The only remedy available to a debtor under [§535.5] when an usurious rate of interest is required by a contract is cancellation of interest in excess of eight percent on the unpaid balance. This eight percent interest assessed against the debtor is awarded the State for the use of the school fund."

Obviously, it is extremely unlikely that your creditor would sue you for usurious interest alone when the law prevents him from recovering *any interest* in such a case and when you, having paid the principal, would not even have to forfeit 8% to the school fund, 8% of 0 is 0.

Those with whom you have a usurious agreement in existance may before extending you further credit insist on a new contract for the maximum legal interest of 9% on future purchases when the implications of the Younkers case and the statute are fully understood, (and you may even be issued a new credit card). When you have actually entered a new agreement in writing, and not until, you will have to pay 9% per annum on your purchases.

We will appreciate it if you will not call or write our office further about your individual interest problems.[6] Again, this letter does not apply to purchases outside Iowa, or to loans of money or motor vehicle installment

[3] *Allen v. Fogg,* 1885, 66 Iowa 229, 23 NW 643 says:

". . .it is well settled that a usurious contract cannot be purged of the usury by remarks, or by any other change in the form of the contract."

[4] Not only does §535.4 prohibit receiving greater interest than the law allows, but §535.5, Code of Iowa, 1973, says:

". . .in no case where unlawful interest is contracted for shall the plaintiff have judgment for more than the principal sum, whether the unlawful interest be incorporated with the principal or not."

[5] The *Younkers* case says at 210 NW2d 550 at page 565:

[6] Nothing herein is intended to help you avoid your legal debts or obligations. If you have agreed in writing to pay up to 9% per annum, you must pay it. But, if any usurer or collection agency for any usurer threatens your credit rating because of any action you take in reliance upon this letter, please contact me or my office at once! Finally, you should also realize that the General Assembly may legalize greater interest than is presently allowed. They make the law, not I.

contracts in Iowa. With our limited staff and appropriations we cannot possibly handle the individual cases of every Iowa consumer. If you should be sued, you should retain your own attorney and, by all means, feel free to show him this letter whether or not you have relied upon it. It's complicated but I urge you to carefully study what I've said and attempt to apply my advice to your problem. If you have been charged usury, don't pay any interest and if the contract hasn't been paid, try to ascertain the date, cost and tax on each purchase from the merchant in question and deduct the total of your payments, paying only the difference, if any.

January 7, 1974

STATE OFFICERS AND DEPARTMENTS: Department of Public Safety — criminal history data and intelligence data. Chapter 294 (S.F. 115), Acts of the 65th General Assembly, First Session. §§80.9(e), 750.1, 1973 Code of Iowa. The department is not required to keep a list of persons within the department to whom criminal history data and intelligence data is disseminated. Information contained in the monthly B.C.I. Bulletin is neither criminal history data nor intelligence data within the meaning of the act. Criminal history data and intelligence data may be communicated by radio, subject to the restrictions of the act. (Voorhees to Larson, Commissioner of Public Safety, 1-7-74) #74-1-14

Mr. Charles Larson, Commissioner, Department of Public Safety: This letter is in response to Commissioner Sellers' request for an Attorney General's opinion with regard to various provisions of Senate File 115, Acts of the 65th G.A., First Session. Some of those questions were answered in a previous opinion. (Turner to Sellers, Commissioner of Public Safety, 9-25-73) #73-9-27. This opinion will be addressed to those questions concerning the dissemination or redissemination of criminal history data and intelligence data by the Department of Public Safety and the B.C.I. The remaining questions will be dealt with in a later opinion.

It should first be observed that this act is hardly a model of clarity. Many important terms are not defined at all, while other terms are so broadly defined that conflicts are created within the statute. In attempting to make some sense out of all this, two principles of statutory construction must be born in mind. First, this act is a penal statute, and its restrictions must be construed narrowly (see Turner to Sellers, supra, at 3). Put another way, any conflicts must be received *against* the attempted restrictions. Second, the statute should be given a sensible, practical, workable, and logical construction and if fairly possible a construction resulting in unreasonableness as well as absurd consequences will be avoided. *Krueger v. Fulton,* 169 N.W.2d 875, 877 (Iowa 1969); *Janson v. Fulton,* 162 N.W.2d 438, 442, 443 (Iowa 1968), and authorities cited therein.

Before discussing the specific questions raised, the basic provisions of the statute that are relevant to those questions will be briefly enumerated.

Section 2 of the act provides that the Department of Public Safety and the B.C.I.:

". . . may provide copies or communicate information from criminal history data only to criminal justice agencies, or such other public agencies as are authorized by the confidential records council. The Bureau shall maintain a list showing the individual or agency to whom the data is disseminated and the date of dissemination."

Section 3 provides:

"A peace officer, criminal justice agency, or state or federal regulatory agency shall not redisseminate criminal history data, within or without the agency, received from the department or bureau, unless:

"1. The data is for official purposes in connection with prescribed duties of a criminal justice agency, and

"2. The agency maintains a list of the persons receiving the data and the date and purpose of the dissemination, and

"3. The request for data is based upon name, fingerprints, or other individual identification characteristics.

"A peace officer, criminal justice agency, or state or federal regulatory agency shall not redisseminate intelligence data, within or without the agency, received from the department or bureau or from any other source, except as provided in subsections one (1) and two (2) of this section."

Section 8 provides in part:

* * *

"Intelligence data in the files of the department may be disseminated only to a peace officer, criminal justice agency, or state or federal regulatory agency, and if the department is satisfied that the need to know and the intended use are reasonable . . . ."

Section 1 contains definitions of some of the terms used in the act.

"Criminal history data" is defined as:

". . . any or all of the following information maintained by the department or bureau in a manual or automated data storage system and individually identified:

a. Arrest data.

b. Conviction data.

c. Disposition data.

d. Correctional data.

Each of these terms is defined as follows:

"'Arrest data' means information pertaining to an arrest for a public offense and includes the charge, date, time, and place. Arrest data includes arrest warrants for all public offenses outstanding and not served and includes the filing of charges, by preliminary information when filed by a peace officer or law enforcement officer or indictment, the date and place of alleged commission and county of jurisdiction.

"'Conviction data' means information that a person was convicted of or entered a plea of guilty to a public offense and includes the date and location of commission and place and court of conviction.

"'Disposition data' means information pertaining to a recorded court proceeding subsequent and incidental to a public offense arrest and includes dismissal of the charge, suspension or deferral of sentence.

"'Correctional data' means information pertaining to the status, location and activities of persons under the supervision of the county sheriff, the division of corrections of the department of social services, board of parole or any

other state or local agency performing the same or similar function, but does not include investigation, sociological, psychological, economic or other subjective information maintained by the division of corrections of the department of social services or board of parole."

"Intelligence data" is defined as:

". . . information collected where there are reasonable grounds to suspect involvement or participation in criminal activity by any person."

"Criminal justice agency" is defined as:

". . . any agency or department of any level of government which performs as its principal function the apprehension, prosecution, adjudication, incarceration, or rehabilitation of criminal offenders."

I

The first question posed by your letter is whether the requirement that a list of persons to whom criminal history data and intelligence data is communicated applies to internal communication of such data within the department or bureau. §3 of the act requires that a list of persons to whom criminal history data or intelligence is "redisseminated" be kept. This requirement applies to data redisseminated "within or without the agency." §2 which deals with "dissemination" of criminal history data, contains a similar list keeping requirement, except that this latter section does not contain the language "within or without the agency". §8 (dealing with "dissemination" of intelligence data) contains no list keeping provision. Thus, it appears that it would be necessary to keep a list of persons to whom criminal history data or intelligence data is communicated within the agency only if such communication is "redissemination" as opposed to "dissemination".

Those terms, however, are not defined. In the absence of any definition, the courts will give words their commonly understood meaning. *Becker v. Board of Education of Benton Co.*, 258 Iowa 277, 138 N.W.2d 909 (1965); *Consolidated Freightways Corp. of Delaware v. Nicholas*, 258 Iowa 115, 137 N.W.2d 900 (1965); *Sioux Associates, Inc. v. Iowa Liquor Control Comm.*, 251 Iowa 308, 132 N.W.2d 421 (1965); *In re Trust of Highland Perpetual Maintenance Society*, 254 Iowa 164, 117 N.W.2d 57 (1962).

In a rhetorical sense, any communication of data, except the initial communication of the data from its original source, would be "redissemination". In other words, information must be "disseminated" before it can be "redisseminated". While this is probably the most logical definition, a problem arises with regard to the requirement of §3 that a criminal justice agency or state or federal regulatory agency shall not *redisseminate* criminal history data or intelligence data within or without the agency *received from the department or bureau* unless the provisions of that section are followed. The term "criminal justice agency" is defined very broadly, and would undoubtedly include the department or bureau. The terms "state or federal regulatory agency" are not defined, but could conceivably include the department or bureau.

Under the literal terms of §3, the department or bureau could not *re*disseminate data it received from itself — a logical impossibility. Such data can't be *re*disseminated unless it was received from some other source. If it was not received from some other source, communication of the data would be dissemination, not redissemination.

It would therefore appear that §2 (dealing with "dissemination" of criminal history data) and §8 (dealing with "dissemination" of intelligence data) are supposed to refer to the communication of criminal history data and intelligence data by the department or bureau to some other "criminal justice agency". Section 3 (dealing with "redissemination" of criminal history data and intelligence data) is apparently referring to the communication of the data by some criminal justice agency received from the department or bureau to some other agency. Although this construction is somewhat inconsistent with the very broad definition of criminal justice agency in §1, it is the only interpretation that makes any sense. §1 provides that the definitions therein "are to apply unless the context otherwise requires." We believe that the context here requires that the terms criminal justice agency and state or federal regulatory agency, insofar as §3 is concerned, be construed as not including the department or bureau. Any other interpretation would be a logical absurdity. While §2 undoubtedly applies to the department and bureau, that section does not contain any list keeping provision if the criminal history data is disseminated within the agency. §8 also obviously applies to the department or bureau, but there is no list keeping requirement in that section at all.

Accordingly, we are of the opinion that the department and bureau need not keep a list of persons within the agency to whom criminal history data and intelligence data is communicated. See also, O.A.G. Haesemeyer to Bidler, 11-5-73.

II

Commissioner Sellers' letter further asks whether the various restrictions of the act apply to the monthly B.C.I. Bulletin. The letter further states that the Bulletin contains information concerning reported crimes, inmates discharged from penal institutions, wanted persons, and stolen property. The sample bulletin furnished us contained in formation relating to the suspension or revocation of drivers licenses.

The questions specifically asked were: (1) Is the information contained in the B.C.I. Bulletin criminal history data or intelligence data, (2) Can such information be disseminated without an individually identified request as required by §2, and (3) Does the Bulletin mailing list meet the list keeping requirement of §§2 and 3. For the reasons stated in Division I we do not believe that §3 includes in its purview the department or bureau. Even if it did, it would make no difference in this case. As far as the B.C.I. Bulletin is concerned the restrictions contained in §3, if applicable, are the same as in §2. On its face, §2 does apply to the department and bureau. It will therefore be necessary to look at the specific information contained in the bulletin to determine if it is either criminal history data or intelligence data.

It should first be observed that some of the information is obviously neither criminal history data nor intelligence data. Information relating to reported crimes and stolen property does not pertain to a particular subject, so such information is neither criminal history data nor intelligence data. Information regarding the suspension or revocation of drivers licenses is not criminal history data or intelligence data because the suspension or revocation of a drivers license is not a criminal matter, but rather a civil administrative proceeding. *Swenumson v. Iowa Department of Public Safety,* 210 N.W.2d 660, 661 (Iowa, 1973); *Shellady v. Sellers,* 208 N.W.2d 12 (Iowa, 1973).

Information relating to wanted persons would at first glance appear to be "arrest data". (see definitions §1.4, cited at 3). However, it should be noted that most of this data does not come from the files of the department or bureau, but from the police department or agency reporting the crime. There will be circumstances where some information relating to wanted persons might come from bureau or department files. This situation might occur where a crime was being investigated by the Iowa State Patrol, the B.C.I. or other agency within the department. If this was the case, the information would come from the files of current investigations rather than the criminal history files. We do not believe that the legislature intended that the restrictions regarding the communication of criminal history data should apply to every scrap of paper anywhere in the department or bureau. Rather, it would appear that these restrictions apply only to the criminal history file.

In our previous opinion (Turner to Sellers, supra, at 2) we said the purpose of the statute was ". . .to protect individuals from misuse of their criminal histories which are now being indexed and centrally stored. . . . on a large-scale basis in many states, including Iowa . . ." This purpose would not be enhansed in any substantial way by broadly construing the restrictions of §2 as applying to all information kept anywhere in the department or bureau. The restrictions of §2 apply only to criminal history data ". . . maintained by the department or bureau in a manual or automated data storage system. . ." The key word in this definition is "system". We believe that the use of the singular evidences the legislature's intent to refer only to a data storage system where criminal history data is kept, and not to every file cabinet in the department or bureau. Accordingly, we do not believe that information relating to wanted persons that does not come from the bureau's criminal history file is criminal history data. Even if this information could be construed as criminal history data, the current departmental procedures would comply with the restriction of §2. The mailing list of the B.C.I. Bulletin would certainly meet the list keeping requirement. The restriction that the request for data must be based on "individual identifying characteristics" does not apply to ". . . dissemination or redissemination of information that an arrest warrant has been or will be issued, and other relevant information including but not limited to, the offense and the date and place of alleged commission, individually identifying characteristics of the person to be arrested, and the court or jurisdiction issuing the warrant."

The situation is similar in case of information concerning inmates discharged from penal institutions. This information would appear to be "correctional data." (see definitions, §1.7, cited at 4). However, this information does not initially come from the bureau's criminal history file, but from the Department of Social Services. It would not become "correctional data" until it was put into the criminal history file.

In summary, it is our opinion that the information contained in the monthly Bulletin is neither criminal history or intelligence data. While an argument to the contrary could be made in the case of information relating to wanted persons, current departmental procedures comply with the restrictions that might be applicable.

III

Commissioner Sellers' letter also asked what procedures would be necessary for the Iowa State Patrol Communication Division to meet the list keeping restrictions of the act.

The Department of Public Safety is specifically authorized by §§80.9(e) and 750.1, 1973 Code of Iowa, to utilize frequencies alloted by the F.C.C. for law enforcement purposes. The use of such radio communications is a recognized, established law enforcement procedure. Senate File 115 does not place any special restrictions on radio communications that aren't applicable to other means of communication. The act focuses on the nature of the data being communicated, and not the means of communication. If the data being disseminated was criminal history data or intelligence data, the restrictions would apply.

We are informed that recordings of all radio communications are maintained for 30 days and that a list is kept of persons or agencies to whom criminal history data or intelligence data is disseminated, including dissemination of such data by radio. In our opinion, these procedures would meet any applicable list keeping requirements of the act. The fact that police band radio receivers are widely owned and used by persons who are not criminal justice agencies is not relevant. Data is not communicated to such persons but is intercepted by them, a circumstance over which the department has no control.

January 8, 1974

CITIES AND TOWNS: Open Meetings — Chapter 28A, Code of Iowa, 1973. The actions of a city council taken at a meeting in violation of Chapter 28A are not void or voidable. (Blumberg to Greenfield, Guthrie County Attorney, 1-8-74) #74-1-12

Mr. C. F. Greenfield, Guthrie County Attorney: We are in receipt of your opinion request of December 17, 1973, concerning a meeting of a city council, which was held without notification to the mayor or to the public. At that meeting, an attorney was hired to do work for the city. You specifically asked:

"Pursuant to Chapter 28A of the 1973 Code of Iowa, can four councilmen hold a meeting without notifying the mayor or the public and bind the town to a legal contract when they have kept no minutes and no proceedings relative to said meeting?"

Closed meetings are prohibited by Section 28A.1 of the Code. Sections 28A.4 and 28A.5 provide that advance notice of meetings be given and that minutes of the meeting be kept. In *Dobrovolny v. Reinhardt,* 1970, 173 N.W.2d 837 (Iowa), the question was whether the actions taken at a meeting in violation of Chapter 28A were void. The Supreme Court held that the actions were not void or voidable on the basis that the legislature had not so provided in the Chapter. A more recent case reaffirms this holding, *Anti-Administration Association v. North Fayette County Community School District,* 1973, 206 N.W.2d 723 (Iowa).

Accordingly, we are of the opinion that the actions of the city council, in hiring an attorney, at a closed meeting in violation of Chapter 28A are not void or voidable.

January 10, 1974

STATE DEPARTMENTS: Open Meetings Law. 28A.3, 68A.7, Code of Iowa, 1973. Board of Regents may go into executive session to discuss matters involving litigation or negotiating position with legal counsel. (Nolan to Richey, Executive Secretary, Board of Regents, 1-10-74) #74-1-13

Mr. R. Wayne Richey, Executive Secretary, Board of Regents: This is written in response to your request for an opinion concerning meetings of the Board of Regents and §28A.3, Code of Iowa, 1973, pertaining to executive sessions. In your letter you state:

"While recognizing that Iowa law and good public policy require that public business normally be conducted in public, the Board of Regents also recognizes that Iowa law and good public policy provide that there may be 'exceptional reasons so compelling as to override the general public policy in favor of public meetings'. (Iowa Code 1973, Section 28A.3) Because of the importance the Board of Regents attaches to complying not only with the letter of the open meeting law but with the policy underlying it, the Board of Regents feels that it needs the guidance of the Attorney General concerning the requirements and policy of Chapter 28A of the 1973 Iowa Code. Thus, it asks:

"In which of the following situations, if any, and under what circumstances would it be appropriate for the Board of Regents in its discretion, to meet in executive session?

"1. To discuss with the Attorney General, or a representative of the Attorney General, matters concerning litigation prospectively or presently in court, e.g., whether to file or to negotiate, whether to settle a suit or to litigate, what strategies to pursue in negotiation and what policies to follow in individual suits.

"2. To discuss among members of the Board of Regents matters concerning litigation prospectively or presently in court, e.g., whether to file suit or to negotiate, whether to settle a suit or to litigate, what strategies to pursue in negotiation and what policies to follow in individual suits.

"3. To discuss among members of the Board of Regents matters which are unlikely to result in litigation but in which the board having decided to negotiate with another or others, is in the process of working out a negotiating position, which position may be weakened by premature public disclosure."

The statute in question provides:

"Any public agency may hold a closed session by affirmative vote of two-thirds of its members present, when necessary to prevent irreparable and needless injury to the reputation of an individual whose employment or discharge is under consideration, or to prevent premature disclosure of information on real estate proposed to be purchased, or for some other exceptional reason so compelling as to override the general public policy in favor of public meetings. The vote of each member on the question of holding the closed session and the reason for the closed session shall be entered in the minutes, but the statement of such reason need not state the name of any individual or the details of the matter discussed in the closed session. Any final action on any matter shall be taken in a public meeting and not in closed session, unless some other provision of the Code expressly permits such action to be taken in a closed session. No regular or general practice or pattern of holding closed sessions shall be permitted."

In *Dobrovolny v. Reinhardt,* 1970 Iowa 173 N.W.2d 837, the Supreme Court of Iowa declared that the clear purpose of the Iowa open meeting law is to permit the public to be present unless the meeting is within the exceptions stated in the statute so as to prohibit secret or "star chamber" sessions. In *Buchholz v. Board of Adjustment, Bremer County,* 1972 Iowa, 199 N.W.2d 73, at page 77, the Iowa Supreme Court distinguishes between a public hearing and a public meeting as follows:

"A hearing affords more substantial rights than does a meeting. A hearing requires that interested parties be given an opportunity to appear and object. Black's Law Dictionary, Revised 4th Ed., at page 1134, defines a meeting as a 'coming together; and assembly. Particularly, in law, as assembling of a number of persons for the purpose of discussing and acting upon some matter or matters in which they have a common interest'."

In an opinion dated June 16, 1971, with respect to school board meetings, this office advised that the requirements of the Iowa public meeting statute cannot be evaded by devices such as just getting together to talk things over. 1972 O.A.G. 158. The opinion cited further stated at page 162:

"Our General Assembly has, by these enactments [Chapter 28A and Chapter 68A, Code of Iowa], established and given force to a public policy of guaranteeing the people full and complete knowledge of governmental affairs. Now declared by statute to be public records are, not only those which were so at common law, but also all manner of contemporary files and archives. In like manner, the General Assembly has enacted a guarantee not known to the common law, that public bodies, boards, councils and commissions, shall deliberate, make their decisions and conduct their business in public. The Legislature has recognized that equity or the public interest will, from time to time, require confidentiality. But as the statutory requirements of public access and observation are precatory and broad, the exceptions are precise and narrow."

The provisions of §68A.7, Code of Iowa, 1973, provides a confidential status to "records which represent and constitute the work product of an attorney, which are related to litigation or claim made by or against a public body". Accordingly, when it is necessary for the Board of Regents to meet with the attorney general or a member of his office, or with an attorney for the State by contract with the Executive Council, on any matter involving litigation, it would be proper for the Board to go into executive session to discuss such matters. With respect to the development of matters unlikely to result in litigation but which the Board wishes to work out a negotiating position, §68A.7(6) provides confidentiality to "reports to governmental agencies which if released, would give advantage to competitors and serve no public purpose". Consequently, a closed session may be held to discuss the developments of such negotiating position.

Insofar as matters involving confidential reports are directly involved in each situation you describe, it is our opinion that the test of "exceptional reason so compelling as to override the general public policy in favor of public meetings" is met. Accordingly, in such instances the Board may go into executive session to deliberate. However, any final action taken by the Board at the conclusion of discussion of any of these matters, must be recorded in the minutes of the meeting. 1972 O.A.G. 158.

January 14, 1974

LIQUOR, BEER & CIGARETTES: Beer brand advertising signs. Ch. 123, §§123.51(2), 123.51(3), 1973 Code of Iowa. §123.51(3) does not apply to advertisements of beers; §123.51(3) prohibits the erection of signs advertising beer anywhere on the grounds of a ball park licensed to sell beer. (Coriden to Horn, State Representative, 1-14-74) #74-1-15

The Honorable Wally E. Horn, State Representative: You have requested an opinion from this office regarding Section 123.51 of the 1973 Code of Iowa. You asked:

"(1) Does section 123.51, subsection 2 of the Code apply to advertisements of beer?

"(2) Does section 123.51, subsection 3 of the Code prohibit the erection or placement of signs or other matter advertising any brand of beer, if:

"(a) located anywhere on the inside surface of the fence surrounding a licensed ball park?

"(b) located on the inside surface of the fence but visible from off the premises?

"(c) located on the outside surface of the building but within the fenced portion of the grounds? whether or not visible from off the premises?"

In answer to your first question, "alcoholic liquor" is defined in §123.3(8), 1973 Code of Iowa to include:

". . . the three varieties of liquor defined in subsections 5, 6, and 7 of this section, *except beer* as defined in subsection 9 of this section. . . ."

Clearly, then, §123.51(2), 1973 Code of Iowa, which refers to alcoholic liquors only, does not apply to advertisements of beer.

Section 123.51(3), 1973 Code of Iowa, which you refer to in your second question, provides that:

"No signs or other matter advertising any brand of beer shall be erected or placed upon the outside of any premises occupied by a licensee or permittee authorized to sell beer at retail."

A recent Attorney General's Opinion, 1972 OAG 589, is, I believe, determinative of the issue involved in your second question. That opinion was also concerned with an interpretation of §123.51(3), the issue being whether or not a licensee could attach a beer sign on a pole or other stationary object not connected to the building in front of his establishment. The opinion said:

". . .assuming that the area in front of the establishment is either owned or controlled by the licensee through leasehold, ownership in fee or some other similar form of control, it would be our opinion that no beer brand sign could be hung, attached,. . . or in any other manner affixed to any area forming a part of the right, title or interest of a separate and distinct piece of property upon which is located or houses a liquor licensed establishment or beer permit 'authorized to sell beer at retail'."

The same statement would apply to the situation described in your second question. Signs placed anywhere on the grounds of a licensed ball park are prohibited by the statute.

January 21, 1974

CITIES AND TOWNS: Civil Service — §§365.8, 365.12 and Chapter 411, Code of Iowa, 1973; Art. III, Amend. 2, Iowa Constitution. A fireman or policeman who transfers to the other department within the same municipality must take the civil service examination for that new position. An individual's seniority does not transfer to the new position. A municipality may transfer contributions from a fire or police pension fund to the other pension fund. (Blumberg to Potter, State Senator, 1-21-74) #74-1-16

Honorable Ralph W. Potter, State Senator: We are in receipt of your opinion request of November 16, 1973, regarding interdepartmental transfers between police and fire departments within a civil service structure. You specifically asked:

1. Can a fireman or policeman, in an organized department, transfer to the other department with out the necessity of an original entrance examination as provided in Sec. 365.8 of the Iowa Code?

2. Can firemen or policemen who are appointed to a position in the other department within the same city transfer his annuity contribution and the city's pension contribution from one retirement system to the other?

You also asked whether seniority rights would transfer. It appears that the civil service tests in the municipality in question are different for firemen and policemen.

Section 365.8 of the Code provides that examinations to determine the qualifications of applicants for civil service positions be given to test the mental and physical ability of the applicant to discharge the duties of the position sought. Even though both the police and fire departments fall within the category of public safety, there are differences as evidenced by the different tests given. An applicant must take a test for the position sought pursuant to section 365.8, and the fact that the person wishes to transfer from the police department to the fire department does not prevent the operation of the above section.

With respects to whether seniority rights would transfer with the individual, section 365.12 provides in part:

"For the purpose of determining the seniority rights of civil service employees, seniority shall be computed, beginning with the date of appointment to or employment in any positions for which they were certified or otherwise qualified.

"In the event that a civil service employee has more than one classification or grade, the length of his seniority rights shall date in the respective classification or grades from and after the time he was appointed to or began his employment in each classification or grade."

Pursuant to this section, an individual may have different seniorities for different positions. However, it is apparent that seniorities do not transfer from position to position except in the case of a promotion.

In answer to your final question, there is nothing in the Code, specifically, Chapter 411, speaking to the question of whether contributions to a pension fund for an employee may be transferred to another pension fund within the municipality. The only transfer mentioned in the Code refers to Chiefs of Police and Fire Chiefs. Section 2, Chapter 233, Acts of the 65th G.A., Home Rule provides that a city may, unless expressly limited, and if not inconsistent with another statute, determine its local affairs and government. See, Article III, Amendment 2, Iowa Constitution. We can find nothing in Chapter 411, which concerns pension funds for firemen and policemen, expressly prohibiting such a transfer. The grant of home rule power appears to allow a municipality to transfer an employee's and employer's contributions from the policemen's pension fund to the firemen's pension fund or vice-versa.

Accordingly, we are of the opinion that one transferring from the police to the fire department must take the civil service examination for the new posi-

tion. One's seniority does not transfer from one department to another. And, an employee's and employer's contributions to the police pension fund may be transferred to the fire pension fund.

January 21, 1974

GAMBLING: Chapter 153, 65th General Assembly, 1973 Session. Gambling licensees are not required to report their dedications of net receipts to charity. (Turner to Briggs, 1-21-74) #74-1-17

Mr. Donald Briggs, Director, Department of Revenue: You have requested an opinion of the attorney general as to whether it is necessary for a qualified organization to report to the Department of Revenue the net receipts of gambling as provided in §7, Chapter 153, Acts of the 65th G.A., First Session, 1973.

§1(10) of said Act provides that a qualified organization is "any licensed person who indicates the net receipts of a game of skill, game of chance or raffle" as provided in §7. §7 of the Act requires the qualified organization to dedicate the net receipts to contestants or participants and to educational, civic, public, charitable, patriotic or religious uses in Iowa and defines such uses. §7(1).

§7(1) then provides in the last paragraph:

"The net receipts must be devoted within six months to one or more of the permitted uses. A person desiring to hold the net receipts for a period longer than six months must apply to the department of revenue for special permission and upon good cause shown the department may grant the request."

While the Act requires the net receipts be devoted within six months, (apparently from the date of each event, although the Act does not say) I find nothing that requires the licensee to report that he has in fact devoted the net receipts to any of said purposes. Of course there may be nothing to report if all is dedicated to the contestants or participants. §7(1). The requirement that a person must apply to the Department of Revenue for special permission, upon good cause, to hold the net receipts for a period longer than six months, does not require the person to report the amount of the net receipts.

January 24, 1974

AUCTIONEER: Bulk Sales Law. §554.6108. An "auctioneer" under the Bulk Sales Law, includes the individual who conducts the auction, even though he does not handle money and acts only as a selling agent. His liability is joint and several with other persons who direct, control or are responsible for the auction. (Murray to Priebe, State Senator, 1-24-74) #74-1-18

Senator Berl Priebe: You have submitted the following question to us for our opinion:

"In a bulk transfer is the 'auctioneer' responsible for mortgaged property, if he acts only as the selling agent and does not actually handle the money?"

The section to which you refer states as follows:

"1. A bulk transfer is subject to this Article even though it is by sale at auction, but only in the manner and with the results stated in this section.

"2. The transferor shall furnish a list of his creditors and assist in the preparation of a schedule of the property to be sold, both prepared as before stated (section 554.6104).

"3. The person or persons other than the transferor who direct, control or are responsible for the auction are collectively called the 'auctioneer'. The auctioneer shall:

"a. receive and retain the list of creditors and prepare and retain the schedule of property for the period stated in this Article (section 554.6104);

"b. give notice of the auction personally or by registered or certified mail at least ten days before it occurs to all persons shown on the list of creditors and to all other persons who are known to him to hold or assert claims against the transferor.

"4. Failure of the auctioneer to perform any of these duties does not affect the validity of the sale or the title of the purchasers, but if the auctioneer knows that the auction constitutes a bulk transfer such failure renders the auctioneer liable to the creditors of the transferor as a class for the sums owing to them from the transferor up to but not exceeding the net proceeds of the auction. If the auctioneer consists of several persons their liability is joint and several."

It is clear from the provisions of the above statute that the term "auctioneer" refers to more than one individual and you will note that it includes the selling agent with "person or persons other than the transferor who direct, control or are responsible for the auction". It is also apparent from the provisions of paragraph four (4) of the above quoted statute that the liability of the several persons connected with a bulk sale by means of auction are jointly and severally liable.

January 25, 1974

LIQUOR, BEER & CIGARETTES: Beer brand advertising signs. Chapter 123, §123.51(3), 1973 Code of Iowa. The term owner in §123.51(3), has no definite legal meaning and will have to be decided on a case-by-case basis. In general, it means that person who has control over the sign and who can dispose of it at will. Failure to remove beer brand advertising signs will subject the owner of the sign not only to the penalties outlined in §123.51(4), but also to possible revocation or suspension of the owner's license or permit under §123.39(2), 1973 Code of Iowa. (Coriden to Gallagher, Director, Iowa Beer & Liquor Control Department, 1-25-74) #74-1-19

Mr. Rolland A. Gallagher, Director, Iowa Beer & Liquor Control Department: You have requested an opinion on §123.51(3), 1973 Code of Iowa. As passed by the 64th General Assembly, First Session, that section reads as follows:

"No signs or other matter advertising any brand of beer shall be erected or placed upon the outside of any premises occupied by a licensee or permittee authorized to sell beer at retail. All such signs shall be removed by the owner of same by July 1, 1974." Chapter 131.51(3), Acts of the 64th G.A., First Session.

This is the official copy of the statute until July 1, 1974, when the last sentence of the section will be deleted from the permanent version of the law.

In your letter, you asked who would be considered under the statute to be the owner of a beer brand advertising sign — the distributor, the retailer, or the owner of the property. Unfortunately, there is no easy definition of "owner." The term has no definite legal meaning, and is not a legal term. 73 C.J.S., *Property*, §13, at 181. Black's Law Dictionary defines an owner as:

"The person in whom is vested the ownership, dominion, or title of property;. . . He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits,. . . ."

A similar definition is found in 73 C.J.S., supra:

"The word 'owner' has been frequently defined by courts and text writers as one having dominion over a thing; . . . one who has full dominion over property, with a right to sell or otherwise dispose of it without accountability to anyone; one who has dominion over a thing, which he may use as he pleases, except as restricted by law or by agreement;. . . ."

And in 63 Am. Jur.2d, *Property,* §32, p. 316, it is said that:

"Both in common parlance and in legal acceptation, the owner of property is he who, in case of its destruction, must sustain the loss of it."

Assuming that the signs were initially erected by the distributor, we still do not know what, if any, agreements exist between distributor, retailer, and owner of the premises as to the sign. Therefore, it would seem that the determination of who is the owner of a particular sign must be done on a case-by-case basis, using as guidelines the definitions quoted above. In some cases, it may be that the beer brand advertising sign will have become a fixture, attached to the premises on which it was erected and passing with the premises when the property is sold. Black's Law Dictionary, p. 766. In other cases, the person who erected the sign may have retained ownership of the sign separate from ownership of the property on which the sign is located. In any case, the owner of a sign will be that person who has control over the sign and who can dispose of it at will.

An important thing to be remembered is that failure to remove beer brand advertising signs will subject the owner of the signa not only to the penalties outlined in §123.51(4), 1973 Code of Iowa, but also to possible revocation or suspension of the owner's license or permit under §123.39(2), 1973 Code of Iowa. The owner of a sign still standing after July 1, 1974, will face both criminal charges and the filing of a Hearing Complaint with the Iowa Beer and Liquor Control Department, charging the owner of such sign with violation of the provisions of the Iowa Beer and Liquor Control Act, Chapter 123, 1973 Code of Iowa. Because of the seriousness of the potential consequences of failure to remove beer brand advertising signs from the outside of any premises occupied by a licensee or permittee authorized to sell beer at retail, distributors, retailers, and owners of the property upon which such a sign has been placed would be well advised to settle the matter of ownership between themselves before July 1, 1974.

January 25, 1974

CITIES AND TOWNS: Conflict of interest — No conflict of interest exists when an attorney for a community college negotiates an easement agreement with a city for which he was a police judge. (Blumberg to Fitzgerald, State Representative, 1-25-74) #74-1-20

Honorable Jerry Fitzgerald, State Representative: We are in receipt of your opinion request regarding a possible conflict of interest. Your situation concerns an attorney for a community college who participated in negotiations for an easement between the college and a city for which the attorney was a police

judge. You ask whether the attorney could properly have participated in the negotiations.

We can find no statute which prohibits this type of activity. The Iowa Code of Professional Responsibility for Lawyers has analogous situations. Ethical Considerations 5-15 and 5-16 refer to a lawyer representing multiple clients. It is suggested there that the attorney not represent multiple clients with differing interests in litigation. However, if the matter does not involve litigation the attorney need not withdraw if the differences are not great, and if both clients know of the multiple representation.

In *Goreham v. Des Moines Metropolitan Area Solid Waste Agency,* 1970, 179 N.W.2d 449 (Iowa), the plaintiffs alleged that the agreement in question was contrary to public policy in that it permitted elected officials of the member governments to serve on the governing board of the agency. The court held (179 N.W.2d at 462):

"Although the members of the board understandably will want to keep the rates their constituents must pay as low as possible, they are well aware that rates must be maintained sufficient to meet the agency's cost for such services. This is not such a conflict of interest as to be contrary to public policy or fatal to the agreement.

"In passing on this question the trial court said, 'Inasmuch as each representative is on the board primarily to serve as spokesman for the particular municipality or political subdivision he represents, (it could) * * * see no conflict of interest as would likely affect his individual judgment by virtue of his status as an elected official'."

The duties of police judge would be related primarily to criminal matters and would have no bearing on any matter concerning an easement. The attorney's role was to work out an agreement between the city and the college. We can find no relation between that and any duties he may have had as police judge. Accordingly, we are of the opinion that no conflict of interest existed.

January 28, 1974

VOTER REGISTRATION: Lists. §48.5, Code of Iowa, 1973, as amended by Chapter 136, Acts, 65th G.A., §100, 1973. A county commissioner of registration must furnish either a duplicate computer tape or a computer print-out of registration data to the county chairmen of the political parties depending on which form the respective chairmen elect to receive the data. However, where one form is more expensive the difference in the actual cost of the two forms may be charged to a party chairman electing to receive the data in the more expensive form. Any citizen, corporate or otherwise, may examine the voter registration list and the responsibility for misuse of such list rests upon said citizen and not upon the commissioner of registration for providing such list. (Haesemeyer to Faches, Linn County Attorney, 1-28-74) #74-1-21

William G. Faches, Linn County Attorney: Reference is made to your letter of January 18, 1974, in which you request our opinion on two questions relative to voter registration lists. In your letter you state;

"The 65th General Assembly amended Chapter 48.5 of the 1973 Code of Iowa to read in part as follows:

'One copy of the original registration record which includes the elector's name, address, precinct, and party affiliation shall be prepared before the

primary election and on August 1st preceding the General Election, upon the request and without charge, for the county Chairman of each political party. The County Commissioner of Registration shall, each week, upon demand and without charge from August 1st until October 1st, prior to the General Election each day thereafter, until the close of registration, provide the county chairman of each political party a list of electors who have registered since the last such list was provided. Additional copies may be provided to political parties at cost. Duplicate registration records shall be open to inspection by the public at reasonable times.'

'Such lists shall not be used for any commercial purpose, advertising, or solicitation of any kind or nature, other than to request such persons vote a primary or general election, or any other bonified political purpose.'

"In an opinion of the Attorney General under date of May 5, 1970, it was stated that every citizen of Iowa has a right to examine the Voter Registration List and that under the election law, the Commissioner of Registration is required to furnish from duplicate registration lists only to the county chairman of political parties. That any private party requesting such list may be charged a reasonable fee related to the actual cost for copying records and supervising such records while they are being examined and copied.

"Linn County, through its own computer center, has computerized voter registration. In the past, we have always made it a policy to supply computer print-outs of voter registration records to bonified and qualified individuals under Chapter 48.5. Recently, we have had a request that we supply a computer tape rather than a computer print-out to a particular political organization. Our first question upon which we would like to have an opinion is whether or not we must give out a computer tape or are we in compliance with Chapter 48.5 by providing a complete computer print-out of the registered voters?

"Further, a corporation has requested a copy of the voter registration list pursuant to Chapter 48.5 in order to conduct a franchise election for cable television in Cedar Rapids. It is our understanding that if the corporation wins the franchise election, it will be the sole contractor for cable television in the Cedar Rapids area. Our second question is:

'In light of Chapter 48.5 which states: "such lists shall not be used for any commercial purpose, advertising, or solicitation, or any kind or nature, other than to request such person vote at a primary or general election, or any other bonified political purpose", are we authorized to provide a voter registration list to a cable television corporation pursuant to Chapter 48.5?' "

It is evident from your letter that the voter registration data which the law requires the county commissioner of elections to make available to the county chairman of the political parties exists or is available in more than one form, i.e., computer tape and computer print-out. Under these circumstances, it is our opinion that the county commissioner must furnish the data in whichever form each of the political parties requests provided that if one form is more expensive than another a party requesting the more expensive form may be charged the difference. For example, if it is more expensive to make and furnish a copy of the computer tape than the print-out, a party requesting a tape may be required to pay the difference between the actual cost of the tape and the printout.

In answer to your second question, we refer to our opinion as expressed in 1970 O.A.G. 614, in which we said that every citizen has a right to examine the voter registration list, and we believe such is the intent of §48.5 of the Code.

Therefore, the commissioner must permit every citizen, corporate or otherwise, to examine said list; of course, the commissioner cannot be held responsible if such list should be improperly used in contravention of paragraph 2 of §48.5 of the Code. Such improper use is imputable solely to the perpetrator of said improper use, and subjects him to the criminal penalties contained therein.

January 29, 1974

LIQUOR, BEER & CIGARETTES: Beer brand advertising signs. Chapter 123, §51(3), 1973 Code of Iowa. No beer brand sign may be placed or erected upon any area forming a part of the right, title or interest of a separate and distinct piece of property upon which is located or which houses an establishment licensed to sell beer at retail. (Coriden to Gallagher, Director, Iowa Beer & Liquor Control Commission, 1-29-74) #74-1-22

Mr. Rolland A. Gallagher, Director, Iowa Beer and Liquor Control Department: You have requested a ruling and clarification on the following:

"(1) Could a ball park or golf course that lists the buildings and surrounding playing area as licensed premises, erect new beer *brand* signs or retain the present ones that are on the playing area and facing inside?

(2) Could an establishment holding a beer permit or liquor license have a beer brand sign placed inside the window or entrance of the building so that it would be visible from the outside of the building?

"(3) Could a licensed establishment in a building that is adjacent to another building, not covered by beer and liquor license, place a beer brand sign on the non-licensed building with an arrow pointing to the building covered by a beer permit or liquor license?"

Going to your first question, since a ball park or golf course lists all of its buildings and surrounding playing area as licensed premises, one might argue that "outside" would refer only to signs placed on the outermost perimeter of the property and facing outward. However, this ball park/golf course situtation is analogous to the fact situation discussed in a recent Attorney General's Opinion, 1972 OAG 589. That opinion was also concerned with an interpretation of §123.51(3), the issue being whether or not a licensee could attach a beer sign on a pole or other stationary object not connected to the building in front of his establishment. The opinion said:

". . . assuming that the area in front of the establishment is either owned or controlled by the licensee through leasehold, ownership in fee or some other similar form of control, it would be our opinion that no beer brand sign could be hung, attached, . . . or in any other manner affixed to any area forming a part of the right, title or interest of a separate and distinct piece of property upon which is located or houses a liquor licensed establishment or beer permit 'authorized to sell beer at retail.'"

In the ball park/golf course situation, even though the buildings and surrounding playing area are listed as being licensed, beer is sold only at distinct concession stands. By analogy to the fact situation discussed in the opinion cited above, only the concession stand where beer is actually sold would constitute the "premises" referred to in the statute. Thus, as of July 1, 1974, it will be illegal to erect new beer brand signs or retain the present ones that are on the playing area of a ball park or golf course and facing inside.

Your second question asks whether it would be legal for an establishment licensed to sell beer to place a beer brand sign inside the window or entrance of the building so that it would be visible from the outside of the building. Assuming that the building contains only the licensed establishment and that the signs were placed inside the actual physical exterior of the building, then I would think that such signs would be legal. However, if the building contains other businesses besides the establishment licensed to sell beer, the situation would be different. Again, the Attorney General's Opinion cited above is helpful.

"Assuming that the mall or building housing the establishment is under the same or common ownership and control it would be our opinion that the beer sign could not be erected on the building or the mall even though the named permittee or licensee might not be the owner of the building or mall."

Applying this reasoning to the instant situation, a beer brand sign erected inside a building housing other businesses besides a beer or liquor establishment would be prohibited by the statute if it were placed "inside" the building but still "outside" the actual premises licensed to sell beer.

Finally, you ask whether a beer brand sign could be placed on a non-licensed building adjacent to the building containing a licensed establishment. This question was also answered in the Attorney General's Opinion cited above:

"In answer to your question as to whether or not a licensee could attach a beer sign to an adjacent building not operating under a beer and liquor license it would be our opinion he could do so so long as the estate or property in which any right, title or interest is held in common with the property or premises upon which is housed the physical establishment for which a license or permit has been granted to sell beer at retail."

January 30, 1974

SPEED LIMIT: DELEGATION OF POWERS: SF 1013, 65th GA, 1974 Session. §§321.285, 321.286 and 321.287, Code of Iowa, 1973. Enactment of a law to suspend and reduce maximum motor vehicle speed limits on Iowa highways to 55 mph during a claimed fuel shortage, with a provision that the Act shall be effective until the President of the United States declares there is no fuel shortage, or until June 30, 1975, whichever occurs first, at which time now existing speed limits are revived, is not an unconstitutional delegation of legislative power but rather a delegation of fact-finding powers upon which the law makes its own action depend. (Turner to Fischer, 1-30-74) #74-1-12

The Honorable Harold O. Fischer, State Representative: You have requested an opinion of the attorney general as to "whether it is legal under the provisions of [Senate File 1013] to rescind or revoke a state statute on the basis of action by the executive branch of the federal government."

Senate File 1013 of the 65th General Assembly, as passed by the Senate, prescribes a 55 mile per hour speed limit as the maximum speed on any highway of this state "effective until the President of the United States declares that there is not a fuel shortage requiring the application of The Emergency Highway Energy Conservation Act or until June 30, 1975, whichever time occurs first."

As I understand it, you question whether repeal of the 55 mile per hour speed limit, once enacted by the General Assembly, can be effected, and present speed limits reinstated, on the basis of action by the President of the United States, without a further act of the General Assembly. In my opinion, the answer is yes.

While the General Assembly is vested with the power to make the laws of this state and cannot delegate that power to anyone, it can nevertheless make a law delegating to someone else the power to determine a fact or state of things upon which the law makes, or intends to make, its own action depend. This would include, in my judgment, a provision for self-executing repeal and reinstatement based upon a set of factual circumstances if those circumstances are fairly definite.

In *Spurbeck v. Statton, Commissioner of Public Safety,* 1960, 252 Iowa 279, 106 NW2d 660, 664, our Iowa Supreme Court said:

"The plaintiff thinks the commissioner is given authority to act without any proper guide. The true rule is expressed in Locke's Appeal, 72 Pa. 491, quoted with approval in Field v. Clark, 143 US 649, 12 S. Ct. 495, 505, 36 L.Ed. 294: *'The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.'"* (Emphasis added)

The Iowa General Assembly, in Senate File 1013, is not delegating its power to repeal the law but rather to determine whether there is no longer a factual basis for the law's existence. The law then operates, on the basis of that determination, to repeal itself.

The purpose of Senate File 1013 was to comply with a recently approved act of Congress which I understand provides that federal highway funds will be withheld from any state which does not adopt a 55 mile per hour speed limit during the alleged energy shortage. It is questionable whether Congress can so "blackmail" the state into doing that which Congress itself cannot do directly. The police power rests with the individual states and is primarily vested in the state legislature. The United States has no general police power. 16 CJS 906, Constitutional Law §177. The Tenth Amendment to the Constitution of the United States says:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Thus, Congress cannot directly enact a federal law fixing a speed limit to operate within any state except upon federal real estate therein. Nor can the State of Iowa be compelled by Congress or the President to enact Senate File 1013. And without definitely deciding herein, I think it doubtful that Congress could withhold federal highway funds to which Iowa is otherwise entitled, solely upon the basis that the General Assembly refuses to enact a 55 mph limit or enacts instead a speed limit greater than 55 mph. We stand ready to test the constitutionality of the congressional act should the General Assembly hurl down its gauntlet and enact a speed limit of say, for example, 57 mph, as one indignant Iowan suggested it ought to do. Unfortunately, I do not believe we will have any justiciable issue, case, controversy or standing, to challenge federal withholding of highway funds on this flimsy basis if Senate File 1013 is enacted and approved. Worse, still, when the states all knuckle under to such blackmail their abject surrenders become precedents for ever greater federal

incursions and judicial disregard of the Tenth Amendment. Such unchallenged abuses of power have a way of feeding upon themselves.

But as to your specific question, the General Assembly may enact a law providing for the temporary suspension of the state and its revival under these circumstances. See 82 CJS 521-522, Statutes §§304 and 305. Under Senate File 1013 the General Assembly is entrusting the fact-finding power to the President of the United States, alone, and he and he alone is granted the power to determine when the fuel shortage ends. Under the Senate's version, it will make no difference if everyone but one person in the United States, the President, concludes there is no fuel shortage. In that case, unless the General Assembly steps in to repeal the law it will remain in effect until June 30, 1975.

February 1, 1974

CONSUMER FRAUD: Lumber: Deception, Omission of Material Facts — §713.24(2a), Code of Iowa, 1973. While it is not unlawful to describe dry lumber being sold or offered for sale "nominally" as two-by-fours, etc. when that lumber measures "actually" one and one-half inches by three and one-half inches, the seller has duty pursuant to the provisions of §713.24(2a), the Iowa Consumer Fraud Act, to disclose sufficient information to the buyer so that he will not be misled by the difference between the "nominal" and "actual" measurements. (Garrett to Miller, State Representative, 2-1-74) #74-2-1

Honorable Kenneth D. Miller, State Representative: You have asked for an opinion as to whether lumber distributors and lumberyards are illegally overcharging their customers by selling dry lumber described and two-by-fours (2 x 4), two-by-sixes (2 x 6), two-by-eights (2 x 8) etc. when the actual measurements of those pieces of lumber are one and one-half inches by three and one-half inches (1 ½" x 3 ½"), one and one-half inches by five and one-half inches (1 ½" x 5 ½"), and one and one-half inches by seven and one-fourth inches (1 ½" x 7 ¼") respectively. In addition you ask whether changes in the sizes of various pieces of lumber might be a violation of the federal price freeze or price controls.

While it might appear to the layman that a "two-by-four" (2 x 4) should be a piece of lumber measuring four inches by two inches deep, it appears that the national standard within the lumber industry which has been endorsed by the U. S. Department of Commerce dictates that what is "nominally" referred to as a two-by-four (2 x 4) is "actually" a piece of lumber one and one-half inches by three and one-half inches (1 ½" x 3 ½") provided that the lumber shall be no more than nineteen percent (19%) in moisture content. However if the lumber be "green", meaning that it has a moisture content of more than nineteen percent (19%), then a piece of lumber "nominally" described as being two inches by four inches (2" x 4") would "actually" measure three and nine-sixteenths inches by one and nine-sixteenths inches (3 9/16" x 1 9/16"). This is similarly true for lumber of various other "nominal" and "actual" measurements which for purposes of this opinion need not be set out.

This has all been made into a national standard referred to as PS 20-70, a voluntary product standard developed by the National Bureau of Standards of the U. S. Department of Commerce pursuant to procedures set out in Title 15, Part 10, Code of Federal Regulations.

The justification given for the difference between the "nominal" size and the "actual" size is that a piece of lumber shrinks a certain amount in the drying out process and also when it is machined and finished, the dimensions are further reduced. Therefore, it is claimed that piece measuring two inches by four inches (2″ x 4″) when it is green and originally cut from a log will be reduced in drying and machining to a final dimension of approximately one and one-half inches by three and one-half inches (1½″ x 3½″). However it is still referred to as a two-by-four (2 x 4) although it does not actually measure two inches by four inches (2″ x 4″).

Because of the fact that these sizes are national standards recognized basically throughout the lumber industry, it is not correct to say that a customer is actually being overcharged.

When a particular price is quoted by a lumber retailer, it is generally in terms of so much per board foot. A board foot is nominally a piece of lumber twelve inches long by twelve inches wide by one inch thick (12″x 12″ x 1″). The board feet in a given purchase of lumber is determined by the "nominal" size of the lumber and not by the "actual" size, however.

When a customer is charged for a lumber order, he is charged according to a nationally set standard and as long as he understands the standard, he would not be misled. It is not as though one dealer was charging according to one standard and another dealer was charging by an altogether different standard.

Of course, there is a danger in all this in that it readily lends itself to confusion on the part of the customer who is not familiar with the difference between the "nominal" size and the "actual" size. To clearly understand this difference, it would be best to regard the expressions "two-by-four" (2 x 4) or "two-by-six (2 x 6) as being names for a particular piece of lumber rather than as being descriptive of the actual physical size of the lumber. Put differently, one might as well refer to a "widget" as to a "two-by-four" (2 x 4) and in fact, it might be somewhat less confusing to the customer if lumber sizes were referred to in some other terms. If lumber sellers are to use this national standard, then it seems clear that they have a duty to see to it that their customers are not misled in violation of 713.24(2)(a), 1973 Code of Iowa, commonly referred to as the *Iowa Consumer Fraud Act.* Therefore, it is necessary that the seller fully inform the buyer of the difference between the "nominal" size of a piece of lumber and the "actual" size so that the customer will know exactly what he is getting. Obviously if he did not know he could be greatly inconvenienced in the purchase of lumber. For example, if a person were to purchase twelve pieces of lumber "nominally" described as being one-by-twelves (1 x 12) in order to cover the wall of a building twelve feet wide, he would find that he would be short and would have to make another trip to the retailer to purchase additional lumber, since a one-by-twelve (1 x 12) is eleven and one-fourth inches (11¼″) wide.

The *Iowa Consumer Fraud Act,* §713.24(2)(a) provides in part that:

"The act, use or employment by any person of any deception, . . . or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice."

Although the *Iowa Consumer Fraud Act* sets out no specific requirements for various possible hypothetical situations where the customer might be misled, it might be suggested that an oral explanation of the difference between "actual" and "nominal" measurements, along with some disclosure of this difference on the receipt or contract received by the customer, should constitute compliance with the *Iowa Consumer Fraud Act*. This is not to say that there might not be other things a retailer could do, such as the posting of signs and giving printed pamphlets explaining the difference which might also be helpful in informing the customer of the "actual" and "nominal" distinction. In fact, reputable dealers already are taking one or more of the above mentioned steps to avoid confusing their customers.

Regarding the question as to the relationship between a change in lumber sizes and the federal price controls, PS 20-70 went into effect September 1, 1970, which was before there were any federal price controls and the sizes have remained constant since that time. Therefore, assuming that lumber is sold pursuant to the provisions of PS 20-70, its size has not changed since 1970 and there would be no violation of the price controls.

February 4, 1974

CITIES AND TOWNS: Qualifying for Office. §§63.1, 63.3, 63.7, 363.28 and 368A.1(8), Code of Iowa, 1973. If a newly elected municipal officer fails to qualify for office within ten days after the second secular day of January, a vacancy in that office exists unless the incumbent qualifies within a subsequent ten day period. Said vacancy shall be filed by the city council. (Blumberg to Brunow, State Representative, 2-4-74) #74-2-2

Honorable John B. Brunow, State Representative: We are in receipt of your opinion request of January 2, 1974, concerning qualification for office. You indicate that a mayor-elect has left the State on a winter vacation and does not expect to return to qualify for office until spring. You wish to know whether there will be a vacancy in the office, and what the procedure is for filling the vacancy.

Section 363.28, 1973 Code of Iowa, provides that all elected municipal officers shall take office on or before the second secular day of January following the election. Section 63.1 also provides the same. Section 63.3 states that when on account of sickness, inclement weather, unavoidable absence or casualty, an officer has been prevented from qualifying, he or she may do so within ten days after the fixed time. Section 63.7 provides that the incumbent may hold over if the new officer fails to qualify, but must qualify within ten days after the failure to qualify.

With respect to your situation, if the mayor-elect is the incumbent, he must qualify within ten days after the second secular day of January or there will be a vacancy in the office. If the mayor-elect is not the incumbent, the incumbent may hold over if he qualifies within ten days after the failure to qualify. If the incumbent fails to qualify within the time period, there will be a vacancy in the office.

Vacancies in elective municipal offices are filled pursuant to Section 368A.1(8). There it is stated that the city council shall elect by ballot persons to fill vacancies in offices not filled by election by the council. The person receiving the majority of votes shall fill the vacancy.

Accordingly, we are of the opinion that if the newly elected municipal officer does not qualify within ten days after the second secular day of January, a vacancy exists unless the incumbent qualifies within ten days after the failure to qualify. Said vacancy is filled by election by the city council.

February 4, 1974

STATE OFFICERS AND DEPARTMENTS: Iowa Department of Health; Vital Statistics. §§144.1(2), 144.3, 144.23, 144.38, 144.39, 1973 Code of Iowa. A new birth certificate showing the new sex and name cannot be issued to a person who undergoes sex reassignment surgery. Nor can the original birth certificate be amended to show the new sex. However, upon the receipt of a certified copy of a court order changing the name pursuant to Chapter 674, the original birth certificate could be amended to show the new name. (Haskins to Pawlewski, Commissioner, Department of Health, 2-4-74) #74-2-3

Mr. Norman L. Pawlewski, Commissioner of Public Health, State Department of Health: You ask whether, when an individual undergoes sex reassignment surgery, his original birth certificate may be removed and placed in a sealed file and a new birth certificate reflecting the new sex and name issued. It is our opinion that a new birth certificate showing the new sex and name cannot be issued. Moreover, the original birth certificate cannot even be amended to show the new sex. But the original birth certificate could be amended to show the new name upon the receipt of a certified copy of a court order changing the name pursuant to Chapter 674.

§144.23, 1973 Code of Iowa, sets forth circumstances under which a new birth certificate can be issued. §144.23 states:

"The state registrar shall establish a new certificate of birth for a person born in this state, when he receives the following:

"1. An adoption certificate as provided in section 144.19, or a certified copy of the decree of adoption together with the information necessary to identify the original certificate of birth and to establish a new certificate of birth; except that a new certificate of birth shall not be established if so requested by the court decreeing the adoption, the adoptive parents, or the adopted person.

"2. A request that a new certificate be established and evidence proving that the person for whom the new certificate is requested has been legitimated, or that a court of competent jurisdication has determined the paternity of the person."

No authority exists under the above section (or any other section) for the issuance of a new birth certificate reflecting the new sex and name of a person who undergoes sex reassignment surgery. The enumeration of specific instances — adoption, legitimation, or a determination of paternity — in which a new birth certificate can be issued implies that a new birth certificate cannot be issued in other than those instances. In construing a statute, the express mention of one thing implies of the exclusion of other things not mentioned. See *North Iowa Steel Co. v. Staley,* 253 Iowa 355, 112 N.W.2d 364 (1961). Hence, a new birth certificate cannot be issued to a person who undergoes sex reassignment surgery. Perhaps it would be desirable if a new birth certificate could be issued to such a person so as to insure the confidentiality of the fact of the surgery. But under the present state of law, no authority exists to issue a new birth certificate and it is therefore for the legislature to create authority to issue such a certificate.

Nor does authority exist for the amending of the original birth certificate to reflect the new sex produced by the sex reassignment surgery. §144.37, 1973 Code of Iowa, states in relevant part:

"To protect the integrity and accuracy of vital statistics records, a certificate or record required under this chapter may be amended only in accordance with this chapter and regulations adopted thereunder. A certificate that is amended shall be marked 'amended' except as provided in section 144.40."

No section in Chapter 144 authorizes the amending of the original birth certificate to show the new sex. Accordingly, an amendment to show the new sex cannot be made.

However, upon receipt of a certified copy of a court order changing a name of a person pursuant to Chapter 674, the original birth certificate can be amended to show the change of name. Section 144.39, 1973 Code of Iowa, states:

"Upon receipt of a certified copy of a court order from a court of competent jurisdiction or certificate of the clerk of court pursuant to chapter 674 changing the name of a person born in this state and upon request of such person or his parent, guardian, or legal representative, the state registrar shall amend the certificate of birth to reflect the new name."

Of course, the birth certificate could amended to show the change of name only if the procedure dictated by Chapter 674 is followed and a court order is obtained changing the name.

February 4, 1974

CITIES AND TOWNS: Civil Service Commission. §§365.8 and 365.9, Code of Iowa, 1973. A municipal Civil Service Commission may not delegate its duties relative to civil service examinations. (Blumberg to Potter, State Senator, 2-4-74) #74-2-4

Honorable Ralph W. Potter, State Senator: We are in receipt of your opinion request of January 23, 1974, relative to a municipal Civil Service Commission. You specifically asked:

"'Must Municipal Civil Service Commissions make up test questions and forms, give Civil Service Tests and grade same; or can they appoint some outside agent to do same in their behalf?'"

Section 365.8, Code of Iowa, 1973, provides:

"The commission shall, during the month of April of each year, and at such other times as shall be found necessary under such rules . . . as shall be prescribed and published in advance by the commission . . . hold examinations for the purpose of determining the qualifications of applicants for positions under civil service . . . which examinations shall be practical in character and shall relate to such matters as will fairly test the mental and physical ability of the applicant to discharge the duties of the position to which he seeks appointment. Provided, however, that such physical examinations of applicants for appointment to the positions of policeman, policewoman, police matron or fireman shall be held under the direction of and as specified by the boards of trustees of the fire or police retirement system established by section 411.5." [Emphasis added]

Section 365.9 provides:

"The commission *shall,* during the month of April of each second year . . . under such rules as shall be prescribed and published in advance by the commission . . . hold competitive promotional examinations for the purpose of determining the qualifications of applicants for promotion to a higher grade under civil service, which examinations shall be practical in character, and shall relate to such matters as will fairly test the ability of the applicant to discharge the duties of the position to which he seeks promotion." [Emphasis added]

The word "shall" makes the duties mandatory. In two prior opinions, this office has determined that the Commission cannot delegate its duties relative to civil service examinations. 1960 O.A.G. 16 and Strauss to Reppert, April 4, 1960. These opinions were based upon the general rule that the preparation and conduct of civil service examinations are administrative functions involving judgment and discretion, rather than ministerial in nature. In *Bunger v. Iowa High School Athletic Association,* 1972, 197 N.W.2d 555, 560, the Supreme Court of Iowa held:

"[W]hile a public board or body may authorize performance of ministerial or administrative functions by others, it cannot re-delegate matters of judgment or discretion. Kinney v. Howard, 133 Iowa 94, 110 N.W. 282. The Kinney case involved an invalid re-delegation by a school board, and this court stated (133 Iowa at 104-105, 110 N.W. at 286), 'While it is a general rule that power conferred upon a public board or body cannot be delegated, yet a public corporation or municipality or instrumentality of government may, like a private corporation or person, do its ministerial work by agents or committees . . . Where the act to be done involves judgment or discretion, it cannot be delegated to an agent or a committee.' See also, State v. Johnson, 253 Iowa 674, 113 N.W.2d 309; Thomson v. Iowa State Commerce Com'n, 235 Iowa 469, 15 N.W.2d 603; Schroyer v. Jasper County, 224 Iowa 1391, 279 N.W. 118; Thede v. Thornburg, 207 Iowa 639, 223 N.W. 386; Mulhall v. Pfannkuch, 206 Iowa 1139, 221 N.W. 833; Erickson v. Cedar Rapids, 193 Iowa 109, 185 N.W. 46; Young v. County of Black Hawk, 66 Iowa 460, 23 N.W. 923."

The Court also cited to 2 Am. Jur. 2d, *Administration Law* §222 wherein it is stated that a delegated power may not be further delegated by the person to whom such power is delegated. See also, 56 Am. Jur. 2d, *Municipal Corporations, Counties & Other Political Subdivisions* §§193, 196, 197 and 198; 73 C.J.S., *Public Administrative Bodies and Procedure* §57a; and 62 C.J.S., *Municipal Corporations* §154b.

Accordingly, we are of the opinion that a Municipal Civil Service Commission may not delegate any of its duties relative to civil service examinations which involve the preparation, requirements, holding and grading of such examinations.

February 4, 1974

MOTOR VEHICLES: Chauffeur's license. §321.1(43), 1973 Code of Iowa. An individual who uses a truck in his occupation is required to have a chauffeur's license unless the use of the truck is a casual event, fortuitous happening, as if by chance or accident. (Voorhees to Larson, Commissioner, Department of Public Safety, 2-4-74) #74-2-5

Mr. Charles W. Larson, Commissioner of Public Safety: This is in response to Commissioner Sellers' request for an opinion on the following question:

"Your opinion is respectfully requested as to the meaning of the words 'occasional and merely incidental to his principle business' as used in §321.1, subparagraph 43, 1973 Code of Iowa."

Those words have not been defined by the Iowa Supreme Court in the context used in that subparagraph. I believe a sufficiently clear definition can be found, however, in an Attorney General's Opinion of October 4, 1962, which definition was also adopted in an opinion of December 22, 1964. In the 1962 opinion it was stated:

"It is not required that a person's exclusive employment be that of operating a truck such as the one in question before the requirement that he have a chauffeur's license becomes available. Under §321.1(43), the exemption is applicable only if the use is occasional and incidental to his principle business. The import of such words is that the exemption will apply only if the operation of such truck is a *casual event, fortutious happening, as if by chance or accident.*" (Emphasis added). "The question of what is 'occasional' and 'incidental' is necessarily one of fact . . . ."

The specific fact situation to which Commissioner Sellers' letter referred involved a roofing company whose drivers drive the company vehicles regularly each working day from the facility where the vehicles are headquartered to the specific job location. The vehicles are used to haul tools and equipment and supplies as needed and also used to carry scraps and rubbish from the work site to the local city dump. On the facts presented, it is our opinion that the operation of the trucks is *not* a casual event, fortuitous happening, as if by chance or accident, and thus the drivers are required to meet the chauffeur license requirements as provided in §321.1(43).

February 5, 1974

COUNTIES: Civil Service Commission. Chapter 227 Acts, 65th G.A., 1973. Statutory language directing supervisors to budget an amount "equal to" ½ of 1% of covered payroll imposes a limitation on the amount of county funding for the county civil service commission. (Nolan to Yarrington, Director, Iowa Law Enforcement Academy, 2-5-74) #74-2-6

Mr. Ben K. Yarrington, Assistant Director, Iowa Law Enforcement Academy: This is in response to your request for an interpretation of Chapter 227 (House File 439), laws of the 65th General Assembly, 1973 session. According to your letter, the question raised is whether the language in §20 of the act limits funding by the county board of supervisors to the civil service commission to the one-half of one percent of the preceding year's total payroll of those included under the act. In other words, does the statutory language impose a limit upon the authority of the board to appropriate funding for the civil service commission?

Section 20 provides:

"The county board of supervisors of each county shall provide in the county budget for each fiscal year a sum equal to one-half of one percent of the preceding year's total payroll of those included under the jurisdiction and scope of this Act. The funds so provided shall be used for the support of the commission. Any part of the funds not expended for the support of the commission during the fiscal year shall be placed in the general fund of the county, or counties, according to the ratio of contribution, on the first day of January following the end of such fiscal year."

You will note that the language quoted above employs the term "a sum equal to". It is the opinion of this office that the board of supervisors is required to budget an amount of money which is neither more nor less than one-half of one percent of the total amount paid in the previous year to persons covered by this act. Accordingly, it is our view that the amount of funding thus budgeted is limited to that prescribed by the statutory formula. The board of supervisors is not authorized by this act to fund the civil service commission at a higher level. Further, as indicated by the language of the quoted section, if the amount budgeted according to the statutory formula is excessive to the needs of the commission, the surplus is to be returned to the county general funds at the beginning of the following calendar year.

February 5, 1974

ELECTIONS: Registrars: §§48.27, 49.20, Code of Iowa, 1973, as amended by Ch. 136, Acts, 65th G.A., 1973; Ch. 136, Acts, 65th G.A., §400, 1973. Those persons appointed by the county election commissioner to register electors at a polling place on election day are entitled to compensation for such services. (Haesemeyer to Jesse, State Representative, 2-5-74) #74-2-7

Honorable Norman G. Jesse, State Representative: In your letter of January 2, 1973, you request an opinion from this office interpreting Chapter 136, Acts, 65th G.A., §400, 1973, which reads as follows:

"The county commissioner of registration shall in advance of the 1974 general election, any may in advance of any other election occurring after the effective date of this Act and before January 1, 1975, appoint two or more persons in the manner provided by section ninety-four (94) of this Act to register electors at each polling place on election day as permitted by this section."

You specifically inquire,

"Must the County Commissioner of elections pay these appointees, and if he must, must he do so at the same rate as election judges and clerks?"

Section 49.20 of the Code, as amended, states that members of election boards (judges and clerks) shall receive $2.00 per hour while engaged in their duties and $0.10 per mile for actual and necessary travel. They serve only during the election, and their duties include general supervision of the polling place as well as canvassing, counting and reporting the vote. The persons who are appointed to act as registrars at the polls would have essentially the same tenure, and their duties would be approximately the same. They are provided for as a temporary means of making registration available at the polls for people who are unaware of the new pre-election registration requirement. Thus, after January 1, 1975, the electors will not be able to register at the polls, and these registrars will not be required, but until then, those appointed must receive the same compensation as election board members.

Mobile deputy registrars, §48.27, are specifically precluded from receiving any remuneration, and regular fulltime registrars receive only the salary which they are entitled to be virtue of their employment in the auditor's office. However, these are distinguishable since the former have no set hours and no specific times of appearance; and the latter have hours and duties which merely correspond with and do not increase those required and compensated for by their regular employment in the auditor's office.

Therefore, since polling place registrars will only be used until January 1, 1975, and since they must expend time and effort similar to that of election

board members, it is our opinion that such registrars should receive compensation equal to that of election board members.

February 11, 1974

COUNTIES: Deputy Sheriff's Civil Service Act. Ch. 227 Laws, 65th G.A., 1973 Session. 1. The commission established by Ch. 227 Laws, 65th G.A., 1973 Session, has power to certify eligible persons to be paid but does not have power to fix the rate of pay for each level of classified service. 2. Commission funds not expended during the fiscal year revert to the county general fund. (Nolan to Riley, State Senator, 2-11-74) #74-2-8

The Honorable Tom Riley, State Senator: This is written in response to your request for an attorney general's opinion on two issues involving the Deputy Sheriff's Civil Service Act:

"1. The Board of Supervisors of Linn County is apparently willing to extend a 9.6 percent pay increase to deputy sheriffs in Linn County, such increase to commence on an individual-case basis on either the anniversary date the deputy sheriff became a deputy sheriff or received his last pay increase. This means that some deputy sheriffs will receive a pay increase of 9.6 percent immediately while others may have to wait nearly a year to do so. Mr. Juan Cortez of the Linn County Civil Service Commission has asked me to obtain an opinion as to whether the commission, under authority of House File 439 and specifically sections 6 and 14 can require that the pay increase become effective for all deputy sheriffs simultaneous or, in the alternative, can the commission refuse to approve an increase that would discriminate by anniversary dates, whether dates of employment or of the last pay increase the deputy received.

"2. With specific reference to section 20, do funds not expended during the fiscal year revert to the general fund and therefore, become "lost" as far as the Civil Service Commission for deputy sheriffs is concerned or, contrarywise, are unexpended funds placed in the general fund to be used, when needed, by the commission thereafter?"

With respect to the first question, it is the opinion of this office that nothing in §§6 and 14 of Chapter 227, Laws of the 65th G.A., 1973 Session (H.F. 439) provides authority for the Civil Service Commission to refuse to approve any increase in the deputy sheriff's pay authorized by the board of supervisors. At the outset it should be noted that the classified civil service positions covered by the act do not include a chief deputy sheriff and two second deputy sheriffs in counties with a population of more than 100,000 and four second deputy sheriffs in counties with the population of more than 200,000. Accordingly, there will be some deputy sheriffs not subject to civil service action. Further, while Chapter 227 deals extensively with the commission's powers to adopt rules pertaining to appointments, promotions, transfers, reinstatements, demotions, suspensions and discharges, and annual investigations and reports concerning the effectiveness of such regulations and the hearing and determination of appeals respecting allocation of positions of appointment and the maintenance of service records of employees in the classified service, the act does not give the Commission power to prescribe the pay scale for each level of classified service, nor does it give the Civil Service power to do more than certify the pay of a public officer or employee legally and properly appointed and acting in compliance with the rules of the Commission.

With respect to your second question, §20 of Chapter 227 clearly provides that Commission funds not expended during the fiscal year revert to the general fund of the county.

February 11, 1974

SCHOOLS: Public Records. §68A.1. Notes of the secretary of the school board become a public record when transcribed for submission to the board as the minutes of the preceding meeting. (Nolan to Bradley, Keokuk County Attorney, 2-11-74) #74-2-9

Mr. Glenn M. Bradley, Keokuk County Attorney: This is written in response to your request for an opinion on the following matter:

"It is the practice of the Tri-County School Board to have a Secretary take notes of the discussions and decisions of the School Board.

"At some time during the following month the Secretary types her notes for the approval of the School Board. At the following meeting of the School Board, the typewritten notes are read and either approved as read or corrected and then become a part of the official records of the School Board, as the approved minutes of the preceding meeting.

"The question involved is whether the longhand or shorthand notes taken by the Secretary are 'public records', or confidential work copies, and whether the typed record the Secretary prepares becomes a 'public record' or is confidential work copy until such time as it has been officially approved by the school board, as the minutes of the preceding meeting."

It is the opinion of this office that the notes taken by the secretary at the meetings are a work product, and as such, may not necessarily constitute a public record within the meaning of Chapter 68A, Code of Iowa, 1973. On the other hand, the typed record prepared by the secretary for submission to, and approval of the board is an official document and a "public record" within the meaning of the statute.

In *Linder v. Eckard,* 1967 Iowa, 152 N.W.2d 833, the following is stated:

"There is no single definition of public record which is applicable in all situations and under all circumstances. Perhaps the one most generally used refers to a public record as one required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done. 45 Am.Jur. 420, Records and Recording Laws, # 2. A similar, although somewhat more inclusive definition, is found in 76 C.J.S. Recores §1, p. 112. The concept of public records has now generally been extended to embrace not only what is *required* to be kept but also what is *convenient* and *appropriate* to be preserved as evidence of public action." (cases cited)

In *Linder,* the court further stated that not every record which comes into the possession of a public official is a public record, but that the nature and purpose of the document determines its status. In the *Linder* case, the court held that appraisals of certain properties subject to consideration under a plan of urban renewal was not a public record or writing "which an officer is required by law to keep or which is intended to serve as a memorial and evidence of something written, said, or done by the officer or public agency". 152 N.W.2d 833, 836.

Accordingly, it is our view that the secretary's notes prior to being transcribed for presentation to the board, do not constitute a public record, but are merely a preliminary work product. 1972 O.A.G. 616. However, the transcription of such records once prepared, becomes an official record and is subject to examination by citizens pursuant to the provisions of Chapter 68A, Code of Iowa, 1973.

February 12, 1974

STATE EMPLOYEES: Leaves of Absence, limitations. §29A.28, Code of Iowa, 1973. State employees within the purview of §29A.28 are entitled to thirty days military leave paid per calendar year. (Haesemeyer to Keating, Director, Iowa Merit Employment Department, 2-12-74) #74-2-10

W. L. Keating, Director, Iowa Merit Employment Department: I refer to your letter of February 1, 1974, in which you request an Attorney General's opinion on the following question:

"Are state employees within the purview of Section 29A.28, Code of Iowa, 1973, 'entitled to 30 days' military leave pay per calendar year or per incident' of military leave?"

Section 29A.28, Code of Iowa, 1973,

"All officers and employees of the state, or subdivision thereof . . . 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 . . . ."

In a prior opinion of the Attorney General, 1940 O.A.G. 245, we said:

"It is to be observed that the evident purpose of the legislature was to recognize patriotic service of state and municipal employees in the national guard by granting to them certain privileges during their first thirty (30) days of leave because of national guard service. This statute in addition provides a suitable example and precident for the encouragement of like provisions on the part of private employers under similar circumstances. Although this statute is not explicit upon the matter, the legislature evidently intended that such leave should be annual. We can discover no other reasonable interpretation of the statute. This being true, the state and municipal employees who are members of the national guard are entitled to the privileges granted by statute if their leave does not exceed thirty (30) days per year."

In another opinion of the Attorney General issued the same year, 1940 O.A.G. 587, it is stated:

"We therefore conclude that *on each occasion* that the officer or employee is ordered by proper authority to active service — as defined by section 467.02, quoted above — such officer or employee is entitled to leave of absence without loss of status or efficiency rating, and to pay during the first thirty days thereof." (emphasis added)

Since the first quoted opinion clearly limits pay to the first thirty days of military leave annually, and since the second quoted opinion contains no language specifically overruling or superceding that interpretation, we must construe the opinions as being consistent. Therefore, we find that the phrase "during the first thirty days thereof" in the latter opinion refers to the first thirty days of the total of all leaves taken annually.

In 1973 O.A.G. 9 we stated that an employee comes within the purview of §29A.28, Code of Iowa, 1973, even though the initiative for the active duty assignment comes from the employee himself and is primarily for his own benefit. Thus, it is conceivable that a particularly resourceful employee could initiate a multitude of active duty assignments throughout the year, thereby having a number of pay periods in which he works one job while receiving pay from two sources simultaneously.

Therefore, it is our opinion that, in the absence of specific statutory or other compelling precendential language to the contrary, state employees within the purview of §29A.28, Code of Iowa, 1973, are entitled to thirty days military leave pay per calendar year, and not per incident of military leave.

February 15, 1974

PUBLIC SAFETY: Drivers Licenses. §§321B.18, 321B.22, 1973 Code of Iowa. A motorist whose license is revoked under §321B.18 cannot regain his driving privileges until he successfully completes the drinking drivers school. An employer cannot discharge an employee for the reason that he is required to attend the school. (Voorhees to Long, Wright County Attorney, 2-15-74) #74-2-11

Mr. William A. Long, Wright County Attorney: Reference is made to your letter of February 4, 1974, wherein you asked for an opinion as to when an individual convicted of OMVUI and order to attend the drinking drivers school could regain his driving privileges if he did not attend the school. §321B.18, 1973 Code of Iowa, provides:

"When the court orders a person to enroll, attend and successfully complete a course for drinking drivers, the court shall also order that the revocation of the person's drivers license shall be for an indefinite period and until the required course is successfully completed and proof of completion has been filed with the department of public safety and the provisions of chapter 321A have been complied with."

Under the clear language of this provision, a licensee cannot regain his driving privileges until he successfully completes the school. If he was unable to successfully complete the school, he would have to re-enroll another time. Only when he successfully completes the school can he regain his driving privileges. The only other way he could regain his license would be for the court to modify its order and order the license revoked for a specific time under the provisions of §321.209(2) and §321.281. At the end of the revocation period, his privileges could be reinstated.

It is noted that your letter indicates that the individual that was the subject of your inquiry is in danger of loosing his job if he attends this school. I would point out that §321B.22 prohibits an employer from discharging an employee for the reason that he is attending the school.

February 15, 1974

STATE DEPARTMENT OF SOCIAL SERVICES; COUNTY BOARDS OF SOCIAL WELFARE: 42 U.S.C. §602; 45 C.F.R. §205.50(a)(1)(i); P.L. 92-603; §234.6(2), 1973 Code of Iowa; §234.6(5), 1973 Code of Iowa, as amended by §14, Chapter 186, 65th G.A.; §§234.9, 234.10, 1973 Code of Iowa; §234.11, 1973 Code of Iowa, as amended by §16, Chapter 186, 65th G.A.; §§239.1(3), 239.2, 1973 Code of Iowa, as amended by Chapter 105, 65th G.A.; §239.5, 1973 Code of Iowa; §239.8, 1973 Code of Iowa, as amended by §2, Chapter 175, 65th G.A.; §239.10, 1973 Code of Iowa; §239.11, 1973 Code of Iowa, as repealed by §§6, 7, Chapter 175, 65th G.A.; §§239.12, 239.18, 1973 Code of Iowa; Chapters 241, 241A, 249, 1973 Code of Iowa; §§12, 13, Chapter 186, 65th G.A. The county boards of social welfare continue to perform the duties detailed in Section 239.5, in addition to the additional duties assigned to them by the said amendment to §234.11, although their status is merely advisory to the State Department of Social Services, i.e., the boards continue to make investigations, inquiries and hold

hearings and make recommendations based upon their findings as to eligibility, etc., to the State Department of Social Services. (Haesemeyer to Rodenburg, Pottawattamie County Attorney, 2-15-74) #74-2-12

The Honorable Lyle A. Rodenburg, Pottawattamie County Attorney: By your letter of January 22, 1974, you have requested an opinion of the Attorney General, concerning the respective roles of the County Boards of Social Welfare and the State Department of Social Services and its local offices in the administration of the Aid to Dependent Children program within Iowa, in view of §16, Chapter 186, 65th G.A., which amends §234.11, 1973 Code of Iowa.

Since the ADC program is a joint State-Federal undertaking, pertinent portions of the Federal Act are first hereinafter referred to with an explanation of the "organizational structure" required by the Federal law.

Title 42 U.S.C. §602 requires a State to present a State Plan for approval by the Department of Health, Education and Welfare which "provides that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them" and which "either provide for the establishment or designation of a single State agency to administer the plan, *or* provide for the establishment or designation of a single State agency to supervise the administration of the plan;". (Emphasis supplied)

Some States were entirely "state administered", some were "county administered" but "state supervised" (or a combination of the two). All, however, were under the direction of a "single State agency", whichever administrative structure was adopted by a particular state. Iowa, as originally registered with HEW, chose the "county administered" with "state supervision" of the single State agency. This organizational structure was also recognized in the judicial decision *Fenton v. Downing, Chairman Board of Social Welfare,* 261 Iowa 955, 155 N.W.2d 517.

The 65th General Assembly left untouched the following provisions relating to the county organizational structure, namely:

"234.6 . . . The state director shall . . . * * *

2. Exercise general supervision over the county boards of social welfare and their employees."

"234.9 County board of social welfare. The board of supervisors of each county shall appoint a county board of social welfare. . . ."

"234.10 Compensation of county board members. . . ."

Your question concerns the legislative intent in the enactment of Chapter 186, Acts of the 65th G.A., and to reach that intent, attention should be called to the change in the Federal Social Security Act which shifted payments under the adult "federal categorical welfare programs" (Old Age Assistance, Aid to the Disabled and Aid to the Blind) from State responsibility to Federal responsibility, with states providing supplementation. (P. L. 92-603, October 1972, effective January 1974)

Under the recognized principles of construction of statutes, the legislature, in making amendments to the law, is presumed to know the statutes relating to the same subject matter currently in effect and approve the same else a change would have been reflected in the amendment. *Iowa Electric Co. v. Scott,* 206 Iowa 1217, 1221, 1222, 220 N.W. 333 (1928), reads in part:

"The legislature is presumed to have had the former statute before it and to have known its scope and purpose when it enacted a subsequent statute."

[*See also Jahnke v. Incorporated City of Des Moines,* 191 N.W.2d 780 at 787.]

In *Farbicius v. Montgomery Elevator Co.,* 121 N.W.2d 361, 254 Iowa 1319 (1963), the Court stated at page 1322 that "it is proper to consider the subject matter of the statute as stated by the legislature in determining the proper construction of a statute" whereupon the court quoted the preface "AN ACT relating . . .".

Here, the 65th General Assembly, in the enactment of Chapter 186, stated its purpose to be:

"AN ACT relating to authority of the department of social services to provide state supplementary cash payments to certain persons and revising the laws of this state relative to federally-assisted categorical welfare assistance programs the operation of which are to be terminated by federal law, providing penalties for certain violations, and making an appropriation."

It should be noted that this legislative Act did not change the State's "organizational structure" for the administration of the ADC nor Medical Assistance programs, but changes were made as to the adult categorical programs in Section 13, Chapter 186, 65th G.A., reading in part as follows:

"SEC. 13. Section two hundred thirty-four point six (234.6), unnumbered paragraph one (1), Code 1973, is amended to read as follows:
"The state director shall be vested with the authority to administer old age assistance, aid to the blind, aid to dependent children, child welfare, and emergency relief, *family and adult service programs* and any other form of public welfare assistance and institutions that may hereafter be placed under his administration. . . ."

The chapters of the 1973 Code of Iowa, Chapter 241 (aid to blind), Chapter 241A (aid to the disabled) and Chapter 249 (old age assistance), were also stricken in Section 14, Chapter 186, 65th G.A., leaving untouched the ADC Chapter 239 in amending Section 234.6 subparagraph 5 which relates "to the consideration of income and resources of claimants for assistance" and "rules and regulations as may be necessary to qualify for federal aid".

Section 16, Chapter 186, 65th G.A., amended Section 234.11, 1973 Code of Iowa, as follows:

"SEC. 16. Section two hundred thirty-four point eleven (234.11), Code 1973, is amended to read as follows:

"234.11 Duties of the county board — food stamp program. The county board shall be vested with the authority to direct in the county old age assistance, aid to the blind, aid to dependent children and emergency relief with only such powers and duties as are prescribed in the laws relating thereto. *The board shall act in an advisory capacity on programs within the jurisdiction of the department of social services. The board shall review policies and procedures of the local departments of social services and make recommendations for changes to insure that effective services are provided in their respective communities. The state department shall establish a procedure to insure that county board recommendations receive appropriate review at the level of policy determination.*

"Each county shall participate in federal commodity or food stamp program."

The specific question you raise then, is, did the General Assembly, by enacting Section 16, Chapter 186, repeal the duties assigned by the county boards of social welfare in the ADC program concerning eligibility matters as detailed in Section 239.5, 1973 Code of Iowa, which reads in part as follows:

"239.5 Granting of assistance and amount of assistance — co-operation of parent. Upon the completion of an investigation the county board shall decide whether the child is eligible for assistance under the provisions of this chapter and determine the amount of such assistance. The county board shall, within thirty days, notify the person with whom the child is living or will be living, of the decision made. The county board may require, as a condition of granting assistance, that a legal guardianship be established over any recipient, or any child or children . . .

"The county board, in accordance with rules and standards established by the state department of social services, shall fix the amount of assistance necessary for any dependent child. In determining the amount of assistance, the county board shall take into consideration the income and resources of any child or relative claiming assistance under this chapter. However, in fixing the amount of assistance for any child or family, the county board, in accordance with rules established by the state department of social services, may disregard a reasonable amount of the income of the child or the family, in order to encourage the family or any of its members to become self-supporting. . . .

"The county board, under the supervision of the state department of social services, shall establish services to help families and persons receiving assistance under this chapter to become self-supporting; . . .

"No payment for aid to dependent children shall be made unless and until the county board of social welfare, with the advice of the county attorney shall certify that the parent receiving the aid for the children is co-operating in legal actions and other efforts to obtain support money for said children from the persons legally responsible for said support."

The answer is no. There is no express repeal of Section 239.5, 1973 Code of Iowa, and the courts have repeatedly held that implied repeals are not favored. *Llewellyn v. Iowa State Commerce Commission,* 200 N.W.2d 881 (Iowa 1972), *Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co.,* 165 N.W.2d 771 (Iowa 1969).

If it had been the legislative intention to repeal Section 239.5, 1973 Code of Iowa, it would have done so expressly as it did in other sections of the ADC Chapter 239 (§§239.10 and 239.11) and as it did in the "table of organization" Chapter 234, 1973 Code of Iowa; or if it had been the intention to amend Section 239.5, it would have done so expressly as it did in other sections in the ADC Chapter 239 (§§239.1(3), 239.2, 239.8 and 239.12) and as it did in the "table of organization" Chapter 234, 1973 Code of Iowa. In view of the fact that it did not expressly repeal or amend Section 239.5 and the fact that implied repeals are not favored, Section 239.5 should be given effect and harmonized with §16, Chapter 186, 65th G.A., amending §234.11, 1973 Code of Iowa.

The well established principle of *"pari materia"* applies when statutes relate to the same subject matter. The common purposes and intent of the statutes should be construed and given effect. This concept has long been recognized by the Iowa Supreme Court which stated in *Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co.,* 165 N.W.2d 771 (1969) at 774:

"We have also consistently held that statutes relating to the same subject matter or to closely allied subjects must be construed, considered and examined in the light of their common purposes and intent. Such statutes are said to be 'in pari materia'."

Another well established principle of law which applies in the instant case would be that of the specific statute controlling the general statute. Here Chapter 239 is the specific statute which controls the general statute, Chapter 234 as amended. These two (2) chapters must be harmonized to give full meaning to the legislative intention. This principle of statutory construction was most recently approved by the court in *Shriver v. City of Jefferson,* 190 N.W.2d 838 (1971) at 840:

"We have consistently held that when a general statute is in conflict with a specific statute the latter prevails whether enacted before or after the general statute."

See also §4.7, Code of Iowa, 1973.

In *Northern Natural Gas Company v. Forst,* 205 N.W.2d 692 (1973), the Court stated, at 697, that harmonization of the two statutes is desired, if possible.

". . . [W]here both a general and specific statute encompass the subject matter in question, the specific will control and take precedence, regardless of whether it was passed before or after the general enactment assuming the general validity of this claim it still remains, where one statute deals with a subject in general terms and another in a more detailed way, the two shall be harmonized if possible."

Not only was there no express repeal nor express amendment to Section 239.5, 1973 Code of Iowa, it should be noted that the 65th General Assembly amended Sections 239.1(3), 239.2, 239.8, 239.12 and repealed Sections 239.10 and 239.11, either in this chapter, 186, or in Chapters 105 or 175. The only logical conclusion that can be drawn is that the 65th General Assembly specifically wanted the county boards to play a role in the eligibility findings, even on an advisory basis, in the ADC program or it would have repealed or amended Section 239.5. The two sections, §16, Chapter 186, 65th G.A., and §239.5, 1973 Code of Iowa, as discussed above, should be harmonized, and the cardinal principle of statutory construction is that statutes must be harmonized, if at all possible, rather than discard a statute or declare it repealed by implication. See also *Board of Park Commissioners of City of Marshalltown v. City of Marshalltown,* 58 N.W.2d 394, 244 Iowa 844 (1953).

Further support for the conclusion that the General Assembly desires the county boards to play an active role in making eligibility determinations (although in an advisory capacity), is found by the express reenactment of Section 239.8, 1973 Code of Iowa, mandating that the county boards continue to concern themselves with eligibility determinations in the ADC program.

The 65th General Assembly amended Section 239.8. That amendment, found in Chapter 175, reads:

"SEC. 2. Section two hundred thirty-nine point eight (239.8), Code 1973, is amended to read as follows:

"239.8 Removal from county. When any child for whose benefit a grant of assistance has been made removes or is removed from the county giving *in*

which he resided at the time he was granted assistance, it shall be the duty of the recipient to immediately notify the county board of the county giving assistance of the fact of such removal and of the city or town (or the nearest city or town) and of the county to which the child has removed. If the removal is into another county in the state, the county which has been giving assistance shall continue the assistance for a period of six months after the date of removal, but if the removal is out of the state, assistance shall be continued as long as the child remains otherwise eligible for assistance under this chapter or until he becomes eligible for assistance from the state to which he has moved, but in no case may assistance payments from this state be continued for more than one year beyond the date of the child's removal from this state; provided, further, that during the period in which such assistance may be paid, the county board shall, by regular contact with the proper state or local welfare agency in the state to which such child has been removed, review and determine such child's eligibility for assistance other than with respect to the residence eligibility requirement. Thereafter any assistance can be granted only in the manner provided for herein as to obtaining assistance, and can be only in and from the county in which the child is then living.

"*Periodic status reports shall be requested of the recipients to assist in determining eligibility for assistance payments.*"

A re-enactment of a former statute without change indicates the former construction to be continued. See *New York Life Ins. Co. v. Burbank,* 216 N.W. 742, 209 Iowa 199 (1927).

CONCLUSION

It must be noted that the 65th General Assembly defined the status of the county boards of social services to be advisory and assigned additional duties to it without regard to the detailed responsibilities set forth in Section 239.5, 1973 Code of Iowa. In harmonizing these two sections, therefore, it is the opinion of the Attorney General that, in an advisory capacity, the county board shall make such investigations and inquiries as required in Section 239.5, 1973 Code of Iowa, [and Section 239.8, 1973 Code of Iowa, as amended by §2, Chapter 175, 65th G.A.] and its findings and recommendations shall serve as an auxiliary aid to the final decision of the State Department of Social Services.

It should be noted further that since those detailed investigatory and decision-making findings are to be "in accordance with rules and standards established by the state department of social services", it is consistent with the amendment [Section 16, Chapter 186, 65th G.A.] to Section 234.11, 1973 Code of Iowa.

Since previously the actions of the county boards were mandated to be "in accordance with rules and standards established by the state department of social services" (§239.5, 1973 Code of Iowa), and in view that "questions of policy and control respecting administration of this chapter (ADC) shall vest and remain in the state division" (§239.18, 1973 Code of Iowa), the role of the county board is not actually at variance with former procedures and duties. The final decision, however, with consideration to the recommendations of the county boards, clearly rests with the State Department.

The employees serving the county boards in the performance of their duties are now State employees, and they are to be furnished by the State Department under the amendments by the 65th General Assembly, but the county

must arrange for the office space and supplies for the State employees, with reimbursement provisions. [See Sections 6 and 7, Chapter 175, 65th G.A., and the second "New Section" following subsection 7 of Section 12, Chapter 186, 65th G.A.]

The amendment, as herein construed, also can be harmonized with both the Federal Social Security Act and the regulations thereunder. The county boards, acting as auxiliary agents for the State Department, are performing services "directly connected with the administration of the program" (of the ADC program in Iowa) and as such are to have access to the records of the local departments in the performance of their duties, [Title 45 C.F.R. §205.50(a)(1)(i)]. Thus, there is no restriction by the Federal laws or regulations from interpreting the Iowa law and the amendments thereto as expressed herein.

February 19, 1974

COUNTIES: Solid waste disposal. 1. A county can contribute money to fund a legal entity created under Ch. 28E, Code, 1973, for a governmental purpose authorized by law without holding an election. The limitation of §345.1 does not apply to a public facility owned by an entity other than the county. 2. There is no statutory authority for a council of government created under Ch. 28E to hold an election to authorize the expenditure of funds for a solid waste disposal facility. (Nolan to Ridout, Emmet County Attorney, 2-19-74) #74-2-13

Mr. William B. Ridout, Emmet County Attorney: This is written in response to your request for an opinion on the following questions:

"1. Can a County contribute an amount in excess of $50,000 to a Council of Government formed under Chapter 28E, 1973 Code of Iowa (said contribution being primarily for the purpose of developing a Council of Government Solid Waste Agency; the Agency would purchase land and machinery and erect buildings) without holding an election under Section 345.1, 1973 Code of Iowa.

"2. Can the Council of Government spend funds in excess of $50,000 for land and buildings without any election."

The limitations of §345.1, 1973 Code of Iowa, apply where the county expends money for the improvement of real estate, which is acquired by the county. Under the situation which you present, it appears that the county would have no title or property interest in the land acquired for the purposes of complying with the requirements of Code §455B.1, which mandates some approved plan for the disposal of solid waste by July, 1975. Under §332.3(12), the county itself has the authority to purchase or acquire title or possession by lease or otherwise, for the use of the county to any real estate necessary for county purposes. With this authority the county may also join with other public agencies to create a separate entity to carry out the purposes of joint exercise of governmental powers pursuant to Chapter 28E of the Iowa Code.

The county supervisors also have authority to make appropriations to fund county projects authorized by law. 1966 O.A.G. 113. Under §455B.76, Code of Iowa, 1973, every county is required to provide for final disposal of solid waste not later than July 1, 1975. Every plan proposed by the county is subject to review and approval of the executive director of the state solid waste disposal commission. The statute provides for public hearings but is silent with respect

to authorization of a referendum, except where the issuance of general obligation bonds is concerned. Chapter 228, Laws of the 6th G.A., 1973 session. Accordingly, it is our opinion that under the stated facts, the county may make such an appropriation without holding an election just as it might purchase waste disposal service by contract from a non-governmental entity without holding an election, because the county itself is not the entity establishing the public improvement or directly responsible for its erection or location, etc.

In answer to your second question, if such council of government is, in fact, a separate legal entity and is not merely a group of public agencies acting jointly under Chapter 28E to administer a cooperative undertaking, it is not limited by §345.1 and can spend funds in excess of $50,000 for land or buildings, without election, provided some member of such council at the time of its organization is a governmental body other than a county and having authority without such limitation to acquire and improve real estate.

February 19, 1974

SCHOOLS: Driver Education Programs. §321.178. Where two school districts agree to jointly provide an approved driver education program to students at a private high school, reimbursement under §321.178 is properly made to the district offering the course at a site within its territorial limits. (Nolan to Bittle, State Representative, 2-19-74) #74-2-14

Honorable Edgar H. Bittle, State Representative: This is written in response to your request for an opinion on the following question:

"Can reimbursement to a school district under Section 321.178, Code of Iowa 1973, be made directly to a school district that is the administrative agency providing the services of school personnel, classrooms, laboratories, equipment, and facilities for an approved driver education course pursuant to the provisions of Section 257.25, Sub-section 16?

The Des Moines School District and the West Des Moines School District are operating an approved driver education course to students at Dowling High School. This course is offered to students or residents of the Des Moines School District, as well as students who are residents of the West Des Moines School District attending Dowling High School. Under the terms of the agreement, the Des Moines School District is the administrative agency providing the personnel, classrooms, laboratories, equipment and facilities. As such, the Des Moines School District is required pursuant to the agreement to keep records and prepare all forms and applications necessary to certify to the State the number of students enrolled. Under the agreement, the forms are to be executed by the West Des Moines Community School District and filed with the State. Reimbursement is then made to the West Des Moines School District, which passes the money on to the Des Moines School District, the administrative agency.

All this entails a great amount of clerical work which would be unnecessary if the reimbursement could be made directly to the administrative agency pursuant to the intergovernmental agreement.

The intergovernmental agreement is approved by the State Department of Public Instruction, and has been filed as required by law.

Section 321.178 provides as follows:

'The State shall reimburse each public school district in an amount not to exceed $30 per student for each student enrolled in and regularly attending an

approved driver education course offered or made available by the school district.'

That section continues:

'Every school district in Iowa shall offer or make available to all students *residing in the school district* an approved course in driver education. Said courses may be offered at sites other than at the public school, including non-public school facilities *within the public school district.* The public school district offering said course in a non-public school *within* the public school district shall be eligible for the $30 State reimbursement for each student in the course regardless of the public school district in which the student happens to reside. . . . Funds for such reimbursement shall be appropriated by the legislature to a special driver education to be administered by the Department of Public Instruction. . . .'

Based upon the foregoing, I respectfully request your opinion whether the State Department of Public Instruction may directly reimburse the administrative agency, which is a school district offering an approved driver education course at a non-public school within another school district, when such services are being administered pursuant to an intergovernmental agreement, approved by the State Department of Public Instruction."

It is the view of this office that every school district is required to offer or make available an approved drivers' education course to all students residing therein. Presumably, under the terms of the present agreement between West Des Moines and Des Moines, the West Des Moines School District *offers* the drivers education course to Dowling students and is thereby entitled to reimbursement under the statute. Such reimbursement is limited to school districts *offering* such courses at sites *within the school district.*

It is our view that the statute cited does not contemplate direct reimbursement to a school district providing such educational program to another school district. The State Department of Public Instruction has properly approved an agreement providing for reimbursement to be paid to West Des Moines, although the Des Moines school district may actually provide the program pursuant to the approved agreement.

February 20, 1974

SCHOOLS: District Directors. §§278.1, 2, 275.12, 13, 36 Code of Iowa, 1973. The voters of a school district have statutory power to change the director district boundaries. Directors are to be elected under one of four optional plans. Where the voters mandate a change in director districts or the method of election the directors are required to carry out such directive. (Nolan to Robinson, State Senator, 2-20-74) #74-2-15

The Honorable Cloyd Robinson, State Senator: You have requested an attorney general's opinion on several questions pertaining to the school laws. These questions were submitted by separate letters, all bearing the date February 1, 1974, and have been consolidated for this response and are set out as follows:

1. Must a school district submit the director district boundaries to a vote of the people when a petition, signed by 50 or more voters, has been presented to the board as provided for in Iowa Code Section 278.2.

The change in district director boundaries is a matter which the voters have power to determine under §278.1, Code of Iowa, 1973. Section 278.2 provides

that matters authorized by law shall be submitted to the voters by the school board upon the written request of 50 voters of any school district in which registration of any of the voters is required. If a petition for a change in the boundaries of proposed director districts signed by at least one-third of the voters residing within the school district and accompanied by affidavit as required by §275.13 is filed with the school board, not earlier than six months nor later than two months before a special school election, the board shall submit such proposition to the voters at the special election.

2. Under Chapter 227, 278 and 279 of the Iowa Code, is it necessary that each director district be equal in population and that the entire school district be divided into director districts and not elected at large after a vote has been had at a general school election requiring director districts?

The Iowa Supreme Court in *Dunham v. Sauter,* 1972 Iowa, 201 N.W.2d 75, has recently upheld division of an entire school district into two director districts of "nearly equal population" where the school board of such district was composed of five directors, all elected at large, with two directors required to be residents of each of the two director districts. Under the general plan for reorganization of school districts in the State of Iowa, and particularly §275.12 of the Code, directors are to be elected under one of four optional plans:

a. Election at large from the entire district.

b. Division of the entire district into designated geographical subdistricts, each of which is to be represented on the board by a resident of such district elected at large. The boundaries of such districts and the area and population included therein to be such "as justice, equity, and the interests of the people may require".

c. Division of the entire district into designated director districts with not more than one-half of the total number of directors elected at large and the rest from and as residents of the director districts, with all directors elected by the electors of the entire school district.

d. Division of the entire district into designated geographical subdistricts known as director districts, with one director who shall be required to be a resident of each district and who is elected by the voters of such district.

In answer to your question, the voters of the school district have the power to determine which plan they wish to adopt. The Code further provides, in §275.35:

"Any existing or hereafter created or enlarged school district may change the number of directors from five to seven and may also change its method of election of school directors to any method authorized by section 275.12 by submission of a proposed new method of election and describing the boundaries of the proposed director districts if any, by the school board of such district to the electors at any regular or special school election. . . ."

Accordingly, if the voters direct that new districts be drawn, then it would be incumbent on the directors to carry out this mandate.

3. If petition which was filed does not mandate 7 director districts what would the petitioner have to do to get their proposal to a vote of the people?

Under §275.36 of the Code the following appears:

"If a petition for a change in the number of directors or in the method of election of school directors, . . . signed by at least one-third of the voters

residing within the school district and accompanied by affidavit as required by section 275.13 be filed with the school board of a school district, not earlier than six months and not later than two months before a regular or special school election, the school board shall submit such proposition to the voters at such election."

4. If the voters reject the so-called "Plan B" submitted to them by the school board, are the petitioners then back where they were in the first place and with school board members being elected at large?

A rejection of a proposition by the voters maintains the status quo. However, should the voters fail to remedy a situation of invidious discrimination inconsistent with the "one man, one vote" principle, then the constitutional validity of the present scheme of electing school board directors is subject to challenge in the courts.

February 22, 1974

TAXATION: Property Tax Reimbursement: Chapter 251, Acts of 65th G.A., First Session. The mobile home tax imposed by Chapter 135D, Code of Iowa, 1973, does not constitute "Property taxes paid" as defined in §3(10) of Chapter 251 and a mobile home which has not been converted to realty in accordance with §135D.26 is not a "Homestead" as defined in §3(5) of Chapter 251. Under such circumstances, rent paid by a mobile home owner for the use of land upon which a mobile home is located is not "Rent constituting property taxes paid" as defined in §3(8) of Chapter 251. (Griger to Riley, State Senator, 2-22-74) #74-2-16

Hon. Tom Riley, State Senator: You have requested an opinion of the Attorney General on several questions relative to Chapter 251, Acts of the 65th G.A., First Session. You inquire whether the semiannual mobile home tax imposed by Chapter 135D, Code of Iowa, 1973, is a property tax paid pursuant to §3(10) of Chapter 251. You also make the following inquiry:

"A question has arisen as to whether or not a senior citizen or totally handicapped person, otherwise eligible, who owns his or her mobile home and pays rent to the owner of land for space upon which to locate the mobile home qualifies for the benefits under Chapter 251. A typical case involves a constituent who pays $40.00 a month or $480.00 a year for such rent. If this rent qualifies, then 20% thereof ($96.00 in the illustration) would constitute property taxes paid which would result in a percentage refund to the senior citizen dependent upon the income bracket into which he or she falls."

Chapter 251 provides for property tax reimbursements to select classes of elderly and totally disabled claimants who own or rent their homesteads. Such property tax reimbursements will be payable to these claimants in amounts determinable under §§9 and 10 of Chapter 251. If a claimant actually paid property taxes on his homestead, he will be reimbursed for all or part of said taxes. If a claimant paid no property taxes as such on his homestead, but rented it, he will be reimbursed for a portion of his rent.

Section 3(5) of Chapter 251 defines "Homestead" as:

". . . the dwelling actually used as a home by the claimant during all or part of the base year, whether owned or rented, *and so much of the land surrounding it,* not exceeding one acre, *as is reasonably necessary for use of the dwelling as a home,* and may consist of a part of a multi-dwelling or multi-purpose building and a part of the land upon which it is built. *It does not include personal property except that a mobile home may be a homestead. . . .*" (emphasis supplied)

It is clear that, pursuant to this definition, if a mobile home is not an eligible "Homestead", the land upon which it is situated is not either.

Section 3(8) of Chapter 251 defines "Rent constituting property taxes paid" as:

"twenty percent of the gross rent actually paid in cash or its equivalent during the base year by the claimant or his household solely for the right of occupancy of their homestead in the base year, and which rent constitutes the basis, in the succeeding year, of a claim for reimbursement under this act by the claimant."

Section 9 of Chapter 251 defines "Gross rent" in part as:

"rental paid at arm's length solely for the right of occupancy of a homestead, exclusive of charges for any utilities, services, furniture, furnishings, or personal property applicances furnished by the landlord as a part of the rental agreement . . ."

Section 3(10) of Chapter 251 defines "Property taxes paid" in part as:

"property taxes, exclusive of special assessments, delinquent interest, and charges for services, paid on a claimant's homestead in this state, but includes only property taxes for which the claimant or a person of his household was liable and which were actually paid by the claimant or a person of his household . . . 'Property taxes paid' shall be computed with no deduction for any credit under this Act or for any homestead credit allowed under section four hundred twenty-five point one (425.1) of the Code. Claims for property tax reimbursement filed in 1974 shall be based upon the property taxes paid in 1973. *Claims for property tax reimbursement filed in 1975 shall be limited to two-thirds of the property taxes paid in 1974 and the first one-half of 1975 . . .*" (emphasis supplied).

Section 9 of Chapter 251 provides as follows:

"The amount of any claim for reimbursement filed under this Act shall be determined as provided in this section.

1. The tentative reimbursement shall be the higher of the two amounts determined as follows:

a. The amount shall be determined according to the following schedule:

If the Household Income is:	Percent of Property Taxes Paid or Rent Constituting Property Taxes Paid Allowed as A Reimbursement:
$ 0-$ 999.99	95%
1,000- 1,999.99	80
2,000- 2,999.99	65
3,000- 3,999.99	50
4,000- 4,999.99	35
5,000- 5,999.99	25

b. If the claim is for property taxes paid, the alternative tentative reimbursement shall be one hundred twenty-five dollars, but not exceeding the amount of property taxes paid in the base year, if both of the following are true:

(1) The claimant was entitled to and received the alternative homestead tax credit as provided in section four hundred twenty-five point one (425.1),

subsection five (5) of the Code against property taxes paid in the calendar year 1973.

(2) The household income is less than four thousand dollars.

2. The actual reimbursement for property taxes paid shall be determined by subtracting from the tentative reimbursement the amount of the homestead credit under section four hundred twenty-five point one (425.1) of the Code which was allowed as a credit against property taxes paid in the base year by the claimant or any person of his household. If the subtraction produces a negative amount, there shall be no reimbursement but no refund shall be required. The actual reimbursement for rent constituting property taxes paid shall be equal to the tentative reimbursement."

It is quite clear that Chapter 251 is intended to replace the additional homestead tax credit for the elderly and totally disabled provided for in §425.1(5), Code of Iowa, 1973. See §24 of Chapter 251. Further, Chapter 251 extends the concept of a "homestead" to include that which is occupied by a lessee.

Prior to the enactment of Chapter 251, certain elderly and disabled homestead tax credit claimants were given a tax credit in the maximum amount of one hundred and twenty five dollars. See §425.1(5). However, those persons who owned mobile homes and who had to pay the semiannual tax imposed by §135D.22, Code of Iowa, 1973, were not eligible for any homestead tax credit. Section 135D.26, Code of Iowa, 1973, provides as follows:

"No mobile home shall be assessed for property tax nor be eligible for homestead tax credit or military service tax credit unless:

1. The mobile home owner intends to convert his mobile home to real estate and does so by:

a. Attaching his unencumbered mobile home to a permanent foundation on real estate owned by him. Encumbered mobile homes shall not be converted to real property.

b. Destruction or modification of the vehicular frame rendering it impossible to reconvert the real property thus created to a mobile home.

2. After converting a mobile home to real estate, the owner shall notify the assessor who shall inspect the new premises for compliance with the provisions of this section and if the mobile home is properly converted the assessor shall then collect the mobile home vehicle title, registration, and license plates from the owner and enter the property upon the tax rolls."

Consequently, if a mobile home was converted to realty, owned by the claimant, in accordance with §135D.26, it would be eligible for homestead tax credit.

Section 3(5) of Chapter 251 expressly states that the term "Homestead" does not include personal property except that a mobile home may be a homestead. If the legislature intended to make all such elderly and disabled persons who live in mobile homes, who pay the mobile home tax, and who are not eligible for homestead tax credit, eligible for the property tax reimbursement, it could have done so in clear and unequivocal language. A lessee occupying a dwelling as a home has never been eligible for homestead tax credit. 1938 O.A.G. 541. However, Chapter 251 deliberately and clearly makes such lessees, who otherwise qualify, eligible for a property tax reimbursement, notwithstanding that they may pay no property taxes and receive no

homestead tax credit as such. Therefore, since Chapter 251 is in the nature of a tax exemption, and to the extent of ambiguity, the statute must be strictly construed against a mobile home tax claimant and in favor of the taxing authority. *In Re Estate of Waddington,* 1972, Iowa, 201 N.W.2d 77; *Ahrweiler v. Board of Supervisors,* 1939, 226 Iowa 229, 283 N.W. 889. A claim for tax exemption must be both within the letter and spirit of the exemption statute. *Jones v. Iowa State Tax Commission,* 1956, 247 Iowa 530, 74 N.W. 2d 563.

A mobile home is a homestead when attached to realty in the manner provided for in §135D.26, and, as such, is eligible for homestead credit allowed by Chapter 425 of the Code. A mobile home may be a homestead under §3(5) of Chapter 251. These statutes relate to the same subject matter, are in pari materia, and should be construed together. *France v. Benter,* 1964, 256 Iowa 534, 128 N.W.2d 268.

In Chapter 251, when reference is made to the concept of "Property taxes paid", frequent mention is made of the homestead tax credit which must be deducted in computing the reimbursement. See §§3(10), 9, and 24(3) of Chapter 251. But a mobile home owner is not concerned with homestead tax credit unless his mobile home is assessed as realty under §135D.26. Moreover, there is recognition in §3(10) of Chapter 251 that ad valorem property taxes, not mobile home taxes, are considered as "Property taxes paid" because this statute provides that claims for property tax reimbursement filed in 1975 shall be limited to two thirds of the property taxes paid in 1974 and the first one-half of 1975. This ties the concept of "Property taxes paid" to the fiscal year act found in Chapter 1020, Acts of the 64th G.A., Second Session, which provides for payment of 1973 ad valorem property taxes in the extended fiscal year (January 1, 1974 through June 30, 1975) in three installments, but this statute does not affect the semiannual payment of the mobile home tax pursuant to §135D.24. See §3 of Chapter 1020.

Therefore, it is the opinion of this office that a proper construction of Chapter 251 denotes that the tax imposed upon mobile homes by Chapter 135D of the Code does not constitute "Property taxes paid" and that a mobile home which has not been converted to realty in accordance with §135D.26 is not a "Homestead". Since the mobile home is not a "Homestead" as defined in §3(5) of Chapter 251, the land upon which the mobile home is located, whether owned or rented by the mobile home owner, is not part of the homestead. Therefore, rent paid for the use of such land is not "Rent constituting property taxes paid" as defined in §3(8) of Chapter 251.

February 22, 1974

MOTOR VEHICLES; HIGHWAYS; MAXIMUM LENGTH: §321.457, Code of Iowa, 1973, as amended by Chapter 219, §1, 65th G.A. 1st, 1973, and House File 671, 65th G.A., 2nd, 1974. HF 671 restricts double-bottom trucks (a combination of three vehicles one of which is a motor vehicle) to an overall length of 65 feet and further restricts their movement to four-lane highways or to a point within five miles of such a four-lane highway when measured by the most direct highway or road route, and does not permit such vehicles to be operated virtually everywhere in Iowa as long as they are moving to or from a point within five miles of some four-lane highway. (Turner to Kennedy, State Senator, 2-22-74) #74-2-17

The Honorable Gene V. Kennedy, State Senator: You have requested an opinion of the attorney general as to whether House File 671, Acts of the 65th

G.A., 2nd Session, 1974, as passed by both houses, permits 65 foot trucks, in a combination of three vehicles coupled together, to move virtually anywhere in Iowa or only on four-lane highways or to or from a point within five miles of a four-lane highway.

The question arises from §2 of the bill which provides:

"Section three hundred twenty-one point four hundred fifty-seven (321.457), subsection six (6), Code 1973, is amended to read as follows:

6. No combination of three vehicles coupled together one of which is a motor vehicle, unladen or with load, shall have an /over-all/ *overall* length, inclusive of front and rear bumpers in excess of /sixty/ *sixty-five feet.* No *single semi-trailer or trailer, together with any hitching device and any load thereon, included in such combination, shall have an overall length, inclusive of rear bumper, in excess of thirty feet. A combination of three vehicles in excess of sixty feet but not in excess of sixty-five feet may be operated only as follows:*

a. *On four-lane highways or on highways other than four-lane highways when moving to or from a point within five miles, on the most direct route, of a four-lane highway.*

b. *On other highways designated by the state highway commission."*

A strict grammatical construction of subparagraph (a), above, would appear to allow double-bottom trucks up to 65 feet in length to use any Iowa road as long as they start or end within five miles of a four-lane highway. Since there are some four-lane highways in virtually every part of Iowa, such a vehicle would always be operated while "moving to or from" a point within five miles of some four-lane highway. Such a literal and grammatical interpretation is nonsense and would mean that the General Assembly had no purpose in inserting this proviso and would render the same meaningless.

Any court, following the Iowa cases, would interpret the proviso to mean that such vehicles may be operated only as follows:

"On four-lane highways or on highways other than four-lane highways when moving to or from a point within five miles, on the most direct *highway or road* route, of *such* four-lane highway."

This is particularly true in view of subsection b which provides:

"b. On other highways designated by the state highway commission."

It is well settled that literal construction of a statute leading to absurd results should be avoided if possible. *Monamotor Oil Co. v. Johnson,* 1933, 3 F.Supp. 189. affirmed in 292 U.S. 86, 54 S.Ct. 575, 78 L.Ed. 1141. *U.S. v. Merchants Mutual Bonding Co.,* 1963, 220 F.Supp. 163; *Pilgrim v. Brown,* 1914, 168 Iowa 177, 150 N.W. 1; *In re Licenses for Sale of Used Motor Vehicles,* 1920 Iowa, 179 N.W. 609, reversed in 183 N.W. 440; *McGraw v. Seigel,* 1936, 221 Iowa 127, 263 N.W. 553, 106 A.L.R. 1035; *Lahn v. Incorporated Town of Primghar,* 1938, 225 Iowa 686, 281 N.W. 214; *Haugen v. Humboldt - Kossuth Joint Drainage District No. 2,* 1942, 231 Iowa 288, 1 N.W. 2d 242; *Dingman v. City of Council Bluffs,* 1958, 249 Iowa 1121, 90 N.W.2d 742; *Consolidated Freightways Corp. of Delaware v. Nicholas,* 1965, 258 Iowa 115, 137 N.W.2d 900; *Northern Natural Gas Co. v. Forst* 1973 Iowa, 205 N.W.2d 692.

While it is true that this is a penal statute and a penal statute is strictly construed against the state and liberally for a defendant charged with its violation, nevertheless subsection (a) is part of an exception or proviso to the general prohibition and as such must be strictly construed to resolve any doubt in favor of the prohibition. In addition, the statute is intended for the public benefit and, as such, is to be taken most strongly against those who claim rights or powers under it, and most favorable to the public, and those who would claim the exception must establish it as being within the words, as well as the reason thereof. *Wood Bros. Thresher Co. v. Eicher,* 1942, 231 Iowa 550, 1 N.W.2d 655. The Wood Bros. case dealt with the width of a vehicle, including the load thereon, under a statute which limited said width to eight feet. "Implements of husbandry temporarily moved upon a highway" were specifically excepted from the eight foot width limitation and Wood Bros., a manufacturer of farm machinery, commenced moving its corn pickers, which were clearly implements of husbandry and more than eight feet wide, from its factory in Des Moines to the farms of various purchasers throughout the state. When law enforcement officers attempted to interfere, Wood Bros. Thresher Co. sought an injunction against enforcement of the eight foot limitation on the basis of the implements of husbandry exception. The Iowa Supreme Court refused to interfere with enforcement of the eight foot limitation on the basis of this exception, indicating that the exception applied to such implements of husbandry only when they are moved on the highway "either to different parts of the farm or to other farms" and other "reasonably short, temporary movements" such as when passing over a highway while on a railroad car or from the railroad depot to the farm. Stating that the legislature never intended to allow implements of husbandry to be moved from the factory on Iowa's paved highways, most of which the court pointed out were then eighteen feet wide, the court said:

"It is a well-known rule of statutory construction that any exemption or exception in a statute contrary to its general enacting clause must be strictly construed, and all doubts should be resolved in favor of the general provision rather than the exception. (Citation) 'Statutes intended for public benefit are to be taken most strongly against those who claim rights or powers under them, and most favorable to the public. * * * Those who claim the exception must establish it as being within the words, as well as the reason thereof.' (Citations)."

There is no question in my mind but that subparagraph a is in fact an exception or prohibition to the general limitations on the size of vehicles to be moved upon the highways. §321.457, Code of Iowa, 1973, as amended by Chapter 219, §1, 65th G.A., 1st Session, 1973, proscribes the maximum length of motor vehicles or combinations thereof and, in subsection 3, establishes the overall length, inclusive of front and rear bumpers, at fifty-five feet. Subsection 6 allows so-called "double bottoms" or combinations of three vehicles coupled together, one of which is a motor vehicle, at sixty feet. This subsection (6) is clearly an exception to the fifty-five foot limitation and is the subsection amended by House File 671, §2.

Not only is there no question but that the four-lane limitation is part of an exception which must be strictly construed but it is also clear that the length statute is one intended for the public benefit and to be taken most strongly against those who claim rights or powers under it. *State ex rel Turner v. United-Buckingham,* 1973 Iowa, 211 N.W.2d 288. The United-Buckingham case said of §321.456(6):

"We also believe §321.457(6) is the kind of statute which regulates conduct subject to equitable jurisdiction. It is a traffic law enacted under the legislature's police power to promote public safety and welfare. Specifically, as a statute limiting the length of trucks on our highways, it is intended to keep the highways safe for other motorists. See *Wood Bros. Thresher Co. v. Eicher,* 231 Iowa 550, 560, 1 N.W.2d 655, 660 (1942)."

Thus, for all of these reasons, it is clear that 65 foot double bottom trucks may not move or be located more than five miles, by the most direct road, from a four-lane highway.

The fact that Senator Riley proposed an amendment to clarify subsection a, and which amendment failed to pass, should have no significance in the construction of the act. As I have pointed out on many previous occasions, if interpretation of a law could be influenced by unsuccessful attempts to amend it, virtually any section of the code would be susceptible of such legislative attempts to construe it, thus usurping the prerogative of our Supreme Court, and raising a cloud of doubt upon it. This proposition is so well settled as not to require citation of authority.

February 25, 1974

COUNTIES: Federal Revenue Sharing Funds: Services to Poor: Headstart Program Public Law 92-512, §§103(a)(1)(G), 104(a), 108(d)(1); 42 U.S.C. §2809(a)(1). County boards of supervisors may authorize use of Federal Revenue Funds to aid the Headstart Program in their counties. (Boecker to Nystrom, State Senator, 2-25-74 #74-2-18

The Honorable John N. Nystrom, State Senator: This is in response to your request for an Opinion of the Attorney General in which you ask the following question:

May the Federal Revenue Sharing Funds of a county be used to aid the funding of a Headstart Program? [P.O. 92-512]

The answer to your question is yes.

Public Law 92-512, "State and Local Fiscal Assistance Act of 1972", provides for the use of these funds to aid the poor. Public Law 92-512, Sec. 103(a)(1)(G) reads:

"(a) IN GENERAL.—Funds received by units of local government under this subtitle may be used only for priority expenditures. For purposes of this title, the term 'priority expenditures' means only —

"1) ordinary and necessary maintenance and operating expenses for —

"(G) social services for the poor or aged, . . ."

Counties of the State of Iowa are local government units as defined by Public Law 92-512, and thus to receive Federal Revenue Funds. Public Law 92-512, Sec. 108(d)(1) states in part:

"(1) UNITS OF LOCAL GOVERNMENT.—The term 'unit of local government' means the government of a county, municipality, township, or other unit of government below the State which is a unit of general government . . ."

The Headstart Program is a specific one set up to help the poor and thus qualifies under the term priority expenditure as defined in Sec. 103(a)(1)(G) of Public Law 92-512.

Title 42 U.S.C. §2809(a)(1) reads:

"§2809. Special programs and assistance; Project Headstart; Follow Through; Legal Services; Comprehensive Health Services; Upward Bound; Emergency Food and Medical Services; Family Planning; Senior Opportunities and Services.

"(a) In order to stimulate actions to meet or deal with particularly critical needs or problems of the poor which are common to a number of communities, the Director may develop and carry on special programs under this section. This authority shall be used only where the Director determines that the objectives sought could not be effectively achieved through the use of authorities under section 2808 of this title, including assistance to components or projects based on models developed and promulgated by him. It shall also be used only with respect to programs which (A) involve activities which can be incorporated into or be closely coordinated with community action programs, (B) involve significant new combinations of resources or new and innovative approaches, or (C) are structured in a way that will, within the limits of the type of assistance or activities contemplated, most fully and effectively promote the purpose of this subchapter. Subject to such conditions as may be appropriate to assure effective and efficient administration, the Director may provide financial assistance to public or private nonprofit agencies to carry on local projects initiated under such special programs; but he shall do so in a manner that will encourage, wherever feasible, the inclusion of the assisted projects in community action programs, with a view to minimizing possible duplication and promoting efficiencies in the use of common facilities and services, better assisting persons or families having a variety of needs, and otherwise securing from the funds committed the greatest possible impact in promoting family and individual self-sufficiency. Programs under this section shall include those described in the following paragraph:

"(1) A program to be known as 'Project Headstart' focused upon children who have not reached the age of compulsory school attendance which (A) will provide such comprehensive health, nutritional, education, social, and other services as the Director finds will aid the children to attain their full potential, and (B) will provide for direct participation of the parents of such children in the development, conduct, and overall program direction at the local level."

In conclusion there is nothing in Public Law 92-512 to preclude the county board of supervisors from authorizing the use of Federal Revenue Funds to aid a Headstart Program when there is a shortage of funds. There is one point that should be clarified, however, these funds may not be used for the purpose of obtaining matching Federal funds that local governments are required to contribute in order to receive said Federal funds.

Public Law 92-512, §104(a) reads:

"(a) IN GENERAL.—No State government or unit of local government may use, directly or indirectly, and part of the funds it receives under this subtitle as a contribution for the purpose of obtaining Federal funds under any law of the United States which requires such government to make a contribution in order to receive Federal funds."

The Headstart Program is one designed to aid the poor and thus, counties may use Federal Revenue Funds to assist the program if necessary.

February 26, 1974

DEPARTMENT OF SOCIAL SERVICES: OLD AGE ASSISTANCE. Chapter 249, §§4.1(1); 249.1; 249.1(8); 249.1(9); 249.19; 249.20; 249.39, 1973 Code of Iowa. §§1, 11 and 27 of Chapter 186, Acts 65th G.A., Chapter 249,

1973 Code of Iowa is repealed effective January 1, 1974, and all old age assistance liens on real estate are automatically voided and all assignments of personal property to the Department are void as of said date; however, real property, owned by the Department pursuant to said Chapter 249, property mortgaged by the Department and assets being liquidated for the revolving fund remain property of the department subject to liquidation and division of proceeds between the general fund of the State of Iowa and the Federal government as their proportionate share in said assets appear; claims filed in estates of decedents prior to January 1, 1974, are to be paid from estate assets as sixty-class claims, as rights accrued pursuant to §4.1(1), but no claims for old age assistance are to be filed in estates subsequent to that date. (Williams to Burns, Commissioner, Department of Social Services, 2-26-74) #74-2-19

Mr. Kevin J. Burns, Commissioner, Department of Social Services: You recently submitted to the Attorney General a request for an Opinion regarding Sections 1, 11 and 27 of House File 789, passed by the 65th General Assembly, First Session, now referred to as Sections 1, 11 and 27 of Chapter 186, Acts 65th G.A. You there state:

"First, may I call your attention to the fact that under Chapter 249, Code of Iowa, 1973, and prior Codes, there is a revolving fund in connection with the administration of the Old Age Assistance program. The property in this fund consists of interest in estates of decedents for reimbursement of assistance granted, interest in life insurance policies by reason of assignments, interest in personal property assigned and in real property conveyed to the Department, and the income thereon, and accounts receivable for advances to recipients to pay real estate taxes, special assessments, mortgages, or make repairs upon their real estate and money recovered for excess assistance to recipients or money received from any other source under the Old Age Assistance program.

"It should also be noted that the Federal government has an interest in the revolving fund to the extent of Federal funds expanded for the Old Age Assistance and periodic settlement is made with the Federal government with reimbursement made to it.

"Pursuant to Chapter 249, 1973 Code of Iowa, and prior Codes, notices of liens on real estate were filed in the county records of each county of the real estate and the residences of the recipients to perfect an Old Age Assistance lien upon the real estate."

In your request, you set out nine (9) specific questions which will be referred to and answered below.

1. You first ask, "Is the repeal of Chapter 249, Code of Iowa, 1973, prospective or retroactive?"

The answer is that in the absence of any provision expressly making the repeal retroactive, the repeal is prospective. *Flake v. Bennett,* 261 Iowa 1005, 156 N.W.2d 849 (1968). The pertinent provisions of Chapter 186, Acts 65th G.A., read as follows:

"SECTION 1. Chapter two hundred forty-nine (249), Code 1973, is amended by striking the chapter and inserting in lieu thereof sections two (2) through eleven (11) of this Act.

* * *

"SEC. 11. NEW SECTION. Prior liens, claims and assignments. Any lien existing on the effective date of this Act, which lien was perfected under

the provisions of sections two hundred forty-nine point nineteen (249.19), two hundred forty-nine point twenty (249.10) or two hundred forty-nine point twenty-one (249.21) as they appeared in the Code of 1973 and prior Codes, and which liens have not been satisfied, are void. Any assignment of personal property which was made under the provisions of chapter two hundred forty-nine (249) as it appeared in the Code of 1973 and prior Codes, is void. The commissioner may in furtherance of this section release any lien or claim created or existing under that chapter. Each release made pursuant to this section shall be executed and acknowledged by the commissioner or his authorized designee, and when recorded shall be conclusive in favor of any third person dealing with or concerning the property affected by the release in reliance upon such record.

* * *

"SEC. 31. This Act shall take effect January 1, 1974."

The plain meaning of these provisions is that effective January 1, 1974, the previous chapter 249 will be repealed and the specified assignments and unsatisfied liens will be void. Section 4.1(1), Code of Iowa, 1973, states:

"1. Repeal — effect of. The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, and duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed."

Thus, liens which have been satisfied prior to January 1, 1974, are not affected by the repeal of Chapter 249, Code of Iowa, 1973, but an unsatisfied lien, even though perfected prior to January 1, 1974, would be void since this is the express intent of the legislature. Section 11, Chapter 186, Acts 65th G.A., refers to assignments of personal property as the only other property rights cut off by the repeal of Chapter 249, Code of Iowa, 1973. Even though the heading of §11 refers to "claims", no mention is made in the body of that section as to whether other rights existing by virtue of Chapter 249, Code of Iowa, 1973, are abrogated.

2. You therefore next ask. "Although liens are voided on January 1, 1974, are claims filed in estates of decedents prior to January 1, 1974, to be paid from estate assets as sixth-class claims?"

The answer is yes. On the same rationale as in your first question, where the debt has accrued and a claim of the sixth class against the estate of the decedent has been filed as authorized by §249.19, Code of Iowa, 1973, prior to its repeal and even though the claim remains unsatisfied as of January 1, 1974, the claim is not abrogated by repeal of the statute. The legislature expressly voided unsatisfied liens and assignments of personal property, but did not mention the sixth-class claim in the estate so that the conclusion, supported by §4.1, Code of Iowa, 1973, is that the accrued right and proceeding commenced has not been voided. It cannot be argued that claim of the sixth class against an estate is a "lien" under §249.19, Code of Iowa, 1973, especially where the statute has by its very language distinguished between a "lien" and a "claim". See *Dunlop v. Hemingway,* 245 Iowa 696, 701, 63 N.W.2d 901 (1954). Of course, any such estate claims filed after January 1, 1974, even though the right to do so may have been present before that date, will not be authorized as §249.19, Code of Iowa, 1973, authorizing such filing, was repealed effective January 1, 1974.

3. You next ask, "Can personal property which has been assigned to the Department of Social Services be disposed of prior to January 1, 1974, although the recipients may yet be living?"

The pertinent provision of Chapter 249, Code of Iowa, 1973, repealed effective January 1, 1974, read as follows:

249.20 . . . "If the state director deems it necessary to protect the interest of the state, it may require, as a condition to the grant of assistance, the absolute conveyance or assignment or all, or any part, of the property of an applicant for assistance to the state director; upon the taking of such deed or assignment the state division shall pay any delinquent taxes against said property and said deed shall reserve to the grantor and his spouse a life estate in said property and an option to the grantor and his heirs to purchase said property by repayment of the total amount paid for the benefit of the recipient. Said option insofar as the heirs are concerned shall be for six months from the date of the death of the grantor or the grantor's surviving spouse, if any.

"Title to any real estate may be taken in the name of the state director of the division of child and family services of the department of social services.

"Such property shall be managed by the state division which shall credit the net income to the account of the person or persons entitled thereto. The state director shall have power to lease, sell, assign or convey such property or defend and prosecute all suits concerning it, and to pay all just claims against it, and to do all other things necessary for the protection, preservation and management of the property."

As you state in your request, in some instances, Old Age Assistance recipients have made an absolute assignment of personal property in order to be eligible, for a grant. The clear language of §249.10, Code of Iowa, 1973, allowed the state director, defined as the Director of Child and Family Services by §249.1(1), Code of Iowa, 1973, to dispose of this property, and provisions relating to the death of the recipient merely prescribes the procedures for disposal in the event the property then remains in the hands of the Department of Social Services, and requires the property be liquidated and the funds applied for a repayment of assistance.

Granted, the use of the terms "said property" or "such property" in §249.20, Code of Iowa, 1973, are somewhat ambiguous as to whether both real and personal property conveyed or assigned to the Department of Social Services are covered by that language but in general the powers given to the state director in this section must apply to both real and personal property assigned or conveyed to the Department. Indeed, §249.1(8) defines "property" thusly:

"8. The term "property" shall mean those things in which a person has legal title or owns, whether in lands, goods, investments, stocks, bonds, securities, notes, money or money on deposit, insurance on his life, or intangible rights such as patents, copyrights or anything of value which may be alienated."

In addition, the state division had authority to accept assignment for eligibility purposes of securities and investments for purposes of holding the same in trust for reimbursement to the old age revolving fund pursuant to §249.9(4), Code of Iowa, 1973. The only limitation on this general use of the term "property" would be with respect to the life estate and option to repurchase reserved to the grantor and the use of the term "deed" before these reservations indicates that only real property is so limited. It is therefore the

opinion of the Attorney General that personal property assigned to the Department of Social Services pursuant to Chapter 249, Code of Iowa, 1973, may be liquidated prior to January 1, 1974, and applied to the accrued debt of a recipient, be he living or deceased.

Mention should be made here of a previous Opinion of the Attorney General, which appears at page 107 of the Report of the Attorney General, 1946. In disposing of property, the Department should take care to comply with the requirement there set out that excess proceeds, over and above the amount of assistance provided up to January 1, 1974, be returned to the assignor or his estate. See also, 1944 O.A.G., p. 56.

Indeed this conclusion is strengthened by the provisions of §249.20, Code of Iowa, 1973, which require the state director to take those measures necessary to protect the interests of the State. In light of the abrogation of assignments of personal property effective January 1, 1974, it would appear to be the duty of the Department of Social Services to liquidate assets while they still exist, in order to protect the fund which exists in favor of both the federal government for their funds expended under the program and the State General fund.

4. You next ask, "Can personal property which has been assigned to the Department, remain in the revolving fund until the decease of the assignor and be liquidated at that time?"

The answer is clearly no, as of January 1, 1974. Section 11, Chapter 186, Acts 65th G.A., expressly states that assignments of personal property made pursuant to the repealed Chapter 249, Code of Iowa, 1973, are void as of that date.

5. You next ask, "Under Section 27 of the enrolled bill, is the Department to hold real property in the revolving fund until the death of the recipient-grantor and dispose of the property through his estate or may the same be disposed of prior to the death of the recipient and the proceeds from sale in either event distributed to the Federal government and the State general fund as their proportionate interests appear?"

The reasoning here is the same as in question three, supra, and the answer is even clearer that real property may be disposed of prior to the death of the recipient since there is no ambiguity as to the right of the Department of Social Services to dispose of real property. Moreover, the Department's title to deeded real property is not affected by the repeal of Chapter 249, Code of Iowa, 1973, under the same rationale as in question one, supra, and the property will remain in the revolving fund until disposed of. Chapter 186, Acts 65th G.A., states that the revolving fund will remain until the program is "wound up". The pertinent provision, §27, Chapter 186, Acts 65th G.A., reads:

"SEC. 27 . . .

"The old-age assistance revolving fund existing pursuant to section two hundred forty-nine point thirty-nine (249.39), Code 1973, shall be maintained in the state treasury until such time as the property heretofore managed by the department pursuant to that section has been disposed of in total. The fund shall then be closed and all money remaining in the fund transferred to the general fund of the state."

Thus, the Department of Social Services may dispose of real property to which it holds legal title, both before January 1, 1974, under §249.20, Code of

Iowa, 1973, and after that date, under the above quoted §27, Chapter 186, Acts 65th G.A. In neither case is the death of the recipient a condition precedent to such disposal. In the case of real property, it would be more likely that liquidation by the state would occur after January 1, 1974, since the debt of the recipient, accrued up to that date, would be final and a sum certain. In accordance with the purpose of §27, Chapter 186, Acts 65th G.A., and sound business practice in winding up a business, the Department of Social Services could then effectively dispose of all real property to which it holds legal title and close any accounts in connection therewith.

It should be noted that any deed to real estate which the Department holds pursuant to §249.20, Code of Iowa, 1973, is subject to a life estate in the grantor and his spouse and an option to redeem in the grantor and, for six months from the date of death of the grantor or surviving spouse, in his heirs. It is elementary that any conveyance by the Department would also be subject to these reservations. In addition, any excess proceeds from the sale of the real property over the assistance debt would inure to the recipient or his heirs.

6. You next ask, "Can the Department file claims in estate of decedents to recover on its accounts receivable which represent advances of State funds to pay taxes, special assessments, house repairs, mortgages and such items on property owned by recipients?"

In accordance with the answer to your fourth question, supra, it is clear that sixth class claim for assistance granted may no longer be filed as of January 1, 1974. The question still remains whether the advancement of such funds as above set out could be claimed as an eighth class claim pursuant to §633.425, Code of Iowa, 1973, as an account receivable. Given the nature of the funds advanced, the answer to that question must be no. The funds advanced for the purposes set out above have been advanced from the "Old-Age Assistance Revolving Fund" created by §249.39, Code of Iowa, 1973, and continued by §27, Chapter 186, 65th G.A. Therefore, the advancements constitute "assistance" as that term is defined in §249.1(9), Code of Iowa, 1973, as "money payments to, or in behalf of, a needy, aged, person." As §249.19, Code of Iowa, 1973 providing for a claim of the sixth-class for "assistance" granted is now repealed and no claim exists, it would appear that any claim for "assistance" granted may not be filed subsequent to January 1, 1974. This office knows of no authority which would permit the Department of Social Services to convert its prior claim for "assistance" into a present account receivable or other eighth class claim pursuant to §633.425, Code of Iowa, 1973.

7. You next ask, "Although liens on real estate for the total amount of Old Age Assistance granted are voided, can the Department in protecting the revolving fund for liquidation and disbursement to the Federal government and the State general fund obtain security agreements to the dollar amount of the account receivable on each property for money expended to protect the recipient's real estate?"

As it appears in question number six, supra, the amount of "assistance" granted, including advancements from the revolving fund expended to protect recipient's real estate, may not be converted into an "account receivable" or other eighth class claim. Consequently, no security other than that permitted by Chapter 249, Code of Iowa, 1973, prior to January 1, 1974, or Chapter 186, Acts 65th G.A., subsequent to January 1, 1974, may be required of recipients.

8. Your next question states, "Are liens on real estate automatically released or must the Commissioner execute a release of lien for filing in each county in which an Old Age Assistance lien has been perfected?"

The answer is that the real estate lien is automatically released by the statutory abrogation of the lien. This is supported by implication from the further language of §11, Chapter 186, Acts 65th G.A., which reads in pertinent part:

". . . The commissioner *may* in furtherance of this section release any lien or claim created or existing under that chapter. Each release made pursuant to this section shall be executed and acknowledged by the commissioner or his authorized designee, and when recorded shall be conclusive in favor of any third person dealing with or concerning the property affected by the release in reliance upon such record." [Underscoring supplied]

Thus, the Commissioner may clear title to real property by a specific release of lien, for example on the request of a third buyer, but the filing of such a release is not mandatory and the lien is released by the statute authorizing release. As the Iowa Supreme Court made clear in *In re Estate of Lane,* 244 Iowa 1976, 59 N.W. 2d 593, (1953), Old Age Assistance liens are created by statute and not by operation of law.

9. Your final question states, "Does the enrolled bill affect title to the real estate which has been deeded to the Department pursuant to Chapter 249, 1973 Code of Iowa, and prior Codes?"

As stated in answer to your fifth question, supra, real property which has been deeded to the Department of Social Services pursuant to §249.20, Code of Iowa, 1973, prior to its repeal on January 1, 1974, is not affected by that repeal or by §11, Chapter 186, Acts 65th G.A., Section 249.20, Code of Iowa, 1973, stated in part:

* * *

"If the state director deems it necessary to protect the interest of the state, it may require, as a condition to the grant of assistance the absolute conveyance or assignment of all, or any part, of the property of an applicant for assistance to the state director. . . ."

Section 11, Chapter 186, Acts 65th G.A., specifically voided only "liens" and any "assignment of personal property" and did not attempt to void the "absolute conveyance" of any real property. As in your question number one, supra, the situation is therefore governed by §4.1(1), Code of Iowa, 1973, which states:

"1. Repeal — effect of. The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed."

Consequently conveyance of real property to the Department of Social Services made pursuant to §249.10, Code of Iowa, 1973, and prior codes, are not affected by the repeal of that section or the enactment of §11, Chapter 186, Acts 65th G.A., if completed prior to January 1, 1974. Subsequent to that date of repeal of §249.20, Code of Iowa, 1973, it is clear that no authority exists to require such an absolute conveyance of real property.

The conclusion that the absolute conveyance of real property is not affected is again strengthened by §27, Chapter 186, Acts 65th G.A., which continues the old age assistance revolving fund until such time as the property held pursuant to Chapter 249, Code of Iowa, 1973, is disposed of in total. The revolving fund is to then be closed and all remaining money is to be transferred to the general fund of the state.

February 26, 1974

TAXATION: Property taxation of forest and fruit tree reservations. S.F. 1059, 65th G.A., 2nd, 1974; §441.22, Code of Iowa, 1973. S.F. 1059 violates the due process clauses contained in the Fourteenth Amendment to the United States Constitution and in Article I, §9 of the Iowa Constitution because it provides for a five year period of retroactive taxation. (Griger to Eugene Hill, State Senator, 2-26-74) #74-2-20

Hon. Eugene M. Hill, State Senator: You have requested an opinion of the Attorney General on the question of whether S.F. 1059 as drafted and amendment S-2140 there to as adopted would be unconstitutional because of the retroactive effect of this proposed legislation. Subsequent to your opinion request, the Senate passed S.F. 1059 on February 12, 1974. Therefore, this opinion will only consider the retroactive provisions of S.F. 1059 as passed by the Senate.

Section 441.22, Code of Iowa, 1973, provides that forest and fruit tree reservations shall be assessed, for property tax purposes, on a taxable valuation of four dollars per acre, said valuation for fruit tree reservations being for a period of eight years from the time of planting.

Senate File 1059 amends §441.22. This amendment retains all provisions of §441.22, but, in addition, states that in the year immediately following a change in the use of property which constituted a forest or fruit tree reservation, the assessor shall determine the actual and assessed value of such property pursuant to §441.21, Code of Iowa, 1973, and shall apply such actual and assessed value to each of the preceding five years less the assessed value heretofore certified to the County Auditor for each preceding year. The County Auditor then determines the additional taxes due for each of these preceding five years, enters such taxes on the tax books, and so notifies the County Treasurer who is required to send a statement of these taxes due to the property owner. Thus, under S.F. 1059, if the use of property as a forest or fruit tree reservation changed in the year 1974, the assessor, in 1975, would assess such property at twenty seven percent of its fair market value for the year 1975 in accordance with §441.21, and also apply that same taxable value to each of the five years preceding 1975 i.e. 1974-1970, less the taxable value placed on the property during those five preceding years. Additional taxes for these preceding years would be calculated and the property owner notified.

Clearly, S.F. 1059 provides for retroactive taxation. However, S.F. 1059, is not, as you suggest, an ex post facto law because it is concerned with civil non-penal matters only whereas an ex post facto law is a law applicable to criminal or penal matters. *State v. Wilson,* 1922, 193 Iowa 297, 186 N.W. 886; 16A C.J.S. *Constitutional Law* §414. However, the question arises whether the retroactive taxation contemplated by S.F. 1059 is so arbitrary and unreasonable as to violate due process of law.

The mere retroactivity of a statute affecting taxation does not render it unconstitutional. Such a statute is valid if it is not arbitrary and does not disturb vested rights, impair contractual obligations, or violate due process of law. *Welch v. Henry,* 1938, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87. In *Welch v. Henry,* supra, the United States Supreme Court held that a Wisconsin income tax statute which was enacted in 1935 and which subjected to taxation dividends heretofore tax exempt and received by the taxpayer in 1933 did not violate the due process and equal protection clauses of the fourteenth amendment to the United States constitution. The Court stated at 305 U.S. 151:

"While the Supreme Court of Wisconsin thought that the present tax might 'approach or reach the limit of permissible retroactivity', we cannot say that it exceeds it."

In *City National Bank of Clinton v. Iowa State Tax Commission,* 1960, 251 Iowa 603, 102 N.W.2d 381, the Iowa Supreme Court discussed *Welch v. Henry,* supra, and stated at 251 Iowa 608-9:

"Recent transactions taxable retroactively to be valid would seem to be extended no further than two years, or up to the adjournment of the last previous legislative session, so that, as appellants argue, if the attempt to fix the cost basis herein was in fact retroactive taxation during a period of 20 years between 1935 and 1955, it would clearly be unreasonable and a violation of the due process clause of our constitution."

In *Colonial Pipeline Company v. Commonwealth,* 1966, 206 Va. 517, 145 S.E.2d 227, the Virginia Court stated at 145 S.E.2d 231:

"It is true, as Colonial says, that the Welch case involved the constitutionality of a retroactive income tax, but we think the principles there enunciated apply with equal force to the present case involving ad valorem property taxes."

In *State v. Pacific Telephone & Telegraph Co.,* 1941, 9 Wash. 2d 11, 113 P.2d 542, the Washington Court held that a statute enacted in 1939 for the collection of a state use tax retroactively to April 30, 1935, exceeded the constitutional limits of permissible retroactivity.

Based upon an application of the foregoing authorities to S.F. 1059, it is the opinion of this office that this proposed legislation exceeds the constitutional limits of permissible retroactivity because it provides for a five year period of retroactive taxation. Such retroactive taxation is in violation of the due process clauses contained in the fourteenth amendment to the United States constitution and in Article I, §9, of the Iowa constitution.

February 27, 1974

STATE OFFICERS AND DEPARTMENTS — Examination of Public Records. Chapter 68A, Code of Iowa, 1973. State officers must allow the examination and reproduction of copies of list of names and addresses of state employees. It may provide computerized list of same at requestors' cost. State officers may not allow examination and reproduction of personal information in confidential personnel records. Information as to which employees participate in the Deferred Compensation Plan, including named insured, company providing individual policy, and the amount is such information which is confidential. (Robinson to Selden, State Comptroller, 2-27-74) #74-2-21

Mr. Marvin Selden, Jr., C.P.A., State Comptroller: This is written in response to your request for an opinion concerning applications made to you for list of employees and whether or not other employee related information is part of the "public records" of the State as defined in Chapter 68A, The Code. In your letter you state:

"We have had requests from time to time from various employee organization groups for listings of State Employees and their addresses. Further, we have had some requests from insurance companies and others interested in our Deferred Compensation Plan for lists of those employees participating in these plans, the amounts, and the insurance company writing the contract.

"In connection with this, I would request the following opinion from you:

"1. Is this office, or any other state office, obligated to provide lists of employees and their addresses to anyone requesting the information? If so, may we charge and recover our costs for the preparation of such a listing?

"2. Is this office, or any other State office, obligated to provide data on these employees who have a Deferred Compensation Plan with the State? (Such data would include name, insured, company, amount, and other pertinent information). If so, may we charge and recover our costs for the preparation of such a listing?"

In our opinion these questions should be answered (1) yes and (2) no for the reasons we will develop.

Chapter 68A provides in pertinent part:

"68A.1 Public records defined.

"Wherever used in this chapter, 'public records' includes all records and documents of or belonging to this state. * * *

"or any branch, department, board, bureau, commission, council, or committee of any of the foregoing."

"68A.2 Citizen's right to examine.

"Every citizen of Iowa shall have the right to examine all public records and to copy such records, * * *

"unless some other provision of the Code expressly limits such right or requires such record to be kept secret or confidential. The right ot copy records shall include the right to make photographs or photographic copies while the records are in the possession of the lawful custodian of the records."

"68A.3 Supervision.

"Such examination and copying shall be done under the supervision of the lawful custodian of the records or his authorized deputy. The lawful custodian may adopt and enforce reasonable rules and regulations regarding such work and the protection of the records against damage or disorganization. The lawful custodian shall provide a suitable place for such work, but if it is impracticable to do such work in the office of the lawful custodian, the person desiring to examine or copy shall pay any necessary expenses of providing a place for such work. All expenses of such work shall be paid by the person desiring to examine or copy. The lawful custodian may charge a reasonable fee for the services of the lawful custodian or his authorized deputy in supervising the records during such work."

"68A.7 Confidential records.

"The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information: * * *

"11. Personal information in confidential personnel records of public bodies including but not limited to cities, towns, boards of supervisors and school districts."

QUESTION 1. NAMES AND ADDRESSES OF STATE EMPLOYEES

In an opinion dated January 23, 1968, (Turner to Fulton, Commissioner, Dept. of Public Safety) with respect to the examination and reproduction of drivers licenses, this office advised that same is allowed under the Examination of Public Records Chapter (68A) of the Code of Iowa. 1968 O.A.G. 518. At page 520 of said opinion we find:

"Although there are some public records which are to be kept confidential and are exempted from the open inspection right under Chapter 106, all license and registration lists and records of your department as well as other departments are included and clearly come under the definition of 'public records.' We are unable to find any language in this statute which would justify you in denying to any person the right to inspect your records on a mass basis or that would permit you to require a person asking to inspect any of your records to specify the particular operator's license, chauffeur's license, temporary driving permit or motor vehicle registration to be examined or reproduced. Moreover, while you would not be required to prepare or make lists or compilations of registration information for persons desiring the same, any such lists which you already had or were to prepare for your own use would themselves be public records and open to inspection and copying under the act.

"Whether or not the data obtained from your records is to be used for commercial purposes is immaterial. The statute does not make any distinctions as to the purpose for which public records may be used. Hence, there is no legal authority under which you could resist the purposes for which the person copying your records could use the information contained therein to uses determined by your department to be in the public interest."

Section 68A.3 of the Code of Iowa, 1973, provides for the supervision of the examination and copying of public records. It also provides that all expenses including a reasonable charge for the services of the custodian shall be paid by those seeking such information. This is in contrast to Section 48.5 and the opinion dated May 5, 1970, (Turner to Representative Shaw) regarding registration lists found in 1970 O.A.G. 614. If you find that it is easier for you to furnish a computerized list at the requestors cost, we know of no prohibition against providing same. In fact, we believe this to be the preferred procedure.

Our Iowa Supreme Court has never decided the questions you raise since the passage of the Examination of Public Records Act. In *Linder v. Eckard,* 1967, 261 Iowa 216, 152 N.W.2d 833 the Court held that appraisal reports were not public records under §622.46. This was decided on the admitted narrow issue as to what constituted a "public record" in the absence of a statutory definition. Section 68A.1 now provides that definition. In *Board of School Div. v. Wisconsin Emp. Rel. Com'n,* 1969, 42 Wis.2d 637, 168 N.W.2d 92 the names, addresses, salaries and working conditions of the teachers or any municipal employees were held to be part of the public record and an

employer could not grant exclusive access to such public records to one employee bargaining group and not the other.

QUESTION 2. ADDITIONAL INFORMATION.

Your second question requires a balance of the public's right to know and the individuals' right to privacy. This is a complex problem in contemporary society. It must be weighed against the need to promote honesty in government by seeing to it that public business functions under the hard light of full public scrutiny. The modern trend says that freedom of information is the rule and secrecy is the exception. Yet governmental employees also have a right to privacy. If this is taken away, the ability to locate and keep qualified personnel in government will be harmed.

With questions like this, one must weigh the effect of disclosure with that of non-disclosure together with the consequent effect on the public as the primary concern. We fail to see how disclosure of lists of those state employees participating in the Deferred Compensation Plan, to what amount or with what company enhances the public interest. It appears to us that this is a matter of private concern among competing insurance companies. The totals in each category should be public knowledge. The amount each employee chooses is his own affair. The State provides the basic plan for each employee. The employee has the election to purchase at his cost. Thus, this is a private matter falling within the area of personal information in confidential personnel records of public bodies that shall be kept confidential as specified by §68A.7(11), the Code.

February 28, 1974

STATE OFFICERS: Superintendent of Banking. Funds deposited in commercial checking account by Superintendent of Banking to defray expenses of receiverships originating in the 1920's and 1930's may be turned over to the State Treasury and maintained as a trust account. (Nolan to Hall, Deputy Superintendent of Banking, 2-28-74) #74-2-22

Mr. Howard K. Hall, Deputy Superintendent, Department of Banking: This is written in response to your request for an opinion from this office regarding the transfer of a small checking account with the Iowa-Des Moines National Bank as recommended by the Auditor of State. The account is question represents the balance of a substantially larger amount accumulated to offset the cost of the Department of Banking for handling bank receiverships originating in the 1920's and 1930's. Although all of such receiverships have been closed, from time to time this account has been used to clear title to real property on which a lien was held by a bank no longer in existence or by the Superintendent of Banking as Receiver of a bank.

Section 12.10, Code of Iowa, 1973, requires that all elective and appointive state officers, boards, commissions and departments, deposit with the Treasurer of State or to the credit of said Treasurer in any depository designated by him 90% if all fees, commissions and moneys collected or received. Under §524.207 the Superintendent of Banking is required to pay fees and money received by him to the Treasurer of State within the time required by §12.10. This section further provides that the Treasurer shall hold such funds in an account in the name of the superintendent for the payment of expenses of the Department of Banking. The superintendent is authorized to

"keep on hand with the treasurer of state funds in excess of current needs of his office to the extent approved by the state banking board."

The Superintendent of Banking and the Superintendent of Banking as Receiver are juridically two persons. *Bates v. Niles and Waters Savings Bank of Anamosa,* 1939, 226 Iowa 1077, 285 N.W. 626.

I have been unable to locate any specific authority for the consolidation of funds approved for receivership activities into a single account to be maintained until exhausted. It is my view that it would now be appropriate for the banking board to direct the superintendent to transfer the money currently deposited in the special receiver's account to the State Treasury and used as at present, for expenses arising from the acts of the Superintendent of Banking as Receiver until the legislature provides otherwise. Any other expenses of the department, payable under §524.207 should not be paid from such trust account.

February 25, 1974

RETIREMENT SYSTEM: Banking Board: Delegation of Legislative Power. S.F. 327, 65th G.A., 2nd, 1974. A legislative delegation of power to the State Banking Board to recommend a retirement system does not allow the Executive Council or anyone else to actually create or establish such a retirement system. The recommendation, if any, must be presented to the General Assembly. (Turner to Willits, State Senator, 2-25-74) #74-2-23

The Honorable Earl M. Willits, State Senator: You have requested an opinion as to whether Senate File 327, 65th G.A., 2nd Session, 1974, as amended and passed by the Senate on February 14, 1974, requires Executive Council approval of any retirement system established pursuant to the bill before the system is effective.

Attached to your bill is a copy of Senate File 327 and the clip sheets of the Senate amendments, and which bill, and amended, is entitled "An Act to permit the state banking board to establish a retirement system for employees of the department of banking."

It appears from the clip sheet that Senator Doderer's amendment, Division S-2172A and shown to be adopted, coupled with the amendment of the Committee on Commerce designated S-710, and also shown to be adopted, now makes the bill provide only that the state banking board may "recommend" a retirement system rather than to actually "establish" such.

I see nothing in the Act about Executive Council approval or, indeed, about approval by anyone. Obviously, in adopting Senator Doderer's amendment, the Senate recognized that the power to recommend does not carry with it a delegation of the power to establish.

I note that Senator Doderer's second proposed amendment providing "The retirement plan recommended by the state banking board shall be submitted to the general assembly for approval prior to implementation" lost. I assume the Senate considered this part of the amendment superfluous.

Thus, the delegation to the state banking board to recommend a retirement system, without a specification as to who is to actually approve or establish the system, merely permits the state banking board to present its recommendation for a retirement system to the general assembly if it desires to do so. Hopeful-

ly, the House of Representatives will broaden this great step to allow others, perhaps even elected state officials, to recommend to the general assembly a system providing benefits for their own retirement. Indeed, I myself have several recommendations covering a wide variety of subjects, if the general assembly will ever permit me to make them.

Beyond this, it is doubtful that the general assembly can simply delegate the power to establish a retirement system "substantially equivalent to those received by employees performing similar duties for the Federal Deposit Insurance Corporation under the United States Civil Service Retirement Act as S.F. 327 would do. Such guidelines appear inadequate. Our fathers, in Article III, Section 1, Constitution of Iowa, vested the legislative authority of the state in our general assembly, not the superintendent of banking, the banking board, the Executive Council or even congress. The state banking board is a state agency, part of the Executive Department, and although no appropriation would be required, lawmaking is beyond its constitutional powers.

February 28, 1974

STATE OFFICERS AND DEPARTMENTS: Merit employment department; collective bargaining. Chapter 19A, Code of Iowa, 1973. S.F. 531, 65th G.A., Second Session (1974). Any conflicts between Chapter 19A, the merit employment law and S.F. 531, a measure to grant collective bargaining rights to public employees, would be resolved in favor of the latter. (Haesemeyer to Daggett, Hansen, Bortell & Danker, State Senators, 2-28-74) #74-2-24

The Honorable Horace Daggett, The Honorable Ingwer L. Hansen, The Honorable Glen E. Bortell, The Honorable Arlyn E. Danker, State Representatives: You have requested an opinion of the Attorney General with respect to S.F. 531, the proposed Public Employment Relations Act. This measure passed the Senate in the first session of the 65th General Assembly and it is currently pending in the House. Specifically, you inquire as to whether or not such S.F. 531 is hopelessly and irreconcilably in conflict with the provisions of Chapter 19A. Code of Iowa, 1973, the Merit Employment Law.

For example, §9 of S.F. 531, as amended by the House, provides in relevant part:

"The public employer and the employee organization shall meet at reasonable times, including meetings reasonably in advance of the public employers' budget making process, to negotiate in good faith with respect to wages, hours, vacations, insurance, holidays, leaves of absence, shift differentials, overtime compensation, supplemental pay, seniority, transfer procedures, job classifications, health and safety matters, evaluation procedures, procedures for staff reduction, in service training and other matters mutually agreed upon. Negotiaions shall also include terms authorizing dues checkoff for members of the employee organizations and grievance procedures for resolving any questions arising under the agreement, which shall be embodied in a written agreement and signed by the parties. If an agreement provides for dues check-off, a members' dues may be checked off only upon the member's written request and the member may terminate the dues check-off at any time by giving thirty days written notice. Such obligation to negotiate in good faith does not compel either party to agree to a proposal or make a concession.

"Nothing in this section shall diminish the authority and power of the merit employment department, board of regents; merit system, educational radio

and television facility boards' merit system or any civil service commission established by constitutional provision, statute, charter or special act to recruit employees, prepare, conduct, and grade examinations, rate candidates in order of their relative scores for certification for appointment or promotion or for other matters of classifications, reclassification or appeal rights in the classified service the public employees serve. * * *"

As stated in §19A.1, the general purpose of Chapter 19A is stated in §19A.1 as follows:

"The general purpose of this chapter is to establish for the state of Iowa a system of personnel administration based on the merit principles and scientific methods governing the appointment, promotion, welfare, transfer, layoff, removal and discipline of its civil employees, and other incidents of state employment. All appointments and promotions to positions in the state service shall be made solely on the basis of merit and fitness, to be ascertained by competitive examinations, except as hereinafter specified."

Section 19A.9, as amended by Chapter 12, 65th G.A., First Session (1973) gives the Merit Employment Commission and the Director of the Merit Employment Department broad powers with respect to virtually all of the matters which would now be made the subject of negotiation under the first paragraph of §9 of S.F. 531. Thus, if S.F. 531 were adopted in its present form, the authority and power of the Merit Employment Department would be limited *only* to those matters specifically enumerated in the last paragraph quoted above of §9 of S.F. 531. Expressio unius est exclusio alterius. Thus the effect of the enactment of S.F. 531 as it is presently constituted would be to effectively emasculate the Merit Employment system. This could have serious repercussions where agencies which receive federal funding are involved because such grant-in-aid agencies under federal law are required to have a merit system substantially in compliance with federal guidelines.

The problem is somewhat complicated further by the existence of §19A.22, Code of Iowa, 1973, which provides:

"The provisions of this chapter, including but not limited to its provisions on employees and positions to which the merit system apply, shall prevail over any inconsistent provisions of the Code and all *subsequent* Acts unless such *subsequent* Acts provide a specific exemption from the merit system."

While we cannot say for certain, it would be our opinion that §9 of S.F. 531 would probably amount to a specific exemption from the Merit System and would prevail over the provisions of Chapter 19A. However, if the legislature really intends to diminish the authority of the Merit Employment Department to the extent indicated, it would certainly be cleaner and less productive of litigation if it were to specifically amend Chapter 19A to spell out in clear terms what powers and duties were to be left with the Merit Employment Department.

Under §9 of S.F. 531, grievance procedures is one of the matters which would become a subject for negotiation. Under §19A.14 an elaborate procedure is established for handling grievances by covered employees through appeals to the appointing authority, the Merit Employment Commission and the district court. Section 18 of S.F. 531 attempts to resolve this conflict by creating a by-pass of the Merit Department grievance procedure by providing that an aggrieved employee can follow either the procedure under Chapter 19A or the procedure established under the collective bargaining

agreement. Thus, it is evident that different groups of employees would be having their grievances handled under different procedures and it is conceivable that this would allow an election of forums by the employee according to which board appears to be the most lenient.

Subsection 8 of §16 of S.F. 531 takes away from the Merit Department under Chapter 19A one of its principal duties, in providing that wages and all other fringe benefits of public employees of the state under the Merit Plan shall be negotiated with the Governor or his designee.

Section 26 of S.F. 531 specifically refers to the Merit System and provides that pay plan established under the Merit System shall be altered to the extent necessary and possible in order to reflect an agreement resulting from collective bargaining under S.F. 531. This would effectively negate the Merit Employment Department's powers with respect to the establishment of pay plans contained in §19A.9(2).

In answer then to your question, we do not find that S.F. 531 and Chapter 19A are irreconcilably in conflict. There is a great deal of conflict but the conflict would be resolved in favor of S.F. 531 particularly in view of §19A.22 which contemplates subsequent acts providing a specific exemption from the merit system. However, we would urge that if it is the intent of the legislature to enact this measure reducing the Merit Employment Department to essentially a record keeping agency that substantial and wholesale amendments to Chapter 19A should be included in S.F. 531 to make the two measures compatible in all respects.

March 1, 1974

STATE OFFICERS & DEPARTMENTS: Travel expenses of public officials and employees. §68B, 68B.2(5), Code of Iowa, 1973. Transportation, lodging and other travel expenses of public officials and employees by private interests are in most cases prohibited. (Beamer to Fulk, Secretary, Fair Board, 3-1-74) #74-3-1

Mr. Kenneth R. Fulk, Secretary, Iowa State Fair: Reference is made to your letter of February 22, 1974, in which you raise certain questions with respect to procedures for the Iowa State Fair Board to follow in relation to travel agencies and the promotion of the Iowa State Fair. For purposes of this opinion, it is advisable to set forth the background for your request of February 22, 1974, in which you state:

"Tours to create interest in the themes of the Iowa State Fair, and in the activities of the Iowa State Fair, conducted in recent years have, from all measurements, resulted in being a good advertising investment in proportion to the actual cost to the Iowa State Fair.

"Last fall, when the theme for the 1974 Fair was announced, the Iowa State Fair Board made no plans for a tour to promote and advertise the 1974 Fair because of the uncertainty of fuel supplies. Now that the energy situation has stabilized to a degree, and the government has evidenced the intent is to maintain some economic activity in all areas of work, tour agencies are aggressively trying to survive financially and are having tours.

"Tour agencies aware of the 1974 State Fair theme have contacted the Iowa State Fair Board and stated they are planning tours, and one of their tours could be in honor of the Fair.

"The Iowa State Fair Board is encouraging all agencies conducting tours that would help promote the 1974 Fair to remind their patrons of the Fair and encourage them to come to the Iowa State Fair.

"The Iowa State Fair Board plans to cooperate with agencies with tours that in the Board's judgment do the most to advertise, and in other ways promote interest in the 1974 Iowa State Fair.

"It is customary for travel agencies conducting tours to have a reasonable number of tour escorts to assist the people on the tour by answering questions, helping them on and off transportation vehicles, aware of the availability of special tours, helping people adjust to the changing environment, locating medicines when needed and in general helping people feel a little more comfortable and trying to make the trip more enjoyable and meaningful.

"Tour escorts may be hired employees of the agency. If the tour is being conducted for a special interest group, the tour agencies prefer to have a few people who are related in some way with the special interest group to be part of the escort. Tour agencies usually do not pay the special tour escorts any salary, but usually provide transportation and lodging for the escorts.

"Tour escorts who are employees of the Iowa State Fair, who are officials of the Fair, or individuals who are closely related to the Fair, make the best escorts to promote, advertise and relate the Fair to the travellers."

Specifically, you request an opinion of the Attorney General upon the following questions:

"What is the best procedure for the Iowa State Fair Board to obtain tour escorts who will do the most for the Fair?

"1. Purchase tickets for fair selected escorts and pay their added necessary expenses; or,

"2. Permit the travel agencies to provide the transportation and lodging, or,

"3. Other.

"If the Fair purchases the tickets for Fair selected escorts

"a. The cost of the tickets for those going on the tour can be reduced, resulting in a saving to those who go on the tour; or,

"b. The tour ticket prices can remain the same and the travel agency can make more profit; and

"c. the cost to the Fair would be increased.

"If the travel agency provides the transportation and lodging for the Fair selected escorts

"a. A saving would be made in fair expenditures; and

"b. the cost of the tickets for the tour to those going on the tour would be more, or

"c. the travel agency would make less profit.

"Which alternative or is there another alternative that your office would recommend?"

The best procedure for the Iowa State Fair Board or any state board or agency is to conduct its affairs in such a manner as to promote both the actual

practice and the public appearance of government business without unwarranted privileges or exemptions for its personnel. The possible conflicts raised in your opinion request touch on a subject that has had the benefit of numerous opinions from this office as well as the subject of law review articles and other legal periodicals, but has not been dealt with to an extensive degree by the courts.

Government at all levels continues to grow and increase its role in the economy and welfare of the country and private life of the individual citizen. Concern for honesty and integrity on the part of elected government officials is becoming increasingly important. *Conflicts of Interest of State and Local Legislators,* 55 Iowa L. Rev. 450 (1969-1970). This principle should be equally true of appointed officials and government employees. Americans seem to demand more from their governmental representatives than from their private professional and business community. It has long been recognized that the public official, because of his position of public trust, has "the obligation of acting solely in the interests of the cestui que trust, the public". *Conflicts of Interests: State Government Employees,* 47 Va. L. Rev. 1034 (1961). *State ex rel Grant v. Eaton,* 114 Mont. 199, 133 P.2d 588. *Ekern v. McGovern,* 154 Wis. 157, 142 N.W. 595. Today the questionable conduct of public officials often falls within the gray area of "subtle and illusive conflict situations encompassing a vast span of activities, such as influence peddling, gift giving, arrangements, promises and friendships". *Remedies for Conflict of Interest Among Public Officials in Iowa,* 22 Drake L. Rev. 600 (1972-1973).

Traditionally, nothing has been so damaging to the governmental institution as the mere appearance of a conflict between a public official and private interests. A conflict of interest question tends to undermine public confidence in the individual official specifically, and in state or federal government generally. The federal government enacted 18 U.S.C.S. Section 208 to deal with this problem. The federal statute is designed to prohibit government officials from engaging in conduct which might be inimical to the best interest of the general public. *U.S. vs. Mississippi Valley Generating Co.,* 364 U.S. 520, 5 L.Ed.2d 268, 81 S.Ct. 294.

It is apparent that the regulation of potential as well as actual conflict situations will tend to erase both the temptation which might improperly influence an official in the discharge of his official duty and the concurrent public suspicion of malfeasance. Apparently, this concern in Iowa manifested itself in the adoption by the Iowa legislature of Chapter 68B, Code of Iowa, 1973, known as the Iowa Public Officials Act, enacted by the 62nd General Assembly, Chapter 107, 62nd G.A. (1967). Your opinion request calls for a consideration of Chapter 68B. The question in a broader scope must resolve the manner in which the Fair Board can deal with private interests and not raise questions of conflict of interest or bespeak of any impropriety.

In our opinion, the relationship you describe involving employees of the Iowa State Fair or officials of the Fair acting as tour escorts for the travel agencies in exchange for transportation and lodging expenses falls squarely within the prohibitions of Chapter 68B. Employees of the state are specifically covered under §68B.2(5). State Fair Officials are covered under §68B.2(6) inasmuch as these officials receive per diem and "officials" are defined as "any officer of the State of Iowa receiving a salary or per diem whether elected or appointed or whether serving full time or part time".

Section 68B.5 provides respectively:

"No official, employee, member of the general assembly, or legislative employee shall, directly or indirectly, solicit, accept, or receive any gift having a value of twenty-five dollars or more whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form. No person shall, directly or indirectly, offer or make any such gift to any official, employee, member of the general assembly, or legislative employee which has a value in excess of twenty-five dollars. Nothing herein shall preclude campaign contributions or gifts which are unrelated to legislative activities or to state employment."

Chapter 68B.5 is designed to stop the public official at the doorstep of temptation and relieve the prosecutor of proving actual bribery or influence.

The question then presented is whether officials or employees of the Iowa State Fair would be receiving, "directly or indirectly", a gift having a value of twenty-five dollars or more in the specific forms set forth in §68B.5, or "any other form". Travel is listed as a form of a "gift" and has been so held by this office. Haesemeyer to Wellman, 1972 O.A.G. 276. Lodging certainly would be included as "hospitality" or another form of gift. The fact that a tour escort does provide some service to other members of the tour, in the manner outlined in your letter, does not in the opinion of this office, relieve the Fair officials or employees from the prohibitions of §68B.5. Such a practice could be construed as a "transparent ruse" to circumvent the intent and manifest purpose of Chapter 68B, a practice formally denounced by this office. Haesemeyer to Wellman, 1970 O.A.G. 319.

It should also be noted that free travel expenses cannot be given to the state as a "gift" under §565.3, Code of Iowa, 1973. That section states:

"565.3. Gifts to state. A gift, devise, or bequest of property, real or personal, may be made to the state, to be held in trust for and applied to any specified purpose within the scope of its authority, but the same shall not become effectual to pass the title in such property unless accepted by the executive council in behalf of the state."

This office held in an opinion, cited above, Hesemeyer to Wellman, 1970 O.A.G. 319, that §565.3 contemplates gifts or property somewhat more substantial than gifts principally benefiting specific individuals even though some benefit might be derived by the state.

The question of the Iowa State Fair Board paying for various members of the Board to take part in these tours is an administrative decision which must be made by that body. The justification for members of the Board to participate in tours raises the same questions as any request for travel outside the state by government personnel. It is not the prerogative of this office to make determinations as to which trips should or should not be authorized.

In the event the Fair Board does purchase tickets for selected personnel of the Fair, it would follow that the corresponding cost to all parties taking part in the tour should decrease. This, of course, results from the fact that the travel agency is receiving additional funds from the Fair Board instead of paying their expenses as tour escorts.

The final question presented by the facts contained in your request, although not specifically set forth, is the extent the State of Iowa or the Iowa State Fair Board should allow its name to be associated with a commercial

private enterprise. Iowa's present statutes are directed at prohibiting public officials an opportunity for private gain at public expense. The State must also guard against identifying with a private interest to the exclusion of others or in promotions by that interest. This is not to hold that the Fair Board is limited in recommending or suggesting that all of Iowa's citizens visit and tour foreign countries which involve the theme of the 1974 Iowa State Fair.

March 4, 1974

LEGISLATURE: Standing and Study Committees. §§2.14, 2.15, 2.61, 2.62, Code of Iowa, 1973. The phrase "study committee" is a term of art, and for the purposes of that part of §2.61 of the Code which limits legislators to participation in only two "study committees", refers only to those committees requested by the legislative council to do research on a special topic. (Haesemeyer to Norpel, State Representative, 3-4-74) #74-3-2.

Honorable Richard J. Norpel, Sr., State Representative: In your letter of November 2, 1973, you request an Attorney General's opinion on the following issue:

"Section 61 reads that no legislator shall serve on more than two study committees. To me, this would also include standing committees that do study certain issues of the legislature. This section also definitely states that a standing committee can be assigned the role of study committee. I ask then is not a standing committee a study committee when, at times, they do study a recommended subject matter. The definition of 'study' would include most everything in performance as that of a standing committee.

* * *

"I do not see anywhere in this section that, if a sub-committee of a standing committee is to function during the interim, only a certain number of its members can be chosen to serve. As I interpret it, all members are included, as these standing sub-committees are appointed by the legislators to function. I also do not see where the Legislative Council or the standing sub-committee chairmen have the power to designate the number of members on these standing subcommittees during interim."

The questions which you have presented are: (1) Is a standing committee or sub-committee a study committee (for purposes of the §2.61 restriction) whenever it studies an issue? (2) When a sub-committee of a standing committee is to meet during the interim does the sub-committee chairman or the legislative council have the power to restrict the number of sub-committee members who may participate during the interim?

It is true that all standing committees and sub-committees spend a varying percentage of their time studying various topics. Therefore, if we literally interpret the §2.61 restriction, no legislator could serve on more than two committees, since all committees study issues at various times and are therefore study committees. However, this interpretation obviously runs counter to the legislative intent, as evidenced by two facts: (1) If the legislature had intended to restrict participation in standing or sub-committees a restriction analogous to that used in §2.61 could have been used in §2.14. (2) In current legislative practice, quite a large number of legislators serve on more than two standing or sub-committees.

Therefore, we are left with only one other interpretation of the §2.61 restriction, i.e., that study committee as used therein is a term of art and has a limited

meaning. In our opinion, this interpretation comports with the language of the applicable Code provisions.

Sections 2.61 and 2.62, Code of Iowa, 1973, provide:

"Requests for research on governmental matters may be made to the legislative service bureau by either house of the general assembly, committees of either house of the general assembly, special interim committees of the general assembly, the legislative council, or upon petition by twenty or more members of the general assembly. Any legislative committee may request the service bureau to do research on any matter under consideration by such committee. For each such request the legislative council may, if deemed advisable, authorize a special interim study committee to conduct the research study or may request a standing committee to conduct such study. Members on a study committee shall be appointed by the council and shall consist of at least one member of the council and such other members of the majority and minority parties of the senate and the house of representatives as the council may designate. As far as practicable, a study committee shall include members of standing committees concerned with the subject matter of the study. No legislator shall serve on more than two study committees. Nonlegislative members having special knowledge of the subject under study may be appointed by the council to a study committee but such members shall be nonvoting members of such committee. The legislative service bureau shall assist study committees on research studies when authorized by the legislative council.

"Special interim study committees shall have the following powers and duties:

"1. Elect officers and adopt necessary rules for the conduct of business.

"2. Conduct research on any matter connected with the study assigned by the legislative council. . . ."

Thus, when the legislative council deems it appropriate to have a research study conducted, it may either form a special committee, in accordance with §2.61, or it may request a standing committee to conduct the study. Thus, "study committee" refers only to: (1) standing committees when they conduct a study in response to a legislative council request; (2) special committees authorized by the council to conduct studies. This means that if a standing committee is requested to study some subject, any member of that committee who already serves on two other study committees may not be a member of that standing committee in its role as a study committee. This would be the only situation where the council or committee chairmen could restrict standing or sub-committee membership.

Sections 2.14 and 2.15, Code of Iowa, 1973, provide:

"1. A standing committee of either house or a sub-committee when authorized by the chairman of the standing committee, may meet when the general assembly is not in session in the manner provided in this section. . . .

* * *

"3. Interim studies utilizing the services of the legislative service bureau must be authorized by the general assembly or the legislative council. . . .

"4. Standing committees and subcommittees of standing committees may meet when the general assembly is not in session under the following conditions:

"a. A standing committee may meet one time at the discretion of the chairman.

"b. Additional meetings of standing committees or their subcommittees shall be authorized by the legislative council; however, such authorization may be given at any one time for as many meetings as deemed necessary by the legislative council.

"c. Any study committee, other than an interim committee provided for in subsection 3 of this section, which utilizes staff of the legislative services bureau may meet at such times as authorized by the legislative council.

* * *"

"The powers and duties of standing committees shall include, but shall not be limited to, the following:

* * *

"2. Conducting investigations with the approval of either or both houses during the session, or the legislative council during the interim,. . .

* * *

"5. Undertaking in-depth studies of governmental matters within their assigned jurisdiction, not only for the purpose of evaluating proposed legislation, but also for studying existing laws and governmental operations and functions to determine their usefulness and effectiveness, as provided in section 2.14. . . ."

In answer to the second question presented, and with the exception noted immediately above, we find no language which empowers standing committee or sub-committee chairmen, or the legislative council, to restrict participation in standing committee or sub-committee meetings during the interim insofar as such are committees or sub-committees specifically authorized by the legislature. Their only function is to authorize the meetings and they have no power to decide which committee members may participate in interim meetings in the absence of any clear statutory language indicating such power.

March 5, 1974

STATE OFFICERS AND DEPARTMENTS: Department of Health; Ch. 1088 §236, Laws of the 64th G.A.; §§135.11(9), 135.1(4), 137.2(5), 1973 Code of Iowa. The state housing code is applicable to areas outside a municipality without adoption by the county board of health. (Haskins to Pawlewski, Commissioner of Department of Health, 3-5-74) #74-3-3

Mr. Norman L. Pawlewski, Commissioner of Public Health: You ask whether the state housing code to be established by the State Department of Health under the authority of Chapter 1088, §236, Laws of the 64th General Assembly is applicable to areas outside of a municipality without adoption of the Code by the county board of health. It is our opinion that the state housing code is applicable to such areas without adoption of the Code by the county board of health.

Section 135.11, 1973 Code of Iowa, sets forth the powers and duties of the State Department of Health. Chapter 1088, §236, Laws of the 64th General Assembly amends §135.11(9) to give the department of health the power and duty of establishing a state housing code. Section 135.11(9) as amended by

Chapter 1088, §236, Acts of the 64th General Assembly, states in abbreviated form:

"The commissioner of public health shall be the head of the 'Department of Public Health', which shall:

* * *

"9. Establish, publish, and enforce a state housing code containing minimum requirements for the protection of the public health, safety, and welfare.

* * *

"A city may adopt by ordinance part or all of the state housing code, or may adopt minimum requirements which are higher or more stringent than the requirements of the state housing code, and may enforce its ordinances in the usual manner and in the same manner as the state housing code may be enforced, as provided in this section.

"*Local health boards, or local health officials, shall enforce the state housing code subject to supervision by the department.*" [Emphasis added]

The words "local health board" includes a county or city health board. Sections 135.1(4), 137.2(5), 1973 Code of Iowa.

As can be seen from the above statutes, nothing indicates that the state housing code must be adopted by the county board of health in order for it to be applicable to areas outside a municipality. Rather, the amended §135.11(9) says that "[1] local health boards, or local health officials, shall enforce the state housing code . . .". No qualification is expressed that adoption by the county board of health is required.

It should be noted that nothing herein should be construed to mean that the applicability of the state housing code inside municipalities is contingent on approval by the governing body of the municipality. Indeed, nothing in the amended §135.11(9) indicates that adoption of the state housing code by the governing body of a municipality is required before the code becomes applicable inside a municipality. The paragraph in the amended §135.11(9) permitting a city to adopt the state housing code by ordinance is simply a legislatively created means for the city to add its resources to those of the state department of health for the purpose of enforcing the state housing code. The paragraph in no way implies that adoption of the state housing code by the governing body of a municipality is required for it to become in force therein.

In conclusion the state housing code is applicable to areas outside a municipality without adoption by the county board of health.

March 6, 1974

ELECTIONS: Receipts & Expenditures. 2 U.S.C., §§431-442; S.F. 583, Acts, 65th G.A., 1973. Candidates for federal office, as "federal office" is defined in 2 U.S.C., §431(c), and political committees who support or oppose such candidates, are not subject to the provisions of S.F. 583 while the current Federal campaign funds disclosure act or an analogous one is in effect, except to the extent that a political committee, other than the candidate himself, which anticipates receiving or expending, or does in fact receive or expend more than $100, but not more than $1,000, in support of or opposition to a candidate for Federal office, must file with the State as per S.F. 583

but not with the Federal Government as per 2 U.S.C., §§431-442. (Haesemeyer to Synhorst, Secretary of State, 3-6-74) #74-3-4

Honorable Melvin D. Synhorst, Secretary of State: In your letter of November 20, 1973, you request an Attorney General's opinion on the following questions:

"Are the provisions of Senate File 583, Acts of the 1973 Sessions of the Sixty-fifth General Assembly, applicable to Iowa candidates for the offices of United States Senator and Representative in Congress?

"Are the provisions of this Act applicable to political committees which accept contributions or make expenditures in the aggregate of more than one hundred dollars in any one calendar year for the purpose of supporting or opposing Iowa candidates for the offices of United States Senator and Representative in Congress?"

Section 18, S.F. 583 provides:

"This Act shall apply to candidates for federal office only in the event such candidates are not subject to a federal law requiring the disclosure of campaign financing. Any such federal law shall supersede the provisions of this Act."

"Federal office" as defined in 2 U.S.C., §431(c), 1972, means ". . .the office of President or Vice President of the United States, or of Senator or Representative, or Delegate or Resident Commissioners to the Congress of the United States." This provision is part of the federal campaign funds disclosure act. 2 U.S.C., §431-442, which took effect in April, 1972, and was apparently the model upon which S.F. 583 was drafted. Under the federal law candidates for federal office are required to file reports. 2 U.S.C., §434. Therefore, in answer to your initial query, as long as this Federal act or an analogous one continues in effect, Iowa candidates for the United States Congress are not subject to the provisions of S.F. 583. However, under 2 U.S.C., 439, copies of the federal reports are required to be filed with the appropriate state secretary of state.

Turning to your second question, it is to be observed that both "candidate" and "political committee" are defined terms for the purpose of the Iowa act. Thus, §3 of S.F. 583 provides in relevant part:

"Sec. 3. *NEW SECTION.* As used in this Act, *unless the context otherwise requires:*

"1. 'Candidate' means any individual who has taken affirmative action to seek nomination or election to a public office but shall exclude any judge standing or retention in a judicial election.

* * *

"6. 'Political committee' means a person, including a candidate, or committee, including a statutory political committee, which accepts contributions or makes expenditures in the aggregate of more than one hundred dollars in any one calendar year for the purpose of supporting or opposing a candidate for public office."

While "political committee" as defined includes a "candidate" the reverse is not true and we therefore must conclude that the §18 qualification does not apply to political committees, since by its language it refers only to "candidate". Accordingly, any political committee of a candidate for federal office, other than the candidate himself, must comply with the provisions of S.F. 583,

and this does not preclude such political committees from compliance with any applicable federal provision.

2 U.S.C., §431(d) provides:

"'Political committee' means any committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000."

2 U.S.C., §453(a) provides:

"Nothing in this Act shall be deemed to invalidate or make inapplicable any provision of any State law, except where compliance with such provision of law would result in violation of a provision of this Act."

It follows that any political committee, other than the candidate himself, who supports or opposes a candidate for a federal office, is subject to S.F. 583 if it receives or expends in excess of $100, and subject to 2 U.S.C., §431-442 if it receives or expends in excess of $1,000.

March 8, 1974

ELECTION LAW: County Central committee. §43.99, 1973 Code of Iowa, as amended by Chapter 136, Laws 65th G.A., §55, 1973 Code of Iowa. Each party precinct caucus shall elect only two members as delegates to the county central committee. (Haesemeyer to Patchett, State Representative, 3-8-74) #74-3-6

Honorable John E. Patchett, State Representative: Reference is made to your letter of February 26, 1974, in which you state:

"Specifically, I would like to know whether it is legal under the *Code of Iowa* for an individual county to change the composition of its central committee by providing for the election of additional precinct committee people, who will cast full votes on the central committee, from precincts based on the vote for that party's candidate for Governor in that precinct in the most recent general election."

§43.99, Code of Iowa, 1973, as amended by §55, Chapter 136, 65th G.A., First Session (1973) provides in relevant part:

"43.99 Party committee members. Two members of the county central committee for each political party shall, at the precinct caucuses, be elected from each precinct. * * *"

In our opinion this statutory language is clear, plain and unambiguous and is susceptible of only one interpretation. Two members of the party county central committee, no more and no less, are to be elected at the precinct caucuses.

March 13, 1974

LIQUOR, BEER & CIGARETTES: Payment for treatment of alcoholics. Chapter 163, §§1, 2, 65th G.A., First Session, 1973; Chapter 123B, 1973 Code of Iowa. When an alcoholic is treated at a facility qualified under §123B.1(2), 1973 Code of Iowa, to provide such treatment, the county of the alcoholic's legal settlement must pay only one-half of the cost of care, maintenance, and treatment of the alcoholic by that facility out of the county's state institutions fund. Payment is based upon the facility's average daily per patient charge. (Coriden to Riley, State Senator, 3-13-74) #74-3-7

The Honorable Tom Riley, State Senator: In your request for an Attorney General's Opinion, you set out the following facts:

"As you know, Chapter 163 of the 65th General Assembly, First Session (1973), provides that certain fees obtained in connection with the privilege of selling alcoholic liquor or beer on Sunday are to be refunded to the appropriate local authority to be deposited in the County Mental Health Institutional Fund to be used only for the care and treatment of persons admitted or committed to the Alcoholic Treatment Center at Oakdale or any facilities as provided in Chapter 123B of the Code.

"The Citizen's Committee on Alcohol and Drug Abuse is a facility as provided by Chapter 123B of the Code. Any individual being referred to the Alcoholic Treatment Center at Oakdale from Cedar Rapids must be processed through said Citizen's Committee on Alcohol and Drug Abuse.

"On or about September 30, 1973, the sum of $3,825.16 was paid over from the Iowa Liquor Commission to the City of Cedar Rapids and then to the County Mental Health Institutional Fund for Linn County. For some reason, the Linn County Auditor has not paid said sum to the Citizen's Committee on Alcohol and Drug Abuse, a facility as provided in Chapter 123B, even though said Citizen's Committee on Alcohol and Drug Abuse is in dire need of said funds in order to perform its statutory responsibilities in the treatment of alcohol and drug abuse in our city."

Your question was:

". . .Assuming the foregoing facts (with reference to the amount of money that has been deposited in the County Mental Health Institutional Fund of Linn County and that the Citizen's Committee on Alcohol and Drug Abuse is the facility provided in Chapter 123B of the Code and referred to in Chapter 163 of the Acts of the 65th General Assembly, 1973 Session), what showing must the said Citizen's Committee on Alcohol and Drug Abuse make in order to receive the funds so deposited?"

According to the Iowa Code, the Linn County Auditor cannot pay the entire sum of $3,825.16 directly to the Citizen's Committee on Alcohol and Drug Abuse. Under §123.36, 1973 Code of Iowa, as amended by Chapter 163, 65th G.A., First Session, 1973, the Iowa Beer and Liquor Control Department credits all fees paid annually for special liquor permits and liquor control licenses issued under §§123.29 and 123.30, 1973 Code of Iowa, to the beer and liquor control fund and then remits to the appropriate local authority a sum equal to 65 per cent of the fees collected for each class "A", class "B", or class "C" license covering premises located within their respective jurisdictions. The amount remitted to the local authority out of the fee collected for the privilege of selling beer or alcoholic liquor on Sunday is to be deposited in the county mental health and institutions funds to be used only for the care and treatment of persons admitted or committed to the alcoholic treatment center at Oakdale or any facilities as provided in Chapter 123B, 1973 Code of Iowa.

However, the money which is deposited in the county mental health and institutions fund as outlined above is not then paid directly to the qualified facility. Pursuant to §123B.4, the Iowa Commission on Alcoholism may enter into a written agreement with any qualified facility to pay one-half the cost of care, maintenance, and treatment of an alcoholic confined as a voluntary patient within that county. Under this agreement, if one payment for the care, maintenance, and treatment of a patient is not made by the patient or by those who are legally liable for the patient within thirty days after the patient's discharge, the commission then pays one-half the cost directly to the facility. The payments are to be made monthly and based upon the facility's average daily per patient charge.

The counties pay for the remaining one-half of the cost from their state institutions fund as provided in §444.12, 1973 Code of Iowa. Once each month, the facility where the patient was treated certifies to the county of the alcoholic's legal settlement one-half of the cost of the care, maintenance, and treatment of the alcoholic who has been confined as a voluntary patient. The county then pays the cost so certified to the facility from its state institutions fund. Section 123B.5, 1973 Code of Iowa. If at the time the alcoholic was admitted to the facility, the legal settlement of the alcoholic was in another state or country or was unknown, the Iowa Commission on Alcoholism pays for that portion of the cost that the county of legal settlement would normally pay. Section 123B.7, 1973 Code of Iowa

To summarize, the Citizen's Committee on Alcohol and Drug Abuse is entitled to reimbursement only for the cost of the care, maintenance, and treatment of the patients which it handles. There is no provision in the Iowa Code which would authorize direct payment by the Linn County Auditor to the Committee of the entire sum of $3,825.16 which was remitted by the Iowa Beer and Liquor Control Department to the City of Cedar Rapids.

March 13, 1974

CITIES AND TOWNS: Filling Vacancies, Conflict of Interest — §§366.4, 368A.22, and 397.32, Code of Iowa, 1973; §§2 and 5, Chapter 1088, Acts of the 64th G.A., Second Session. The action of a city council in approving and confirming an appointment to fill a vacancy may be done by motion or resolution in a municipal utility board. Said motion or resolution must pass by a majority of votes which constitute a number greater than half. The owners of a store who are also on the city council and a municipal utility board may have conflicts of interest when the city and utility purchase goods from the store. (Blumberg to Griffee, State Representative, 3-13-74) #74-3-8

Honorable William B. Griffee, State Representative: We are in receipt of your opinion request of February 4, 1974. In it you indicated that the city in question had adopted Divisions I, II, IV, and VII (Parts 1 and 2) of the new City Code. You specifically asked:

"This particular city in my district also has a Municipal Light Plant managed pursuant to Iowa Code Chapter 397 by a Board of Trustees. A vacancy has occurred on the Board of Trustees and Iowa Code Section 397.32 provides that the mayor shall appoint a board of three trustees which appointment shall be *approved and confirmed by the council.* . . . All vacancies occurring on said board shall be filled in the manner original appointments are made. . . .

"Of course, the trustee is compensated for his services on the Municipal Light Plant Board. He will also be engaged in the expenditure of monies on behalf of the Municipal Light Plant and ultimately on behalf of the city. The question I am asking at this point is: When the vacancy is filled, must this action be taken by the council in its approval and confirming of the nominee of the mayor by simple motion, by resolution, or by some other procedural device?

"Question Two is: Iowa Code Section 366.4 provides that no resolution or ordinance shall be adopted without a concurrence of a majority of the whole number of members elected to the council by call of the ayes and nays which shall be recorded. This particular city has a council of six members and has *not* adopted Division VI of the new Home Rule Law. If a resolution is the proper procedural vehicle for the City Council to approve and confirm the nominee

of the mayor to the position of Trustee on the Municipal Light Plant Board, are not four votes needed to effectuate the approval and confirmation by the council?

"Question Three is: If this approval and confirmation by the City Council can be done by simple motion, must the simple motion be backed by at least four members of the City Council?

"Question Four: If the vote on the approval of the nominee of the Municipal Light Plant Board resulted in a vote of three in favor, two opposed and one abstaining, would the nomination fail in view of Code Section 366.4 which requires a majority of the whole number of the council or would it pass because a majority of those voting councilmen voted to confirm the nominee?

"Question Five is: Assuming non-compliance with any of your rulings relating to the above questions, in the course of an appointment whether any person so appointed would be lawfully appointed for the purpose of exercising governmental functions, expending governmental funds and receiving compensation from governmental sources for his services?

* * *

"Question: One of the hardware stores in this particular city is a family enterprise owned jointly by an elderly father and two middle aged sons. One of the sons is Chairman of the Municipal Light Plant Board of the City and the other son is a member of the City Council of the City. The city makes numerous purchases through this particular hardware store. None of these purchases are of a large individual sum but taken together add up to a substantial figure over the course of a year. Is there any violation of the Iowa Conflict of Interest Law by purchases by the city involved from this particular hardware store in view of its ownership and the positions held in city government by two of its three owners?"

In answer to your first question, it appears that section 397.32, 1973 Code of Iowa, controls. That section provides that vacancies in municipal utility trustee boards shall be filled by a mayor's appointment, and such appointment shall be approved and confirmed by the council. You ask whether this approval and confirmation is to be done by motion, resolution or some other procedural device. We know of no means by which a city council may act in this capacity other than by motion, resolution or ordinance.

"Ordinance" is defined in §2(18), Chapter 1088, Acts of the 64th G.A. as a city law of a general and permanent nature. See also *Cascaden v. City of Waterloo,* 1898, 106 Iowa 673, 77 N.W. 333. "Motion" and "resolution" are defined in §2(20), Chapter 1088, Acts of the 64th G.A. as a council statement of policy or a council order for action to be taken. In 5 E. McQuillan, Municipal Corporation (1969, is a discussion of resolution, motions and ordinances. It is stated there that a resolution is not an ordinance and is something less formal. Resolutions deal with matters of a special or temporary nature and are simply an expression of opinion or mind concerning some particular item of business within the municipality's official cognizance. They are ordinarily ministerial in nature, relating to the administrative business of the municipality. Thus, all acts done by a municipality in its ministerial capacity and for a temporary purpose may be put in the form of a resolution. Matters upon which municipalities desire to legislate must be put in the form of ordinances. 5 E. McQuillan Municipal Corporations §15.02.

Generally, where the decision of a matter is committed to the Council alone, and is silent as to the mode of its existence, the decision may be evidenced by

resolution unless it is necessarily implied from legislative intent that an ordinance is necessary. 5 E. McQuillan, §15.06. An example of a resolution found in §15.07 is the authorizing of an election of officers by a board consisting of the mayor and aldermen. A motion confers authority to do a specific act. Generally, there is little difference between a motion and a resolution and the terms are sometimes synonymous. §15.07. As an example, proceedings in the form of a motion duly carried and entered on record are frequently held to be equivalent to a resolution. *Mill v. Denison,* 1946, 237 Iowa 1335, 25 N.W.2d 323.

From the above, it is obvious that an act by the Council in approving and confirming the filling of a vacancy is ministerial in nature and an administrative rather than a legislative function. Therefore, such approval and confirmation may be made by motion or resolution.

Your second and third questions ask what constitutes a majority. Section 366.4 of the Code provided that no resolution or ordinance shall be adopted without a concurrance of a majority of the whole number of council members. In 26 Words and Phrases (1953), the examples of definitions of "majority" show that a number greater than half is necessary, including a cite to *Mills v. Hallgren,* 1910, 146 Iowa 215, 124 N.W. 1077. In your situation where there are six councilmen, four votes are necessary for a majority for either a resolution or a motion. Thus, in answer to Question four, a vote of three in favor, two opposed and one abstaining would not constitute passage by a majority. With respect to Question five, if the Council approved said appointment by anything less than four votes in favor, said person would not be lawfully appointed for the purpose of exercising any functions of that position.

In answer to your last question we refer to §5, Chapter 1088 and §368A.22 of the 1973 Code, which is nearly identical. The general rule is that a city officer or employee shall not have an interest, direct or indirect in any contract or job of work or material or the profits thereof or services to be furnished or performed for the city. There are ten exceptions to this general rule. They are, in pertinent part: (1) Contracts made by a city of less than three thousand population made upon competitive bid; (2) Contracts in which a city officer has an interest solely by reason of employment or a stock interest, if less than five percent, if the contracts were made by competitive bidding and if the remuneration of employment will not be directly affected as a result of the contract, and the duties of employment do not directly involve the procurement or preparation of any part of the contract; (3) A contract with a corporation in which a city officer has an interest by reason of stockholdings of less than five percent; and, (4) A contract made by competitive bid in which a member of a city board of trustees, commission or administrative agency has an interest if he is not authorized by law to participate in the awarding of the contract.

In previous opinions we have held that members of municipal boards of adjustment, city planning commission, and city councils are "officers" within the statute (§368A.22). See, O.A.G., October 26, 1965; February 15, 1965; and 1970 O.A.G. 321. We see no reason to hold otherwise for a municipal utility trustee. Although the facts relative to this question are not complete, some things are obvious. First, by nature of the ownership of the store in question and the official capacities of the owners, it is obvious that the remuneration of the persons involved will be affected by the contracts, and that their duties would directly involve the procurement or preparation of the contract.

Secondly, a member of a utility board would have some authorization in the award of a contract. The only exception of any consequence that might apply is if the city in question has a population of under three thousand. Outside of that, the facts point to a conflict of interest.

March 14, 1974

SCHOOLS: Area Vocational Schools. (1) An area vocational school curriculum may include certain arts and sciences courses obtained by contract with existing private or public institutions. (2) The curriculum is subject to approval by the State Board of Public Instruction, but the contracts for obtaining the desired course offerings are not required to be submitted for approval by the State Board. (3) An area vocational school has no specific authority to offer college transfer credits toward a baccalaureate degree. (4) Area 1 (Calmar) is presently classified as an area vocational school and this classification cannot be changed except by the State Board of by legislation. (Nolan to Blouin, State Senator, 3-14-74. #74-3-9

The Honorable Michael T. Blouin, State Senator: This is written in response to your request for an opinion on the following questions: concerning the legal authority of area schools in Iowa:

"1. Does an area vocational school which has not obtained the designation 'community college' as defined in Chapter 280A.2 of the Code have authority to enter into contracts with private educational institutions within the merged area for the offering of arts and sciences courses?

"2. Are such agreements subject to the approval of the State Board of Public Instruction?

"3. If such authority exists, does the area vocational school have authority to offer college transfer credits which may be applied toward the fulfillment of the requirements for a baccalaureate degree or does the cooperating institution give such college credit?

"4. Can Area 1 (Calmar) even attain the status of 'community college' designation in light of legislation passed in 1973?"

The answer to your first question is yes. The board of directors of each area vocational school, pursuant to §280A.23 has power to:

"Determine the curriculum to be offered in such school or college subject to approval of the state board. If an existing private educational or vocational institution within the merged area has facilities and curriculum of adequate size and quality which would duplicate the functions of the area school, the board of directors shall discuss with the institution the possibility of entering into contracts to have the existing institution offer facilities and curriculum to students of the merged area. The board of directors shall consider any proposals submitted by the private institution for providing such facilities and curriculum. The board of directors may enter into such contracts. . . ."

With respect to your second question, the State Board of Public Instruction must approve the curriculum to be offered in the area school, and in approving curriculum, the State Board must ascertain that all courses and programs are needed and that the curriculum being offered by the area school does not duplicate programs provided by existing public or private facilities in the area. However, there is no specific statutory requirement that the contract between the area board and the existing private schools be subject to the approval of the State Board.

An area vocational school has no specific authority to offer college transfer credits toward a baccalaureate degree. However, the answer to question three must depend on what other schools will accept. This is a fact determination and not a question of law. It is clear in §6 of Chapter 110, Laws of the 65th General Assembly, 1973 Session, that an area vocational school may cooperate with existing liberal arts facilities for the purpose of partially fulfilling requirements for baccalaureate degree. The pertinent language of this section is as follows:

". . .the state board. . .shall also take all necessary action to assure that no area vocational school which is not presently qualified as a 'junior college' or 'community college', as those terms are defined in section two hundred eighty A point two (280A.2), subsections two (2) and three (3), of the Code, shall expand its liberal arts or preprofessional programs, or other instruction partially fulfilling the requirements for a baccalaureate degree, except in cooperation with existing liberal arts facilities, in order to so qualify."

Area 1 (Calmar) is now classified as an area vocational school and this classification cannot be changed except by the State Board or by legislation. The power to designate whether a school shall be classified either as an area community college or an area vocational education school, resets entirely with the State Board of Public Instruction, under the provisions of §280A.25 of the Code. Even under the provisions of Chapter 110, Laws of the 65th General Assembly, 1973 Session, it may be possible for an area vocational school to obtain the status of a community college if such action is taken "in cooperation with existing liberal arts facilities". The State Board must consider the needs of the area and consider whether the programs are competitive as to size, quality, tuition, purposes, and area coverage with existing public and private educational or vocational institutions in the merged area. Section 280A.23(1). However, within these parameters, a change of designation by the State Board could occur. This is not a likely prospect in the immediate future, in view of the language of §5 of Chapter 110, supra, which provides in pertinent part:

"Any area school which budgets funds for arts and sciences for the first time in the 1973-1974 fiscal year by contract with schools or colleges shall limit such a budgetary item to not more than five percent of its total budget."

March 14, 1974

STATE OFFICERS AND DEPARTMENTS: Department of Health; Ear Piercing; §§147.2, 148.1, 150.1, 150A.1, 1973 Code of Iowa. Ear piercing for earrings can be performed by a person who is not licensed as a physician and surgeon, osteopathic physician and surgeon, or osteopath. (Haskins to Pawlewski, Commissioner, Department of Health. 3/14/73) #74-3-10

Mr. Norman L. Pawlewski, Acting Commissioner of Public Health, State Department of Public Health: This opinion supersedes and replaces our opinion of March 6, 1974 on the same subject. You ask whether ear piercing for earrings may be performed by a person who is not licensed as a physician and surgeon, osteopathic physician and surgeon, or osteopath. It is our opinion that ear piercing may be performed by persons who are not so licensed. The key code section is Section 147.2, 1973 Code of Iowa. That section states:

"No person shall engage in the practice of medicine and surgery, . . ., osteopathy, osteopathic medicine and surgery, . . . unless he shall have obtained from the state department of health a license for that purpose."

The central issue is whether ear piercing for earrings falls within the rubric of "medicine and surgery", "osteopathy", or "osteopathic medicine and surgery", so as to be prohibited to be done by persons who are not licensed as physicians and surgeons, osteopaths, or osteopathic physicians and surgeons. Section 148.1, 1973 Code of Iowa, defines persons engaged in the practice of medicine and surgery as follows:

"148.1 Persons engaged in practice. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of medicine and surgery:

"1. Persons who publicly profess to be physicians or surgeons or who publicly profess to assume the duties incident to the practice of medicine or surgeon.

"2. Persons who prescribe, or prescribe and furnish medicine for human ailments or treat the same by surgery.

"3. Persons who act as representatives of any person in doing any of the things mentioned in this section."

Section 147.2 is part of the same title referred to in Section 148.1. Persons who perform ear piercing for earrings are neither persons who publicly profess to be physicians or surgeons or publicly profess to assume the duties incident to the practice of medicine or surgery nor persons who prescribe medicine for human ailments or treat human ailments by surgery nor persons who act as representatives of persons who do these things. Significantly, ear piercing for earrings does not involve a healing purpose. That is, it is not undertaken to treat a human ailment. Hence, it cannot be considered "surgery" for the purpose of treating a human ailment.

Traditionally, the phrase "medicine and surgery" has been defined in such a way as to connote healing. *See, e.g., Lowman v. Kruecker,* 246 Iowa 1227, 71 N.W.2d 586, 587 (1955); *State v. Boston,* 226 Iowa 429, 284 N.W. 143, 144 (1939); *State v. Thierfelder,* 132 P.2d 1035, 1042 (Mont. 1943). Definitions in the Iowa Code of "osteopathy", *see* Section 150.1, 1973 Code of Iowa, and of "osteopathic medicine and surgery", *see* Section 150A.1, 1973 Code of Iowa, like that of "medicine and surgery", have as a key element the treatment of human ailments. Ear piercing for earrings, of course, lacks this element. Accordingly, it is our position that a person who is not licensed as a physician and surgeon, osteopath, or osteopathic physician and surgeon, may engage in ear piercing for earrings. It is realized that ear piercing does involve a risk of infection, in some cases of a severe degree. *See* Release of the Iowa Medical Society, February 7, 1973. For that reason, persons having a regular practice or business of ear piercing probably should be subjected to regulatory control. However, at the present time, no system of regulatory control of ear piercing for earrings exists and it is therefore for the legislature, if it deems it necessary, to create such a system. Neither the office of the Attorney General nor the courts can insert, by statutory construction, such a scheme into the law where none exists.

March 28, 1974

COURTS: Judicial Magistrates — §§595.10, 602.60, 1973 Code of Iowa; Acts of the 65th G.A., Ch. 282, §45. A part-time judicial magistrate may solemnize a marriage. (Haskins to Newell, Muscatine County Attorney, 3/28/74) #74-3-12

David W. Newell, Muscatine County Attorney: You ask the opinion of our office as to whether a part-time judicial magistrate can solemnize a marriage. It is our opinion that he can.

Section 595.10, 1973 Code of Iowa, sets forth the persons who may solemnize a marriage. That section states:

"Marriages must be solemnized by:

"1. A judge of the Supreme or District Court, including a district associate judge, or *a judicial magistrate.*

"2. Some minister of the gospel, ordained or licensed according to the usage of his denomination." [Emphasis added]

The words "judicial magistrate" plainly encompass both full-time and part-time judicial magistrates. Nothing else in the Code indicates that part-time magistrates do not have the power to solemnize marriages. The present Code section governing the jurisdiction of part-time and full-time magistrates does not distinguish between the two for purposes of solemnizing a marriage. That section, Section 602.60, 1973 Code of Iowa, states:

"Judicial magistrates shall have jurisdiction of nonindictable misdemeanors, including traffic and ordinance violations, preliminary hearings, search warrant proceedings, forcible entry and detainer actions, and small claims. They shall also have the power specified in section 748.2. They shall have power to act any place within the district as directed, and venue shall be the same as in other district court proceedings. Judicial magistrates serving on a full-time basis and district associate judges shall have jurisdiction of indictable misdemeanors. While exercising that jurisdiction they shall employ district judges' practice and procedure."

Section 748.2, 1973 Code of Iowa, mentioned in the above section does not pertain to solemnizing a marriage. Section 602.60 is amended by Acts of the 65th G.A., Ch. 282, §45, effective July 1, 1974, to read as follows:

"Judicial magistrates shall have jurisdiction of nonindictable misdemeanors, including traffic and ordinance violations, preliminary hearings, search warrant proceedings, and small claims. They shall also have jurisdiction to exercise the powers specified in sections seven hundred forty-eight point two (748.2), six hundred forty-four point two (644.2), and six hundred forty-four point twelve (644.12) of the Code. They shall have power to act any place within the district as directed, and venue shall be the same as in other district court proceedings. In addition, judicial magistrates appointed pursuant to section six hundred two point fifty-one (602.51) of the Code shall have jurisdiction of indictable misdemeanors, the jurisdiction provided for in section two hundred thirty-one point three (231.3) of the Code when designated a judge of the juvenile court, and jurisdiction in civil actions for money judgments where the amount in controversy does not exceed three thousand dollars and while exercising that jurisdiction, judicial magistrates shall employ district judges' practice and procedure.

"For purposes of administration judicial magistrates shall be under the jurisdiction of the chief judge of the judicial district. Judicial magistrates shall be subject to the same rules and laws that apply to district judges except as otherwise provided in this chapter."

Section 602.51, 1973 Code of Iowa, referred to in the above section, recognizes full-time judicial magistrates. None of the other sections cited in the new Section 602.60 deals with solemnizing marriages. Accordingly, as can be seen, the

new Section 602.60 does not draw a distinction between part-time and full-time magistrates for the purpose of solemnizing a marriage.

In conclusion, it is our opinion that a part-time judicial magistrate may solemnize a marriage.

March 28, 1974

CITIES AND TOWNS: Extending Utilities Beyond Corporate Limits: §§368.26(3), 391A.2, 391A.35, 394.1, 394.6, 397.1, 397.9 and 397.10, Code of Iowa, 1973. A municipality may extend sewer, gas and water facilities beyond its corporate limits. A municipality may pay for same from the earnings of the utility plant or by issuing revenue bonds payable solely from the net earnings of said plant. (Blumberg to Mullin, Assistant Adams County Attorney, 3/28/74) #74-3-13

Mr. Eugene W. Mullin, Assistant County Attorney: We are in receipt of your opinion request regarding the authority of the City of Corning to extend gas and water utilities beyond the city limits. You specifically asked:

"1. Does the City of Corning have the authority to run a sewer line to an industrial site approximately three miles from the corporate limits and pay for the same by revenue bonds or income, said revenue being derived from the use within the city limits? Also with whatever income may be derived from the industrial site when developed.

"2. As I interpret Section 368.26 subparagraph 3, they do have this authority, however, I do not know how to interpret how they would pay for this system.

"3. Does the utilities have the authority to extend the gas and water lines to said industrial site and to retire the costs thereof from the revenue within the City of Corning the same as the sewer plant?"

Section 368.26(3) of the 1973 Code provides that cities have the power to extend their sewer systems and facilities to areas not more than ten miles beyond their corporate limits.

Section 391A.2 provides:

"Municipalities shall have the power to construct, and repair all public improvements within their limits, *and main sewers, sewage pumping stations, disposal and treatment plants, waterworks, watermains, and extensions, and drainage conduits extending outside their limits,* and assess the cost thereof to private property within the municipality as hereinafter provided." [Emphasis added]

Section 394.1 provides that cities and towns are authorized and empowered to own, acquire, establish, improve, extend, operate, and maintain, either within or without their corporate limits, works and facilities for the collection, treatment, purification and disposal of liquid and solid waste. In addition, section 397.1 gives cities and towns the power to purchase, establish, erect, maintain and operate, within or without their corporate limits, heating plants, waterworks and gas works, with all the necessary mains, pipes apparatus and the like. From the above sections it is apparent that municipalities may extend water, sewer and gas service beyond their corporate limits.

Section 397.10 provides that municipalities can issue revenue bonds to defray the cost of any such plant or extension. Said bonds are payable from and secured by the net earnings of the plant. Section 397.9 also allows

municipalities to pay for the plant and its extensions out of the past or future earnings of the plant. With respect to self-liquidating improvements, section 394.6 provides that municipalities may borrow money for said projects and issue revenue bonds payable from the revenue derived from the project or improvement.

Section 391A.35 permits municipalities to pay for improvements or extensions from the municipal fund or funds authorized to be used for the particular type of improvement. Or, the whole or any part of the cost of the public improvement may be paid under section 396.22, which section provides that a municipality may contract indebtedness and issue bonds for building, constructing, extending and improving sewers.

Accordingly, we are of the opinion that a municipality may extend sewer, gas and waterlines beyond its corporate limits, and may pay for same out of net earnings of the utility plant or by revenue bonds payable from the same earnings, depending upon the type of project.

March 28, 1974

STATE OFFICES AND DEPARTMENTS: Commission for the Blind, automobile liability insurance. §19B.3, and Chapter 517A. The Commission for the Blind may purchase its own automobile liability insurance without going through the Department of General Services. (Haesemeyer to Jernigan, Director, Iowa Commission for the Blind, 3-28-74) #74-3-5

Mr. Kenneth Jernigan, Director, Iowa Commission for the Blind: Reference is made to your letter of March 26, 1974, in which you state:

"In view of the fact that the Iowa Commission for the Blind is specifically exempted by law from the requirement that it purchase items (including motor vehicles) through the General Services Administration, we request an opinion as to whether the Commission for the Blind may purchase its own insurance for motor vehicles under its control or whether the Commission must (at the option of GSA) allow GSA to purchase such insurance for it."

Section 19B.3, Code of Iowa, 1973, provides in relevant part:

"The duties of the director [of the department of general services] shall include but not necessarily be limited to the following:

"1. Establishing and developing, in cooperation with the various state agencies, a system of uniform standards and specifications for purchasing. When the system is developed, all items of general use shall be purchased through the department, except items used by . . . the commission for the blind. . .* * *"

Assuming that a policy of automobile insurance is an item within the meaning of the foregoing statutory provision, it would seem clear that the Commission for the Blind need not allow the General Services Administration to purchase insurance for it. Authority for the purchase of liability insurance by the Iowa Commission for the Blind is found in Chapter 517A, Code of Iowa, 1973, which provides:

"All state commissions, departments, boards and agencies and all commissions, departments, boards, districts, municipal corporations and agencies of all political subdivisions of the state of Iowa not otherwise authorized are hereby authorized and empowered to purchase and pay the premiums on liability, personal injury and property damage insurance covering all officers,

proprietary functions and employees of such public bodies, including volunteer firemen, while in the performance of any or all of their duties including operating an automobile, truck, tractor, machinery or other vehicles owned or used by said public bodies, which insurance shall insure, cover and protect against individual personal, corporate or quasi corporate liability that said bodies or their officers or employees may incur.

"The form and liability limits of any such liability insurance policy purchased by any commission, department, board, or agency of the state of Iowa shall be subject to the approval of the attorney general."

Thus the Commission may purchase liability insurance for motor vehicles under its control subject to approval of the form and liability limits of any policy by the Attorney General.

March 29, 1974

STATE DEPARTMENTS: Banking. §524.224 — Bellevue bank management may be returned to its Directors when the superintendent determines the facts warrant. (Nolan to Dunn, Superintendent of Banking, 3-29-74) #74-3-14

The Honorable Cecil W. Dunn, Superintendent of Banking, Iowa Department of Banking: You have requested an opinion from this office on the matter of restoring management of the Bellevue State Bank to its stockholders and directors.

When the Superintendent of Banking took over the control and management of this bank on June 26, 1972, he had good reason to believe that the bank had violated laws of this state by making loans secured by realty not located in this state or an adjoining state and that the bank was conducting its business in an unsafe or unsound manner. Accordingly, he proceeded under §524.226, Code of Iowa, 1971, and this management has continued until the present date. Following the assumption of management by the superintendent, Mr. Dell Pooler voluntarily suspended his duties as executive vice-president and director of the bank, a suspension which was accepted and approved by the board of directors and by the superintendent; and he further executed a trust agreement designating the American Trust and Savings Bank of Dubuque, Iowa trustee of 735 shares of stock in Bellevue Service Company and 1,518 shares of stock in Bellevue State Bank, to be held and administered for the benefit of the stockholders and depositors of the Bellevue State Bank, Bellevue, Iowa, for a period of two years to secure against possible losses arising from loans to persons in Colorado and California.

On January 28, 1974, the Bellevue State Bank formally requested its management of the bank be restored to its board of directors. If the facts available to the Banking Department are such that you are convinced that the circumstances requiring the assumption of management by the superintendent have been corrected or removed, it would be proper to now return the management to the board. In this connection, it is to be observed that §524.224, Code of Iowa, 1973 provides:

". . . The superintendent shall . . . manage the property and business of the state bank until such time as he may relinquish to the state bank the management thereof, upon such conditions as he may prescribe . . ."

On March 22, 1974 there was submitted a proposal of a revised agreement amending the trust agreement referred to above. This proposal would extend

the period of trust for a period of two years from the date of the amendment, unless sooner terminated with the approval of the Iowa Superintendent of Banking. This trust agreement appears to be in proper form and may also be considered by you in light of the statutory provisions set out above.

March 29, 1974

STATE OFFICERS AND DEPARTMENTS: Vital Statistics — §§144.3, 144.43 and 144.44, Code of Iowa, 1973; Rules 103.1(1), 103.1(2) and 103.1(6), 1973 IDR 456. Neither the State Registrar nor a county registrar has authority to permit access to disclosure of or microfilming of vital statistics records to individuals or organizations for safekeeping and for research purposes by others. (Blumberg to Pawlewski, Commissioner, State Department of Health, 3/29/74. #74-3-15

Mr. Norman L. Pawlewski, Commissioner, State Department of Health: We are in receipt of your opinion request of February 25, 1974 regarding microfilming of vital statistics records. It appears that the Genealogical Society of the Church of Jesus Christ of Latter-Day Saints, upon request of the Heritage Committee of the Iowa American Revolution Bicentennial Commission, wishes to microfilm birth, death and marriage statistics from 1910 back to when records were first available. One copy of the microfilms would be maintained by the Department of History and Archives, subject to the rules and regulations prescribed by the Registrar of Vital Statistics pursuant to Chapter 144 of the Code. Another copy would be filed in the Granite Mountain Records Vault, while the last copy will be placed in the main and branch libraries of the Genealogical Society to be made available to genealogists, historians, and researchers upon application. You specifically asked:

"Under Section 144.43 of the Vital Statistics Act and Vital Statistics Regulations, can the State Registrar permit the microfilming of vital records, with the limits imposed, for the purpose specified?"

Section 144.43, 1973 Code of Iowa provides:

"To protect the integrity of vital statistics records, to insure their proper use, and to insure the efficient and proper administration of the vital statistics system kept by the state registrar, access to vital statistic records kept by the state registrar shall be limited to the state registrar and his employees, and then only for administrative purposes. It shall be unlawful for the state registrar to permit inspection of, or to disclose information contained in vital statistics records, or to copy or permit to be copied all or part of any such record except as authorized by regulation."

Section 144.44 provides:

"The department may permit access to vital statistics by professional genealogists and historians, and may authorize the disclosure of data contained in vital statistics records when deemed essential for bona fide research purposes which are not for private gain. Information in vital statistics records indicating that a birth occured out of wedlock shall not be disclosed except as provided by regulation or upon order of a district court."

Rules of the Health Department pursuant to section 144.3, provide that the State or County Registrar shall permit the inspection or issue a copy of a record only when satisfied that the applicant has a direct and tangible interest in the content of the record, and that the information is necessary for the determination of a personal or property right. Rule 103.1(1), 1973 IDR 456. Such information appears to be limited to the registrant, a member of the im-

mediate family, guardians or legal representatives. Rule 103.1(2) allows the State Registrar to permit the use of data from vital statistics records for research purposes, subject to conditions imposed by the State Registrar to insure that the use of the data is limited to research purposes. Finally, Rule 103.1(6) states that no data shall be furnished for research purposes until the State Registrar has prepared in writing the conditions under which the records may be used, and has received an agreement by the researcher or research organization agreeing to abide by such conditions.

There is no doubt that records can be microfilmed. See 1964 O.A.G. 311 and 1972 O.A.G. 454. However, we do not believe that the legislative intent of the confidentiality and limited access to said records will be maintained with respect to the facts presented. Only the State Registrar and his or her employees have control and access to the records. Access by any other individual or organization is limited to genealogical, historical and research purposes, and then only when the prerequisites of the Rules have been followed. Unless geneologists, historians and researchers of the Church are going to use the data themselves, and comply with the rules on obtaining said records, neither the State Registrar nor a county registrar has any authority to permit any individual or organization to keep these records for research by others.

We see no prohibition of the State Registrar contracting out the microfilming of said records for storage in the State Archives. However, it is apparent from the above statutes and Rules that the Church may not keep any microfilms of the records for its Granite Mountain Vault or its Library.

April 1, 1974

CONSTITUTIONAL LAW: General Assembly; State Representative; Qualification for Office; Residence Requirement; Vacancy in Office; Art. III, §4, Const. of Iowa; §§69.2(3) and 2.6, Code of Iowa 1973; Art. III, §§3, 20 and 22, Const. of Iowa; §§66.1, Code 1973; Art. IV, §§6 and 12; Art. V, §§18, 13 and 12. When qualifications for office are defined and fixed in the constitution, they are unalterable by the legislature in absence of constitutional provision to the contrary. §69.2(3) of the Code is not applicable to create a vacancy in the office of a constitutionally elected and seated state representative who ceases to be a resident of the district from which he was elected because Art. III, §4 of our constitution requires only that he shall have had an actual residence of 60 days in the district he was chosen to represent and does not require him to reside in that district throughout the remainder of his tenure. Art. III, §3, and §2.6 of the Code provide that a state representative is elected to a term of 2 years and once seated such a state officer shall not be challenged as to his qualifications and is subject to removal only by impeachment under Art. III, §20 of the constitution. (Turner to Varley, Speaker of the House and Drake, State Representative, 4-1-74) #74-4-1

Honorable Andrew Varley, Speaker of the House and Honorable Richard F. Drake, State Representative: You have each requested an opinion of the attorney general as to whether State Representative Russel De Jong, elected a member of the 65th General Assembly in 1972, while a resident of Marion County, Iowa, to represent the 70th representative district, consisting of parts of Jasper, Mahaska, Marion and Poweshiek Counties, Iowa, has during his tenure abandoned his office, and whether a vacancy has occurred therein, merely because he has moved to, and become a resident of, Polk County, Iowa, which is not within his district.

As I understand the facts, Representative De Jong is still in attendance at the 65th General Assembly and regularly serving in his seat therein, which he does not intend to abandon, but has moved to 614 Southwest 61st Street, Des Moines, Polk County, Iowa, a home which he owns and where he says he resides. On March 21, 1974, he filed an affidavit of candidacy stating "that I reside at 614 S.W. 61st Street, City of Des Moines, County of Polk; that I am eligible to the office for which I am a candidate. . .and that I am a candidate for nomination to the office of" state senator of the 33rd senatorial district, comprising a part of Polk County.

As I also understand the facts, Representative De Jong freely admits he has changed his residence to Des Moines; that he is the owner of two other houses in Des Moines; that his car is registered in Polk County and that he is registered to vote as a resident of Polk County. There really is no question but that Des Moines, in Polk County, is now his official legal residence, although he returns on weekends to a home he still owns at Pella, in Marion County, and confers with his constituents there. Thus the issue is squarely joined as to whether moving his residence from one representative district to another is a constructive resignation which creates a vacancy in office, absent any other action or intention to abandon that office.

Section 69.2, Code of Iowa, 1973, provides:

"What constitutes vacancy. Every civil office shall be vacant upon the happening of either of the following events:

1. A failure to elect at the proper election, or to appoint within the time fixed by law, unless the incumbent holds over.

2. A failure of the incumbent or holdover officer to qualify within the time prescribed by law.

3. The incumbent ceasing to be a resident of the state, district, county, township, city, town or ward by or for which he was elected or appointed, or in which the duties of his office are to be exercised. This subsection shall not apply to appointments authorized by section 368A.1, subsection 7.

4. The resignation or death of the incumbent, or of the officer-elect before qualifying.

5. The removal of the incumbent from, or forfeiture of, his office, or the decision of a competent tribunal declaring his office vacant.

6. The conviction of incumbent of an infamous crime, or of any public offense involving the violation of his oath of office."

Superficially, subsection 3 of §69.2, quoted above, appears to contain the solution: that Representative De Jong's office became vacant when he ceased to be a resident of either the district for which he was elected *or* in which the duties of his office are to be exercised. Are his duties exercised in that part of Polk County which contains the seat of government, or in the home district from which he was elected? Is he now a resident of that district which does in fact contain the seat of government? Does the subsection say that the vacancy occurs when he ceases to be a resident of his home district or the district containing the seat of government, one or the other, or does it say the office becomes vacant when he ceases to be a resident of *both* such districts? We have previously said that the seat of government must be located in Des Moines (Art. XI, §8) but can be changed to any location in Des Moines by appropriate legislation. 1968 OAG 3. In my opinion, none of these questions regarding

construction of §69.2(3) need be answered, and they are not answered herein, because I conclude that subsection 3 applies only to statutory offices created by the legislature and not to constitutional offices created by the people.

Article III, Section 4, Constitution of Iowa, provides:

"No person shall be a member of the House of Representatives who shall not have attained the age of twenty-one years, be a citizen of the United States, and shall have been an inhabitant of this State one year next preceding his election, and at the time of his election shall have had an actual residence of sixty days in the County, or District he may have been chosen to represent."

The important words of Article III, Section 4 are to be found in the last clause which provides:

"and *at the time of his election* shall have had an actual residence of 60 days in the county or district he may be chosen to represent." (Emphasis added)

I find nothing in the language of our constitution expressly requiring that once elected a representative must necessarily remain in actual residence after election day and throughout his term. But in 1906 OAG 355, Attorney General Chas. W. Mullan said:

"The construction which has been universally placed upon a provision of this character in the various state constitutions is that where an incumbent before the expiration of his term of office removes from the political division in and for which he was elected to perform the duties of his office, such removal, without more is a resignation of the office, which he holds. You were elected as representative from O'Brien county. The provisions of the constitution require that you be a resident of that county to be eligible to hold the office. A permanent removal therefrom by you is in effect a resignation of the office which you hold."

See also 1964 OAG 412 (12-30-63).

In 67 C.J.S. 229-230, Officers §56, it is stated that an office may be vacated by abandonment, as, for example, by the failure of the incumbent to perform his duties to such an extent as to constitute an abandonment, "by leaving the state or territorial jurisdiction of his office, or by permanently removing from a particular place or district, where a statute requires residence of the officer in such place or district." Said Corpus Juris Secundum cities only two cases for this proposition and it is not clear therefrom that the rule applies to legislators. Both cases involve judges. In *State v. Green,* 1943, 206 Ark. 361, 175 S.W.2d 575, and in *State v. McDermott,* 1932, 52 Idaho 602, 17 P.2d 343, it was recognized that a removal of residency could constitute an abandonment of office. In *Green,* however, the entry of an elected, qualified and acting circuit judge into the armed forces did not constitute an abandonment of the office and no vacancy was thereby created:

"The action of the officer in leaving the state, or the territorial jurisdiction of his office, under some circumstances may show abandonment on the part of such incumbent, but temporary absence is not ordinarily sufficient to constitute an abandonment of office."

The court in *Green* stressed the fact that it was clear from the record that it was not the intention of the regular judge to relinquish his office. The court could see no reason why his service in the armed forces should not apply "as if his absence was occasioned by the fact that he is ill or that he is away from the state or the territorial jurisdiction of the court, or that he is unavoidably

detained, or on account of any other reason." It would be different, the court said, if the judge should fail to occupy his office and discharge the duties thereof. In that event, his absence would of necessity be occasioned by circumstances which would either constitute a vacancy or require the election of a special judge. A careful study of the case will show it supports Representative De Jong who is, in fact, occupying his office and discharging his duties.

McDermott, the Idaho case, interpreted a statute not unlike our §69.2, with reference to whether a probate judge had vacated his office by being absent from the state for a period of five weeks. But Idaho's vacancy statute was coupled with others not present in the Iowa Code that provided 1) no county officer must absent himself from the state for more than 20 days; 2) the probate judge is a county officer; and 3) the probate judge must reside and keep his office at the county seat. The court stressed the fact that the statute expressly required the officer to reside within the county he represented and said "he may abandon his office by permanently removing from said county and, ipso facto, a vacancy is created in the office." The court also cited other authority that the abandonment must be total and under such circumstances as clearly to indicate an absolute relinquishment. It said the "determination of the question whether an officer has abandoned an office is dependent upon his overt acts rather than upon his declared intention, and the law will infer a relinquishment where the conduct of the officer indicates that he has completely abandoned the duties of the office."

McDermott went on to state that once abandoned, the effect of the abandonment is not removed by the officer's return and reoccupation of the office. "However, a mere temporary removal, without intention to make a permanent change of residence, or surrender or abandon the office, or to perform its duties, does not affect the tenure of the office." In *McDermott* the court held that the probate judge did not abandon his office even though he absented himself from the state for five weeks, in violation of the statute that prohibited him from being gone for more than 20 days, when there was no proof that the office was abandoned or neglected during the time he was gone for more than 20 days. In view of the actual holding, much of *McDermott,* including the statement that a vacancy is "ipso facto" created by permanently removing from the county is obiter dictum. The court apparently ignored or overlooked the fact that its probate judges were constitutional officers. It was conceded the judge had violated the absence statute but nevertheless he was held *not* to have vacated his office. Perhaps the court reached the proper result without hitting upon the true reason—that the statutes could not abridge the constitution.

A careful search of the cases reveals that far from being the "construction which has been universally placed upon a provision of this character in the various state constitutions," as Attorney General Mullan claimed, there is really very little law on the subject. 63 Am. Jr.2d 713, Public Officers §137. At least this is true insofar as constitutional officers, and legislators in particular, are concerned.

My opinion is that §69.2(3) is contrary to the provisions of Article III, §4, which requires only that a state representative must be 21 years of age, a citizen of the United States, "and shall have been an inhabitant of this State one year next preceding his election, and at the time of his election shall have had an actual residence of 60 days in the County, or District he may have been chosen to represent." Nothing requires him to be either an inhabitant of the

state or a resident of his district following the day of election. He must "be" a citizen of the United States, but it is only necessary that he *"shall have been* an inhabitant of this state" and that "at the time of his election" he *"shall have had an* actual residence" in his district. "At the time of his election" does not, at least in its words, include times subsequent to his election. "Be" is not the same as "shall have been" or "shall have had" and I cannot see how the legislature can, by law, as in §69.2(3), abridge the constitutional right of a duly elected, qualified and acting constitutional officer to hold his office, or to declare it vacant, except as provided in the constitution. Representatives are elected for two years, and until their successors are elected and qualified. Art. III, §3. Legislators who have been duly elected, and once they have qualified and been seated in their respective houses, are state officers subject to removal only by impeachment. Art. III, §20, Constitution of Iowa, and §§66.1, Code of Iowa, 1973. A state officer is liable to impeachment "for any misdemeanor or malfeasance in office" and certainly a change of residence is neither. Art. III, §20. A legislator may, however, hold no other lucrative office because the constitution specifically says so. Art. III, §22. 1968 OAG 257.

Moreover, §2.6 of the Code provides:

"Permanent organization. The members reported by the committee as holding certificates of election from the proper authority shall proceed to the permanent organization of their respective houses by the election of officers *and shall not be challenged as to their qualifications during the remainder of the term for which they were elected."* (Emphasis added)

§§3, 4, 20 and 22 of Article III, when read together, in all of their parts, clearly imply that there is no abandonment or resignation of a legislative office merely on account of change of residency to another district, or even to another state, so long as the representative remains a citizen of the United States. If the representative attends and discharges his duties, there is nothing in the constitution of Iowa to indicate abandonment of his office. And I find no constitutional provision or statute except §69.2(3) which attempts such restriction of residence as a condition of continuing in office. That section simply does not apply in this case.

At 63 Am.J4.2d 657, Public Officers and Employees §47, I find:

"At common law there are no residential requirements for candidates for elective offices. However, insofar as residential requirements for the holding of public office or of particular offices are imposed by constitutions or statutes, they are controlling. The Federal Constitution makes residence within the United States a condition of eligibility to the office of President, and requires members of the United States Senate and House of Representatives to be inhabitants of the state from which they are chosen."

"There are provisions in state constitutions and laws prescribing residence qualifications for office, *and statutes dealing with this matter must not contravene constitutional provisions."* (Emphasis added)

* * *

The United States Supreme Court said, under a very similar constitutional provision to Iowa's Art. III, §4 (Art. 1, §2, Clause 2, Constitution of the United States) that "in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution" . . . "Therefore, we hold that, since Adam Clayton Powell, Jr., was duly elected by

the voters of the 18th Congressional District of New York and was not ineligible to serve under any provision of the Constitution, the House was without power to exclude him from its membership." *Powell v. McCormack,* 1969, 395 US 486, 89 S.Ct. 1944, 23 L.Ed.2d 491.

34 ALR 2d 155, 171, contains an extensive annotation with respect to legislative power to prescribe qualifications for or conditions of eligibility to constitutional office. While we find no Iowa cases cited therein, the general rule is that where the constitution lays down specific eligibility requirements for a particular constitutional office, the constitutional specification in that regard is exclusive and the legislature (except where expressly authorized to do so) has no power to require additional or different qualifications for such constitutional office. In *Mississippi County v. Green,* 1940, 200 Ark. 204, 138 SW2d 377, the court set forth the reason for the rule:

"The qualifications fixed by the constitution to be county judge in this state inferentially prohibits the legislature from fixing additional qualifications. Why fix them in the first place if the makers of the constitution did not intend to fix all the qualifications required, and why fix only a part of them and leave it to the legislature to fix other qualifications? There is no reasonable answer to these questions. The makers of the constitution knew exactly what qualifications a county judge should have and fixed them, and of course, fixed all of them and not a part of them. The makers of the constitution intended to cover the whole subject of the qualifications for a county judge. Had the makers of the constitution intended otherwise they would have created the office of the county judge with directions to the legislature to fix their qualifications. Instead of delegating this authority to the legislature they fixed the qualifications of county judges themselves, thinking perhaps it was better to have a good business man in the position than some lawyer who had practiced three years."

Most of the cases pertain to judges but the reasoning is clearly applicable. The more recent cases cited for this general proposition, expressio unius est exclusio alterius, that the legislature cannot add to qualifications detailed in the constitution are: *Whitney v. Bolin,* 1958, 85 Ariz. 44, 330 P.2d 1003; *Wallace v. Superior Court,* 1956, 141 Cal. App.2d 771, 298 P.2d 69; *Cusack v. Howlett,* 1969, Ill. 254 N.W.2d 506; *Knobloch v. 17th Judicial Dist. Democratic Exec. Com.,* 73 So.2d 433, app. transf. 255 La. 491, 73 So.2d 432. *Tuna v. Blanton,* 1972, 478 SW2d 76 (Tex S.Ct.); *Craig v. State,* 1961 Texas, 347 S.W.2d 254. See also Mechem on Public Officers, 1890, §§65 and 96:

"It is entirely competent for the people, in framing their governments, to declare what shall be the qualifications which shall entitle one to hold and exercise a public office, and in many of the constitutions this has been done with more or less certainty and precision. Constitutional provisions, which are exclusive in their nature, are, of course, supreme, and it is not within the power of the legislatures to supersede, evade or alter them.

* * *

"Where the constitution has prescribed the qualifications, the possession of which shall entitle an individual to hold office under the state, it is not within the power of the legislature to change or add to them, unless such power be given to the legislature either in express terms or by necessary implication."

In *Whitney v. Bolin,* supra, an elected superior court judge sought to run for the higher office of judge of the Supreme Court of Arizona but was confronted by a statute that prevented an incumbent in elective office from being eligible

for nomination or election to any office other than the office held, under penalty of having the office held declared vacant. The Arizona Supreme Court held that the constitution specified the qualifications for eligibility to the office of Supreme Court and that the statute had no application to that office. The Court said:

"It is our opinion that the constitution specifications are exclusive and the legislature has no power to add new or different ones. The qualifications fixed in the Constitution are exclusive for the reason that if it were not intended by the framers thereof to fix all the qualifications, then it must have been intended to fix only a part and leave it to the legislature to fix others. Such a view is inconsistent with accepted constitutional construction that the enumeration of certain specified things in a constitution will usually be construed to exclude all other things not so enumerated. Positive directions in a constitution contain an implication against anything contrary to them. Indeed, were the framers to intend otherwise, they would have created the office with directions that the legislature could or should fix other qualifications."

"It is established that where a state constitution provides for certain officials and names the qualifications, the legislature is without authority to prescribe additional qualifications unless the constitution further, either expressly or by implication, gives the legislature such powers. Collected cases 34 A.L.R.2d 171."

In *People v. McCormick,* 1913, 261 Ill. 413, 103 N.E. 1053, the court said:

"There is a distinction between offices created by the constitution and those created by statute. Where an office is created by statute, it is wholly within the power of the legislature creating it. The length of term and mode of appointment may be altered at pleasure, and the office may be abolished altogether."

Later the court said at page 1057 of 103 N.E.:

". . . if the Legislature possesses the power to vary the constitutional qualifications for office by adding new requirements or imposing additional limitations, then eligibility to office and freedom of elections depends, not upon constitutional guaranties, but upon legislative forebearance. If the Legislature may alter the constitutional requirements, its power is unlimited, and only such persons may be elected to office as the legislature may permit. In our judgment, when the constitution undertakes to prescribed qualifications for office, its declaration is conclusive of the whole matter, whether in affirmative or in negative form."

McCormick cites an earlier Illinois case, *People v. Election Commissioners,* 1906, 221 Ill. 9, 77 N.E. 321, 5 Ann. Cas. 562, in which the constitution of Illinois provided for the office of state senator and fixed as the only eligibility requirement, as to residence, that the candidate shall have resided for two years within the senatorial district. A statute providing that only one candidate for the senate could be nominated from each political party in any county within the district was held unconstitutional. The court said:

"The act adds a new qualification and imposes a new restriction upon the candidates and the voters, by requring that the candidates shall come from particular counties of the district. It is not within the power of the legislature to add to the qualifications fixed by the constitution, or to impose the additional restrictions, and that provision of the act must be considered void."

In *State v. Lake,* 1889 Rhode Island, 17 A. 552, the constitution provided that a person shall not be eligible to any civil office unless he was a qualified

elector for such office. In a per curiam decision, the Rhode Island Supreme Court said that even if the magistrate was not a qualified elector at the time a complaint was filed before him, that fact did not prove that he was not a qualified elector when he was elected to his office "which is all that the section referred to requires."

See also *Jansky v. Baldwin,* 1926, 120 Kan. 332, 243 Pac. 302, 47 A.L.R. 476 and cases accumulated in 47 A.L.R. 481. Cf *State el rel Johnston v. Donworth,* 1907 Mo., 105 S.W. 1055, which, however, applied only to a statutory, and not a constitutional, officer.

In *Story's Commentaries on the Constitution,* Vol. 2, published in Boston in 1833, one of the greatest legal scholars of all times, in considering the qualifications of United States Senators said at page 207:

"§729. The only other qualification is, that the senator shall, when elected, be an inhabitant of the state, for which he is chosen. This scarcely requires any comment; for it is manifestly proper, that a state should be represented by one, who, besides an intimate knowledge of all its wants and wishes, and local pursuits, should have a personal and immediate interest in all measures touching its sovereignty, its rights, or its influence. *The only surprise is, that provision was not made for his ceasing to represent the state in the senate, as soon as he should cease to be an inhabitant. There does not seem to have been any debate in the convention on the propriety of inserting the clause, as it now stands."* (Emphasis added)

In *The Federalist Papers,* Alexander Hamilton said:

"The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature."

And in *Powell v. McCormack,* supra, the U.S. Supreme Court quoted James Madison's argument against allowing the legislature the "improper and dangerous power" of determining qualifications of the members elected to each house and said that such "fundamental articles in a Republican Govt. . . . ought to be fixed by the Constitution." Madison argued that if the legislature could regulate the qualifications of the members of either house "it can by degrees subvert the Constitution." Such a power, he also suggested "might be made subservient to the views of one faction agst. another" and "Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of a weaker faction." 89 S.Ct. 1970, 395 U.S. 532 to 534. See also the quotation of Hamilton in *Powell* at 89 S.Ct. 1973, 395 U.S. 540.

As I have already mentioned, earlier, our statutory provision for removal of a public officer does not apply to a legislator. §66.1 of the Code provides that "Any appointive or elective officer, *except such as may be removed only by impeachment,* holding any public office in the state or in any division or municipality thereof, may be removed from office by the district court for any of the following reasons:" * * * (enumerations deleted and emphasis added). Thus, there is no provision for removal of a legislator who has been seated short of impeachment. Art. III, §20, Constitution of Iowa.

In re *Bowman,* 1909 Penna., 74 A. 203, held unconstitutional an act of the legislature authorizing Courts of Common Pleas, of the Commonwealth to declare vacant the office of an ultimate or justice of the peace who shall, for a

period of six calendar months, at any time during his term of office, fail or neglect to reside and maintain an office in the ward, district, borough, or township for which he was elected and commissioned. In that case one of the appellants was a duly elected justice of the peace commissioned to serve a term of five years. He took his family on a trip to Europe and did not return for six months and one day. But he was a constitutional officer commanded by the Constitution to "behave himself well while in office" and subject to removal by the governor for reasonable cause after due notice and full hearing, on the address of two-thirds of the Senate. The Court said:

"What we are to decide is whether a constitutional officer, whose office the Legislature did not create, and which it cannot abolish, may be removed in any other way than that pointed out in the Constitution for the removal of officers elected by the people. Clearly there is but one answer to this. A constitutional direction as to how a thing is to be done is exclusive and prohibitory of any other mode which the Legislature may deem better or more convenient. As the people have spoken directly in adopting their organic law, their representatives in General Assembly met are at all times bound in undertaking to act for them, and what is forbidden, either expressly or by necessary implication, in the Constitution, cannot become a law."

We have made a rather exhaustive study of all aspects of this problem, including time as of which eligibility or ineligibility to office is to be determined. 88 A.L.R. 812, supplemented in 143 A.L.R. 1026. At 88 A.L.R. 828 it is indicated that:

"The fact that the candidate is qualified at the time of his election is not sufficient to entitle him to hold the office, if at the time of the commencement of the term of office, or during the continuance of the term, he ceases to be qualified. Eligibility to public office is of a continuing nature, and must subsist at the commencement of the term, and during the occupancy of the office."

We do not think this annotation or the cases cited thereunder are apposite because the qualification as to residence in the county under Art. III, §4 is met on election day if the individual involved has been a resident for 60 days prior thereto. In other words, one way of viewing it is that the requirement as to residency in the district is not of a continuing nature by the terms of the constitutional provision and does not continue beyond the day of election. Another is that the *eligibility,* insofar as residency is concerned, being fully satisfied on election day, necessarily continues throughout a legislator's term. Cf *State ex rel Johnston v. Donworth,* 1907, 127 Mo. App. 377, 105 S.W. 1055.

In *State ex rel Childs, Attorney General v. Holman,* 1894, 58 Minn. 219, 59 N.W. 1006, the principles I have reiterated herein were held to apply to members of a city assembly, the court holding that the provisions of the municipal charter could not have reference to the residence of the assemblymen after election, observing:

"Suppose the nine candidates receiving the highest number of votes all resided in one of these districts; which five of the nine would be required to change their residences? And to which of the remaining districts should each of the five remove? And if they all refused to change their residences, what then? The provision relates to eligibility or qualification for election."

The court pointed out that every elective office in Minnesota was governed by a constitutional provision, incidentally similar to the one under consideration here, which the court said was a "denial of power to the legislature to impose any greater restrictions or to add other qualifications for eligibility to those prescribed by the constitution."

Iowa has specifically recognized authority of the legislature to fix the qualifications for municipal office in situations where there is no constitutional provision fixing them. *State ex rel Jones v. Sargent,* 1910, 145 Iowa 298, 124 N.W. 339. And in *State ex rel Thornburg v. Huegle,* 1907, 135 Iowa 100, 112 N.W. 234, it was held to be within the "exclusive province of the legislature to fix the qualifications for public office" and that "the legislature, *in the absence of constitutional prohibition,* may at pleasure alter or add to the qualifications for office." And, the court said, "an office *created by statute* may be abolished, the term increased, or diminished, the manner of filling it changed by will of the legislature at any time even during the term for which the then incumbent was elected or appointed. It may also declare the office vacant, or abolish the office by leaving it devoid of duties." Of course, our court was talking only about statutory offices, in that case the office of county superintendent of schools. The court stressed, twice, "in the absence of constitutional limitations."

It seems significant that the constitutional provisions regarding eligibility and qualifications for office in the executive department are worded in a manner very similar to those governing eligibility in the legislative department. Thus Art. IV, §6, says that "No person shall be eligible to the office of Governor or Lieutenant Governor, who *shall not have been* a citizen of the United States, and a resident of the state, two years *next preceding the election,* and attained the age of 30 years at the time of said election." There again seems to be no requirement that, having been elected, the governor or lieutenant governor must remain residents of the state. Again we find all qualifications for these highest executive offices are carefully prescribed in detail, expressio unius est exclusio alterius. On the other hand, the constitutional provisions with respect to the qualifications of judges of the Supreme and District Courts of the state are fixed only in part and such judges, in addition to the requirement that they be members of the bar of the state "shall have such other qualifications as may be prescribed by law." Art. V, §18. And Art. V, §13, originally provided that the qualified electors of each judicial district elect a district attorney "who shall *be* a resident of the district for which he is elected." Thus, the office of district attorney, as it was originally created, would have become vacant under the terms of the constitution if the district attorney ceased to be a resident of his district. Otherwise, there seemed to be no residence requirements for the secretary of state, auditor of state or treasurer of state (Art. IV, §22) or for the attorney general (Art. V, §12). As Story commented, "this is surprising."

Iowa has also considered the problem of qualification for public office from the opposite direction, where a person seeking office was not qualified at the time he was seeking it but apparently would be either at the time of his election or by the date of his induction to office. Thus in *State ex rel Dean v. Haubrich,* 1957, 248 Iowa 978, 83 N.W.2d 451, in which a man was not qualified on the day he was elected mayor, because he had been convicted of an infamous crime, but whose citizenship was restored by the governor after the election, but before the time fixed by statute for taking office, it was held that the controlling time was the date of the election; that the mayor-elect was not qualified and his election was a nullity. The court said it was necessary that the disqualification be removed *before* he could be legally elected. Apparently had the governor restored his citrizenship the day prior to election, he could have taken office when the time came. When it became apparent the office was vacant, the town council properly elected him to fill the vacancy and he took the

office by virtue of the statute because the disqualification had by then been removed.

In 1968 OAG 154, we concluded that a candidate for state senator or state representative must actually reside within the subdistrict he seeks to represent for 60 days prior to the general election — not the primary. See also, to the same effect, 1968 OAG 846. Again, in 1972 OAG 437, we pointed out that a person need not be a resident of the district he seeks to represent in order to be a candidate for nomination at a primary election; that Art. III, §4, regarding qualifications, specifies only that a representative or senator shall "at the time of his election" have had an actual residence of 60 days in the district he may have been chosen to represent. See also *State v. Carrington,* 1922, 194 Iowa 785, 190 N.W. 390, which holds that a primary election is not an election within the meaning of the constitution.

Contrary to *State ex rel Dean v. Haubrich,* supra, I said in 1972 OAG 560 that the constitutional requirement that a state senator be 25 years old applies to the date of his induction to office rather than the date of his election, citing 1970 OAG 738, *State v. Huegle,* supra, *State ex rel Perine v. Van Beek,* 1893, 87 Iowa 569, 54 N.W. 525 and 1928 OAG 294. While it is not necessary here to resolve the differences between *Haubrich* and these other citations, none of which are directly applicable to resolution of the issue of whether a legislator's office becomes vacant when he moves his residence from one district to another, they do point out the difficulties caused by inadequate constitutional and statutory language in this area. The difficulty, however, is common to almost every state, and of course, constitutions are not generally couched in detailed language, but are deliberately left open to construction.

We have taken exceptional caution in considering this opinion because of the obviously far-reaching consequences of finding that §69.2(3) is not applicable to the office of a duly elected and seated state legislator who ceases to be a resident of the district for which he was elected. While we do not say the statute is unconstitutional insofar as it applies to other offices, particularly those which are creatures of statute, we nevertheless do not lightly withdraw opinions of former attorneys general which, when carefully considered, are entitled to weight and recognition by later attorneys general as stare decisis. 1968 OAG 8 and 1968 OAG 32. But we do not think 1906 OAG 355 or 1964 OAG 412, were carefully considered and, accordingly, they are hereby withdrawn.

We have followed the general rule, perhaps first announced by Alexander Hamilton in *The Federalist Papers,* that when qualifications for office are defined and fixed in the constitution, they are unalterable by the legislature, at least unless the constitution provides otherwise. Representative De Jong, by permanently moving his residence from the district from which he was elected, has not per se vacated the office he in fact continues to serve, §69.2(3) notwithstanding.

Having so decided, it is apparent, in answer to your second question, that Representative De Jong's signing of an affidavit of candidacy for the 33rd Senatorial District does not constitute a constructive resignation of his present office.

April 2, 1974

CONSTITUTIONAL LAW: Department of Transportation; power and duties. Article III, §1, Constitution of Iowa; §4.12, Code of Iowa, 1973;

Senate File 1141, 65th G.A., Second Session (1974). The provisions of §§10 and 30 of S.F. 1141 as passed by the Senate are arguably invalid as an unconstitutional delegation of the law making power to an administrative agency, but the adoption of House amendment H-2692 would cure the infirmity, if any. There are sufficient guidelines in the bill as to the duties and responsibilities of the seven (7) divisions created by §14. (Turner to Welden, State Representative, 4-2-74) #74-4-2

The Honorable Richard W. Welden, State Representative: You have requested an opinion of the Attorney General with respect to the constitutionality of parts of Senate File 1141, 65th General Assembly, Second Session, 1974, a bill for an act to create a state department of transportation, as passed by the Senate. Specifically you ask:

"1. May the legislature enact a law which creates an administrative agency without concommitantly establishing with sufficient clarity that the agency cannot commence operations, nor does it become a legal entity, prior to specific legislative approval of its operational policy parameters?

"2. Would such an act constitute an unconstitutional delegation of legislative powers?"

The Iowa Constitution, Art. III, §1, (first part) requires the separation of governmental powers.

"Departments of government. Section 1. The powers of the government of Iowa shall be divided into three separate departments — the Legislative, The Executive, and the Judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted."

Thus, while it is an immutably established rule of constitutional law that the legislature may not delegate its power to make the laws, it has been equally as well settled that it may delegate the power to make interpretations and enforce applications of the law *within the policy guidelines constructed by legislative pronouncement.*

§10(1) of S.F. 1141 states:

"Section 10. *NEW SECTION.* DUTIES. The commission shall:

1. Develop and coordinate a comprehensive transportation policy for the state not later than July 1, 1975, and develop a comprehensive transportation plan by July 1, 1976, to be submitted to the governor and the general assembly, and to update the transportation policy and plan annually."

§30 further provides in pertinent part:

"The commission shall commence the development of a transportation *policy* for the state, to be submitted to the governor and the general assembly, not later than July 1, 1975. During the fiscal year commencing July 1, 1974 and ending June 30, 1975, the commission shall file quarterly progress reports with the governor and the general assembly outlining the development of the state transportation policy. If the general assembly is not in session when progress reports are due, the reports shall be filed with the legislative council * * *"

There is no specific language in the bill to the effect that the DOT will not in fact begin operation until the policy has *in fact* been approved by the legislature, and further, §14 says:

"The following divisions are created within the department:

1. Transportation regulation board.
2. Administration division.
3. Planning division.
4. General counsel division.
5. Highway division.
6. Public transportation division.
7. Transportation regulation and safety division.

"The divisions *created* pursuant to subsections two (2), three (3), and four (4) of this section shall be *created* as of July 1, 1974. The divisions *created* pursuant to subsections one (1), five (5), six (6), and seven (7) of this section shall be *created* as of July 1, 1975.* * *" (Emphasis added)

The foregoing might indicate that the enumerated divisions come into being even in the absence of legislative approval of the policy under which they will operate. Consequently, we must attempt to determine whether constitutional mandates which must condition a delegation of legislative power, such as that which would be made to the proposed Iowa Department of Transportation, have been satisfied.

73 C.J.S., Public Administrative Bodies & Procedures, §29 (1951):

"In determining whether the delegation of power to an administrative body is an unconstitutional grant of legislative power or a proper grant of administrative power, the distinction is between a delegation of power to make the law, which involves a discretion as to what the law shall be, which delegation is void, and the delegation of authority or discretion as to the execution of a law to be exercised under, and in pursuance of, the law, to which delegation no objection can be made. In this respect, *it constitutes an invalid delegation of legislative power for the legislature to vest an administrative agency with an uncontrolled discretion to determine what the law is or shall be, or as to when and on whom a law shall take effect, or to empower such agency to apply the law* to one and refuse its application to another in like circumstances; nor may the legislature vest such an agency with an uncontrolled power to vary, change, or suspend the application of a statute." (Emphasis added)

73 C.J.S., Public Administrative Bodies & Procedure, §30 (1951):

"Notwithstanding the general rule prohibiting the delegation of legislative functions to administrative bodies, an admixture of governmental powers may be conferred on an administrative officer or board, if there is no delegation of actual legislative power or complete surrender of judicial review. Accordingly, *where the legislature sufficiently prescribes a policy, standard, or rule for the guidance of the administrative body, or otherwise confines it within reasonably definite limits,* authority may be delegated to the administrative body to carry out the legislative purposes in detail, and to exercise administrative power to regulate and control. Moreover, administrative discretion in the application of laws enacted by the legislature, and such discretionary power delegated to an administrative agency is not 'legislative' in violation of the Constitution, *if the law furnishes a reasonably clear policy or standard of action,* which controls and guides the administrative officers in ascertaining the operative facts to which the law applies so that the law takes effect on such facts by virtue of its own terms and not according to whim or caprice of administrative officers." (Emphasis added)

The case law in Iowa is in accord with these widely accepted principles. In *Miller v. Schuster,* 227 Iowa 1005, 289 N.W. 702 (1940) the court said, quoting from *State v. Van Trump,* 224 Iowa 504, 275 N.W. 569 (1937):

"When the Legislature lays down an intelligible and complete declaration of policy which is definite in describing the subject to which it relates or to the field wherein it shall apply, and the character of regulation which is intended to be imposed, it is proper to leave to a nonlegislative body the manner in which that general policy shall apply to varying situations."

This rationale was again cited in *Burlington Transp. Co. v. Iowa State Commerce Commission,* 298 N.W. 631, 230 Iowa 570 (1941),

"This court has repeatedly recognized that the legislature has the power to delegate to an administrative board broad power in the 'working out of details under a legislative act,' provided that the power delegated be properly restricted so that it constitutes merely 'filling up the details' after the legislature has laid down 'an intelligible and complete declaration of policy which is definite in describing the subject to which it relates or to the field wherein it shall apply."

Later, in *Lewis Consolidated School District of Cass County v. Johnston,* 256 Iowa 236, 127 N.W.2d 118 (1964) it was noted that the principles governing legislative delegation must change commensurate with fluctuating societal demands, but that nevertheless a delegation without sufficient standards, guidelines or policy limits is unconstitutional.

"We are cognizant. . .of the fact that it is impossible for the legislature to spell out in exact detail every item which an administrative body must follow. We have said that 'Our mode of life has become so complex that many boards, and administrative agencies have been created to render proper governmental service to our citizenry. The details involved in this service are so numerous, complicated and changeable that for the legislature to enact them in detail would not only be impractical, but impossible.' *Wall v. County Board of Education,* 249 Iowa 209, 228, 86 N.W.2d 231, 242. We also know that the trend of modern decisions is to liberalize the setting of standards and to require less exactness in regard to them in legislative enactments. *But where standards or guide lines are readily possible we think the legislature may not abandon them altogether, and say in effect to the administrative body: 'You may do anything you think will further the purpose of the law; in so doing you may set up whatever standards you deem necessary and you may punish for violation of these standards.'*" (Emphasis added)

That the legislature must establish a definite policy or standard for a delegation to be proper was also noted in *State v. Watts,* 186 N.W.2d 611 (1971),

"Only the legislature has the power to create and define crime, the only limitation that such enactment shall not infringe on constitutional rights and privileges. This exclusive legislative function may not be delegated to any other body or agency without adequate guidelines.

"The essentials of the 'legislative function' are the determination of legislative policy and its formulation and promulgation as a defined and binding rule of conduct. These essentials are preserved when the legislature lays down the rule that acts contrary to regulations authorized under a statute containing *sufficient standards* shall entail penal sanctions." (Emphasis added)

Bulova Watch Co. v. Robinson Wholesale Co., 1961, 252 Iowa 740, 108 N.W.2d 365, 369 says:

"A purely fact-finding authority may be vested in a nonlegislative body, but a discretionary power *involving matters of policyy* is legislative in nature and may not be delegated." (Emphasis added)

Thus a preliminary question is whether or not the seven divisions created by §14 of the Act are to come into being without sufficient legislative guidance as to the functions and duties they are to perform. We think not. Other sections of the measure spell out in some detail the responsibilities of the various divisions, e.g. §18 (transportation regulation board), §21 (administrative division), §22 (planning division), §23 (general counsel division), §24 (highway division), §25 (public transportation division) and §26 (transportation regulation and safety division). Beyond this the framers of the measure have included a preamble which states in appropriately general terms what the public policy of the state is which necessitates the establishment of the department of transportation and its various divisions.

Nevertheless, the provisions of §§10 and 30 previously set forth herein arguably delegate to the commission the authority not only to develop a transportation policy, but to *implement* the same without further legislative action; although even here there is a requirement that the policy and plan be submitted to the governor and the general assembly. Approval by the general assembly seems implicit in the requirement of submission to that body. If this is not a fair implication, delegation of law-making power to the newly created department, or any actual implementation of policy without legislative approval, would run afoul of the constitutional stricture described above.

Even if this is so, however, we must be mindful of the provisions of §4.12 of the Code dealing with severability of statutes which would have the effect of saving the remainder of the bill.

In any event, a proposed amendment to Senate File 1141 offered in the House, H-2692, would, in our opinion, cure any question of the possible constitutional infirmity which we have noted might exist unless legislative approval is implicit in §§10 and 30. This amendment would expand the declaration of legislative policy found in the preamble, would require that the policy and plan to be submitted to the governor and general assembly under §§10 and 30 be submitted to the general assembly "for its approval," and would spell out in even greater detail the parameters under which certain of the created divisions would be required to operate. Legislative clarity is never undesirable and frequently eliminates unnecessary questions, as well as the need for statutory construction and litigation.

It perhaps should be noted that the policy and plan required to be formulated and submitted to the general assembly by the terms of §§10 and 30 need not be submitted until July 1, 1975. But division IV of the bill effectively transfers as of that same date the functions and duties of the various governmental departments and agencies which are being centralized in the department of transportation and a great many statutory provisions are repealed, particularly by §194. §197 makes it quite clear that all of the repealers and amendments contained in division IV are to be effective as of July 1, 1975. Thus it is conceivable that, if the commission did not submit its proposed policy and plan until the last minute, a hiatus could develop with no regulatory framework in place. This could have the effect of making it impossible or exceptionally difficult for the general assembly to refuse to approve promptly the policy and plan submitted. Either that or there would result a

situation in which, out of sheer necessity, the state department of transportation would change on July 1, 1975, from a planning body to a full blown, completely operational, regulatory agency—without the necessary, thoughtful and practical legislative approval of the policy and plan required to be developed under §§10 and 30.

April 4, 1974

WORKMEN'S COMPENSATION: Chapter 85, §411.1(3). Insurance company would be liable for workmen's compensation payments to volunteer firemen injured on the job if a city has a general policy covering all employees. (McGrane to C.W. Bill Hutchins, State Representative, 4-4-74) #74-4-3

The Honorable C. W. Bill Hutchins, State Representative: You have requested an opinion on the following question:

". . .if a city does not have a rider on their Workmans Compensation policy to include volunteer fireman, does that city stand liable if such claim might arise."

It is the opinion of this office that, if the city is one that has volunteer firemen on a regular basis, workmen's compensation insurance would cover any volunteer fireman injured on the job unless there was a rider *excluding* such coverage.

Section 85.2 makes workmen's compensation insurance coverage compulsory on cities. Section 85.1 excludes persons covered under Chapter 411, 1973 Code of Iowa, which provides coverage for policemen and firemen. However volunteer firemen are not covered under Chapter 411 as "firemen" under that section means only those appointed under civil service. Section 411.1(3).

Thus, if a city has a workmen's compensation policy, which purports to cover all those eligible for coverage, this would include volunteer firemen. They are specifically covered by the statute, and are included in the category of city employees under the statute, and unless the city and insurance company specifically work something out otherwise, would be covered.

The Industrial Commissioner's office has decided a similar case in *Rhoades v. City of Fort Dodge et al.*, arbitration decision, filed December 5, 1973. In that case it was held that the insurance coverage included police officers who were not covered under Chapter 411. This arose when, following repeal of the section providing that the state paid compensation to injured police officers, it was necessary to determine whether the city or the insurance company was to bear the burden if a policeman was injured.

This office believes the Commissioner's conclusion was correct. It was based in part on *Bates v. Nelson*, 240 Iowa 926, 38 N.W.2d 631 (1949) where the Iowa Supreme Court states:

"We are abidingly convinced that under our statutes the liability of the insurance carrier to the injured employee depends only upon the liability of the employer to the employee, regardless of any question that may arise between the employer and such insurer."

In conclusion, we believe that coverage for volunteer firemen does not require a rider, but that they would be covered under a general workmen's compensation policy, since such coverage is compulsory on a city or town.

April 4, 1974

COUNTIES AND COUNTY OFFICERS: Volunteer Sheriff's Posse, Workman's compensation—§85.1(4) and 85.2, 1973 Code. Volunteer members of Sheriff's posses are not covered under the Iowa Workman's Compensation Act. (Beamer to Hultman, State Senator, 4-4-74) #74-4-4

Calvin O. Hultman, State Senator: This opinion is in response to your request dated March 15, 1974 concerning coverage of a volunteer Sheriff's Posse under the Iowa Workman's Compensation Act.

In your request you stated:

"The posse was recently organized in Mills County with thirty men, who are deputized as special deputies and work a minimum of 8 hours a month for the sheriff's department. The men are uniformed officers and are armed, and ride with the sheriff and deputies, however, they work without pay and receive no renumeration from the county.

"Since there is coverage for the volunteer firemen under the workman's compensation act, we were wondering if there would be coverage for the sheriff's posse under the county workman's compensation policy."

It is the opinion of this office that the Mills County Sheriff's Posse, or for that matter, any volunteer sheriff's posse, is not covered under Workman's Compensation.

You are correct in your statement that volunteer firemen are covered under the Compensation Act. However, a close reading of Section 85.1(4) will reveal that "volunteer firemen" is the only group not specifically excluded in the exclusionary provisions of that section. The "volunteer firemen" exception was inserted into Section 85.1(4) by the 51st General Assembly, See Chapter 75, §1 of the Session Laws (1945).

Section 85.1(4) makes express mention of "volunteer firemen", but does not refer to any other group who may be included in this exception. Thus it would appear all other groups would be excluded. In dealing with similar problems the Iowa Supreme Court has stated: "Express mention in a statute of one thing implies the exclusion of others." *In re Wilson's Estate,* 202 N.W.2d 41 (1972); see also, *Archer v. Board of Ed. In and For Fremount County,* 104 N.W.2d 621, 251 Iowa 1077 (1960).

Furthermore, the members of the sheriff's posse will not fit under the provisions of 85.2 of the Workman's Compensation Act. Section 85.2 deals with applying the Act to state, county, municipal corporation, school corporation, county board of education or city employees.

The definition of an employee under the Iowa Workmen's Compensation Law is found in Subsection 85.61(2) which provides:

"2. 'Workman' or 'employee' means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer, except as hereinafter specified."

In construing Section 85.61(2) the court in *Sister Mary Benedict v. St. Mary's Corporation,* 255 Iowa 847, 124 N.W.2d 548, 550 (1963), held:

". . . a person 'who has entered the employment of an employer' is 'a person who works under contract of service, express or implied. . .' In other words,

employment implies the required contract on the part of the employer to hire and on the part of the employee to perform service."

In determining whether a contract for services exists the court in *Prokop v. Frank's Plastering Co.*, 133 N.W.2d 878, stated at 883:

"The factors for determining an employer-employee relationship are, (1) the right of selection, or to employ at will, (2) responsibility for the payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) is the party sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed. Usgaard v. Silver Crest Golf Club, Iowa 127 N.W.2d 636, 637; Bashford v. Slater, 252 Iowa 726, 731, 108 N.W.2d 474; and Hjerleid v. State 229 Iowa 818, 826-827, 295 N.W. 139, 143."

In applying these tests to the case at hand, it would appear that these special deputies would not qualify as employees under 85.2 because there is no responsibility for the payment of wages. This concurs with two other opinions this office has issued in regards to other volunteer workers and special deputies. See 1966 O.A.G. 344 and 1972 O.A.G. 605.

There are no other sections of the Compensation Act that could possibly contain the inclusion of members of a volunteer sheriff's posse within its benefits. We therefore conclude that members of a volunteer sheriff's posse, (as framed in your request) are not covered under the Iowa Workmen's Compensation Act.

April 4, 1974

CONSTITUTIONAL LAW: Practice of Accountancy. Aliens. §116.9, Code of Iowa, 1973, as amended by Chapter 140, Acts, 65th G.A., §7 (1973). Since citizenship bears no reasonable relationship to the ability of a person to perform services as an accountant, such cannot be required as a condition precedent to taking a CPA examination. (Haesemeyer to Hanson, State Senator, 4-4-74) #74-4-5

The Honorable Willard R. Hansen, State Senator: In your letter of January 23, 1974, you ask for our opinion on the constitutionality of §116.9, Code of Iowa, 1973, as amended, which requires that person must be a citizen or have declared his intention to become a citizen before he may sit for a CPA examination.

Chapter 140, Acts, 65th G.A., §7 (1973) provides:

"Every applicant for the examination provided for in section 116.8 must be over eighteen years of age, a resident of this state, a citizen of the United States or have declared his or her intention to become such, of good moral character, a graduate of a high school having at least a four-year course of study or its equivalent as determined by the board of accountancy, or shall pass a preliminary examination to be given by the board at least thirty days before the regular examination; and a graduate of a college or university commerce course majoring in accounting, or an undergraduate student majoring in accounting in his or her final semester immediately preceding graduation and upon the recommendation of the appropriate college or university officials."

The general rule regarding the right of aliens to obtain work is stated in 3 Am. Jur.2d, *Aliens & Citizens*, §37 (1967):

"The constitutional guaranty of equality invalidates laws denying to aliens the right to obtain licenses to pursue ordinary callings. The power of the state

to make reasonable classification in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It is a denial of the equal protection of the laws when the government, in its capacity as a lawmaker, regulating not its own property, but private business, bars the alien from the right to trade and labor. Thus, if work sought to be controlled by the government is private, and the public welfare is in no way involved, it is clear that the legislature cannot deny to an individual employer the right to employ aliens. In such case it is held that to deprive aliens, merely because of their alienage, of the opportunity of earning a livelihood, would be equivalent to the assertion of the right to deny them entrance and abode in the state.

"On the other hand, if the work, though private, is such that the exclusion of aliens is in fact necessary to the protection of the public welfare, such exclusion is within the police power. So, if a calling is one that a state, in the exercise of its police power, may prohibit absolutely or conditionally by the exaction of a license, as in cases where the calling or occupation is one which, though lawful, is subject to abuse and likely to become injurious to the community, the fact of alienage may justify a denial of the privilege."

Thus, it has been held that aliens may not be discriminated against in the occupations of pawnbrokerage, *Asakura v. Seattle,* 265 U.S. 332; laundering, *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); fishing, *Takahashi v. Fish & Game Comm.,* 334 U.S. 410 ( ); *Traux v. Raich,* 239 U.S. 33 (1915); barbaring, *Templar v. State Examiners,* 131 Mich. 254, 90 N.W. 1058 ( ); and soft drink sales, *George v. Portland,* 114 Ore. 418, 235 P. 681 ( ).

In *People v. Crane,* 214 N.Y. 154, 108 N.E. 427, aff'd. 239 U.S. 195 (1915) the denial of a license based on the applicant's alienage was upheld as reasonably related to protection of the public welfare. But *Crane* was clarified in a more recent decision wherein the court stated that discrimination on the basis of alienage invokes a strict standard of judicial review (citing *Takahashi, supra).* The court additionally stated that under the authority of *Yick Wo, supra,* the equal protection clause extends to aliens, and that any discrimination based on the fact of their alienage must, under the aforementioned strict scrutiny test, be shown to promote a compelling state's interest,

"Not only must the classification reasonably relate to the purposes of the law, but also the state must bear the burden of establishing that the classification constitutes a necessary means of accomplishing a legitimate state interest, and that the law serves to promote a compelling state interest." *Crane, supra.*

In an opinion recently issued by the Attorney General of Michigan, it was stated that aliens could not be prevented from sitting for CPA examinations since citizenship is not related to ability to perform accounting services. With this proposition, we are in complete accord, and it is our opinion that for purposes of licensing of accountants in this state, alienage is an unreasonable and suspect classification; and any discrimination based thereon is unconstitutional.

April 3, 1974

CONSTITUTIONAL LAW: Collective Bargaining for Public Employees. Fourteenth Amendment, Constitution of the United States; S.F. 531, 65th G.A., Second Session (1974). A proposed collective bargaining bill for public employees which would treat state employees under the merit system differently from other public employees is of questionable constitutionality. (Haesemeyer to Taylor, State Senator, 4-3-74) #74-4-6

The Honorable Ray Taylor, State Senator: At your request we have reviewed S.F. 531 as passed by the Senate and amended by the House, together with two legal opinions regarding the same. The first of these is a letter dated March 16, 1974 from the Boone law firm of Mahoney, Jordan & Statton. The second of these is a letter dated March 27, 1974 from Associate Professor of Law Lawrence Pope of the Drake University Law School. We also reviewed our previous opinion of February 28, 1974, which discussed this measure in a previous form before certain amendments had been adopted. Copies of all of these materials are attached for your convenience.

Generally speaking, we are in agreement with the comments made by Mr. Mahoney and Professor Pope but do not feel that any useful purpose would be served by repeating them in this letter. Many of the comments which they make relate to practical aspects of the bill as it is presently before the House and the impact of the measure on the Merit Employment System. However, both Mr. Mahoney and Professor Pope conclude that this bill would be unconstitutional because it invidiously discriminates against persons covered by the Merit System in violation of the Fourteenth Amendment to the Constitution of the United States. They reach this conclusion because the bill provides that in the case of public employees under the Merit System who proceed through the various collective bargaining and compulsory arbitration procedures, do not come up with results which are binding on the employer who under the bill is only required to give "due regard" to the results of the agreement. This is not the case with other public employees not subject to the Merit System.

While we are in substantial agreement with the position of Robert Mahoney and Professor Lawrence Pope that S.F. 531 is subject to serious constitutional questions due to the possibility that it discriminates against merit employees in favor of other state employees and public employees, without any rational or reasonable basis for such discrimination, we feel it is necessary to elucidate the apposite authorities.

It is still the general rule that collective bargaining is a privilege which may be granted by the state to its public employees, and is not an entitlement as it is with private industrial employees. See 48 Am.Jur.2d, *Labor & Labor Relations,* §1191 (1970); 31 A.L.R.2d, *Labor-Public Employees,* §9, p. 1149 (1953). It is also the rule that the equal protection doctrine applies only to legally protected rights and not to discrimination in the grant of mere favors. 16A C.J.S., *Constitutional Law,* §502, p. 299 (1956).

In *Minneapolis Fed. of Teachers Local 59 v. Obermeyer,* 275 Minn. 347, 147 N.W.2d 358 (1966), the Minnesota Supreme Court dealt with a law which granted collective bargaining to public employees, but made teachers a separate class and subjected them to special provisions,

"The principal issue presented is raised by the contention that §7 is unconstitutional as denying to public school teachers employed by boards of education the statutory benefits granted to all other employees, including teachers employed by the state university and state colleges. We find no definite rule of universal application to determine whether a particular classification is reasonable or unreasonable. It must be recognized that all legislation involves classification since the very idea of legislation implies distinctions and categories of one sort or another. The mere presence of inequality does not in itself determine the question of constitutionality. 16 Am.Jur.2d Constitutional Law, §494; 3B Dunnell, Dig. (3 ed) §1669.

* * *

"When the legislature has determined that a sufficient distinction exists between two classes of persons to justify applying rules to one class which do not apply to the other, such determination is binding upon the courts unless it appears that the distinction is purely fanciful and arbitrary and that no substantial or logical basis exists therefor. Classification can never be a judicial question except for the purpose of determining, in a given situation, whether the legislative action is clearly unreasonable. In the matter of classification courts have viewed the action of the legislature with great liberality."

Later in the same opinion,

"This court has repeatedly recognized the right of the legislature to treat classes of employees separately and differently for purposes of legislation in granting privileges for imposing burdens on members of the same general class.

* * *

"It is well recognized that the legislature may classify professions, occupations, and businesses according to natural and reasonable lines of distinction, and if such legislation affects alike all persons of the same class, it is not an invalid classification. Legislation with reference to the teaching profession has generally been sustained as a valid classification."

A classification can be upheld where it bears a reasonable relation to the objects of the legislation. *Kantor v. Honeywell, Inc.*, ____Minn.____, 175 N.W.2d 188 (1970), citing 16A C.J.S., Constitutional Law, §594 (1956); *Hay v. Township of Grow, Anoha County*, ____Minn.___, 206 N.W.2d 19 (1973).

Thus, it is at least arguable that if S.F. 531 does in fact discriminate against Merit System employees in favor of other state employees, that such classification may nevertheless be supported by a rational legislative basis. On the other hand, the discrimination may in fact be merely arbitrary, capricious, unreasonable and entirely unrelated to any legislative purpose.

While we are not as certain as Messers Mahoney and Pope that the measure unconstitutionally discriminates against Merit Employment personnel, we nevertheless are inclined to agree that this is probably the case since no arguments have been presented to us to support the different treatment accorded Merit System employees under the bill. The *Obermeyer* case, *supra,* is distinguishable from the question we are concerned with. Their public school teachers were excluded in their entirety from the Minnesota collective bargaining law just as exceptions are made in S.F. 531 for certain classifications of Iowa public employees. In the matter before us, however, Merit System employees are covered by the proposed Iowa collective bargaining measure but not to the same extent and with the same finality as other employees covered by the proposal.

April 5, 1974

COUNTIES: Supervisors. The prerogative of closing secondary road bridges over railroad crossings rests with the board of supervisors. (Nolan to Eich, Carroll County Attorney, 4-5-74) #74-4-7

Mr. Ronald F. Eich, Carroll County Attorney: This is written in response to your request for an attorney general opinion on the following:

"During April of 1973, the Chicago North Western Railroad placed barricades at the ends of a wooden bridge which bridge carries secondary road

traffic over their tracks. This particular bridge was in a state of disrepair. Subsequent to the closing of the bridge, a controversy arose regarding who should bear the cost of said repairs, the railroad or Carroll County. This matter was submitted to the Iowa Commerce Commission for hearing and on January 29, 1974, the Commerce Commission issued its ruling stating that said bridge was not necessary and therefore declined to answer the question as to who should bear the cost. The Commerce Commission did, however, in its order, state that the bridge did not have to be removed and should the Carroll County Board of Supervisors wish to repair said bridge, they could do so at its own cost upon proper notice being given to the railroad and to the Commerce Commission.

"The Carroll County Board of Supervisors did elect to give notice of its intention to repair it and will repair said bridge.

"There are five other bridges which carry secondary road traffic over the Chicago North Western Railroad Company's tracks in Carroll County and the Board is concerned as to whether or not the railroad can close these bridges if they feel the bridge is in a state of disrepair and specifically, whether or not they can close these bridges without notification."

The answer to your question may be found in §306.10, Code of Iowa, 1973, which provides as follows:

"In the construction, improvement, operation or maintenance of any highway, or highway system, the board or commission which has control and jurisdiction over such highway or highway system, shall have power, on its own motion, to alter or vacate and close any such highway or railroad crossing thereon, and to establish new highways . . ."

The section of the Code set out above was discussed in an opinion issued by this office on July 25, 1963. 1964 O.A.G. 208. In that opinion it was stated that the statutory procedure contained in §306.4 through §306.11 of the Code is the only manner in which highways can be vacated and closed.

However attention should also be given to §309.3, Code of Iowa, 1973, which states that a secondary bridge system of a county shall embrace all bridges and culverts on all public highways within the county, except on primary roads and on highways within cities which control their own bridge levies and excepting culverts that are thirty-six inches in diameter or less. The duty of repairing and keeping the secondary road system in repair is placed on the county board of supervisors and the engineer under §309.67. This standards specifications for all bridges is provided for in §309.79. Temporary closings for construction or repair is authorized by §306.41. The priority of improvements of secondary roads is within the sound discretion of the board of supervisors. 1960 O.A.G. 139.

Accordingly, you are advised that the prerogative of closing secondary road bridges over railroad crossings rests with the board of supervisors.

April 5, 1974

TAXATION: Semiannual mobile home tax. Lien of tax; tax list as public record; §§135D.24, 68A.1, Code of Iowa, 1973; Delinquent semiannual tax on mobile homes is not a lien on real estate. Mobile home tax is a public record. (Capotosto to Faches, Linn County Attorney, 4-5-74) #74-4-8

Mr. William G. Faches, Linn County Attorney: You have requested an Opinion of the Attorney General with reference to certain aspects of the semian-

nual tax on mobile homes imposed by §135D.22, Code of Iowa, 1973. The substance of your inquiry is as follows:

"On January 25, 1973, an opinion was rendered by the Attorney General's Office stating that Delinquent Mobile Home Taxes should be entered in the Delinquent Personal Tax List. In light of said opinion, we would like to have an opinion on the following questions which have been an outgrowth of the aforestated Attorney General's Opinion:

"1. Is a delinquent mobile home a lien on real estate?

2. If the answer to Question No. 1 is in the affirmative, at what point in time does the delinquent mobile home tax become a lien?

3. If the delinquent mobile [home tax] becomes a lien on real estate, when and where should the mobile home tax list be kept, i.e., in the automobile division of the county treasurer's office or the real estate division of said office?

4. Is the mobile home tax list a public record as are general tax lists, personal tax lists, and special assessments?

The January 25, 1973 Opinion of the Attorney General to which you refer in your request was an attempt to resolve the dilemma posed by the complete absence of specific collection and enforcement procedures in §135D.24, Code of Iowa, 1973. Section 135D.24 set the time at which the semiannual tax on mobile homes would be due and when it would become delinquent. It established the procedure for giving notice to the taxpayer of impending delinquency. Section 135D.24 also provided that the semiannual tax becomes a lien on the vehicle. However, the statute did not then go on to set out the procedure to be involked to enforce this statutory lien. In view of this deficiency in §135D.24, the January 25, 1973 opinion construed the statute together with the general property tax collection procedures found in Chapter 445, Code of Iowa, 1973. In effect, that opinion takes §§445.6, 445.7, and 445.8 Code of Iowa, 1973 and makes them applicable to the collection of the semiannual tax on mobile homes. In this way, the missing element of an orderly collection procedure is incorporated into §135D.24. The earlier opinion was intended simply to determine the method whereby the semiannual tax could be enforced. Said opinion did not and was not intended to alter or add to any of the substantive provisions of Chapter 135D Code of Iowa, 1973 for such would have been beyond the authority of the Attorney General to do so. This brings us to the question of whether delinquent semiannual taxes on mobile homes become a lien on the taxpayer's real estate. The last paragraph of §135D.24 states:

"The tax and registration fee shall be a lien on the vehicle senior to any other lien there may be upon it."

The foregoing statute specifically provides that the lien created shall be on the vehicle. Thus, to determine what property is subject to the lien, it is not necessary to look to any other sections of the law. In the opinion of the Attorney General, the lien for the semiannual tax on mobile homes attaches only to the vehicle itself and to no other property, real or personal. The statutory language quoted above includes one specific class of property as being within the coverage of the lien, and by implication excludes all others. It is a well settled rule of statutory construction in this state that in construing a statute, the express mention of one thing implies the exclusion of all others. *Dotson v. City of Ames,* 1960, 251 Iowa 467, 101 N.W.2d 711; *In Re Wilson's Estate,* Iowa 1972, 202 N.W.2d 41.

A mobile home subject to the semiannual tax is clearly personal property unless converted to realty, in which case it ceases to be subject to the semiannual tax altogether. Since the lien attaches only to the vehicle itself, delinquent mobile home taxes do not become a lien on the taxpayer's real estate.

In view of the opinion that delinquent mobile home taxes are not a lien on the taxpayer's real estate, your second and third questions become moot.

Your fourth and final question concerns whether the mobile home tax list is a public record. A public record is defined at §68A.1, Code of Iowa, 1973 as:

". . .all records and documents of or belonging to this state or any county, city, town, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing."

All public records are open to inspection of a citizen under §68A.2, Code of Iowa, 1973. There are a number of exceptions to this right of inspection, many of which are set out in §68A.7, Code of Iowa, 1973. Other types of records which are not open to inspection can be found throughout the Iowa Code. For example, §422.20, Code of Iowa, 1973 insures the confidentiality of state income tax returns. The mobile home tax list maintained by: the county treasurer is clearly a public record within the meaning of §68A.1, Code of Iowa, 1973. Furthermore, nothing appears in §68A.7 or any other section of the Iowa Code which would operate to render the list confidential.

In conclusion, it is the opinion of the Attorney General that delinquent semiannual mobile home taxes are not a lien on the taxpayer's real estate, and that the mobile home tax list kept by the county treasurer is a public record open to inspection.

April 5, 1974

COUNTY OFFICERS: Vacancies, Sheriffs, Article XI, §6, Constitution of Iowa, §§39.17, 69.11, 69.12. Person appointed in 1973 to fill a vacancy in office of sheriff holds the office until a successor is elected at the general election in 1974 and qualifies. (Turner to Wehr, Scott County Attorney, 4-5-74) #74-4-9

Mr. Edward N. Wehr, Scott County Attorney: You have requested an opinion of the Attorney General with reference to the vacancy in the office of sheriff, following his resignation, and under the provisions of §69.8, subsection 4, Code of Iowa, 1973, which provides for the filling of that vacancy by the Board of Supervisors.

Specifically you inquire whether the newly appointed sheriff would hold office only until the next general election in November, 1974, although the regular term of that office would not expire until after the election in November 1976 (December 31, 1976, and until his successor is elected and qualified).

Polk County Attorney Fenton has written an opinion dated January 31, 1974, in which similar questions were raised following the recent tragic death of Sheriff Woodard, a copy of which is herewith enclosed and which we adopt as correct.

As Mr. Fenton notes, Article XI, §6, Constitution of Iowa, is specific in stating that persons *appointed* to fill vacancies in office shall hold until the next

general election and until their successors are elected and qualified. Section 69.11, Code of Iowa, 1973, provides:

"69.11 Tenure of vacancy appointee. An officer filling a vacancy in an office which is filled by election of the people shall continue to hold until the next regular election at which such vacancy can be filled, and until a successor is elected and qualified. Appointments to all other offices, made under this chapter, shall continue for the remainder of the term of each office, and until a successor is appointed and qualified."

Section 69.12 then provides:

"69.12 Officers elected to fill vacancies—tenure. If a vacancy occurs in an elective office ten days or more before the filing date prior to a general election, it shall be filled at such election if the remainder of the term of office is greater than ninety days after the date of the election. If the unexpired term is less than ninety days after the election day at which the vacancy is filled, the person elected to the office for the next regular term shall take office as soon as he qualifies."

Of course, when the vacancy occurred in the office of your sheriff, there were more than ten days remaining before the filing date for filing for the office of sheriff prior to the next regular or general election in November, so that any person could run for the office in the June primary if nomination papers are filed by the deadline. As I understand from you, each party has one or more candidates for sheriff in your county, so the problem is not urgent. Then the person elected in November could qualify the next day after the election to fill out the unexpired portion of the sheriff's term through December, 1976. See *Wilson v. Shaw,* 1922, 194 Iowa 28, 188 NW 940, and §43.3 of the Code which provides:

"Candidates of all political parties for all offices which are filled at a regular biennial election by direct vote of the people shall be nominated at a primary election at the time and in the manner hereinafter directed."

January 31, 1974

The Honorable William Newell, Chairman
Polk County Board of Supervisors
Polk County Courthouse
Des Moines, Iowa

Dear Mr. Newell,

At your request I have reviewed the matter of appointment of a Polk County Sheriff and considered the following questions:

1. Must an election be held for the office of Polk County Sheriff in 1974?
2. Is the appointment of a temporary Sheriff effective until November 5, 1974 or December 31, 1974?
3. If an election is required in 1974, is the term of office two (2) years or four (4) years?
4. If someone is appointed in 1974, and desires to run for election for the two (2) year term in 1974, must he secure nomination papers and go through a primary election and can both political parties take part in such election?

An election must be held for the office of Polk County Sheriff in 1974. Article XI, Section 6, of the Iowa Constitution is specific in stating that persons appointed to fill vacancies in office shall hold until the next general election and until their successors are elected and qualified. Iowa Code (1973) Section 69.11 is nearly identical to the Iowa Constitution in requiring that an officer filling a vacancy in an office which is filled by election of the people shall continue to hold until the next regular election at which such vacancy can be filled, and until a successor is elected and qualified.

The appointment of the temporary Sheriff is effective until November 5, 1974 or until such time thereafter as the elected Sheriff is qualified. This could be as early as November 6, 1974. Iowa Code Section 39.8 provides in part "that an officer chosen to fill a vacancy shall commence as soon as he has qualified therefore."

As an election is required in 1974, the term of office of this election (1974) is two (2) years. The case of *Wilson v. Shaw* 194 Ia. 28, 188 NW. 940 (1922) is directly on point as to this issue.

As an election for the office of Sheriff is required at the general election on November 5, 1974, Section 43.3 of the Code of Iowa (1973) requires that a primary election be held for this office. Section 43.3 provides that:

> Candidates of all political parties for all offices which are filled at a regular biennial election by direct vote of the people shall be nominated at a primary election at the time and in the manner hereinafter directed.

The election for the office of Sheriff would have the requirements normally found in a primary election and these requirements would apply to an incumbant candidate seeking the short term as well as all other candidates.

Yours truly,

RAY A. FENTON
POLK COUNTY ATTORNEY

April 11, 1974

COURTS; JUDICIAL RETIREMENT; WIDOWS; SURVIVORS: Ch. 605A, Code of Iowa, 1971; §605A.15, Code 1973; Ch. 262, 64th G.A., 1st Session, 1971. The surviving spouse of a judge who was qualified for retirement compensation at the time of his death includes the survivor of such a judge who died before July 1, 1971, the effective date of the Act. But the statute is prospective in its operation as to time and such a survivor of a judge dying prior to the effective date of the Act does not become eligible for benefits until July 1, 1971. Such benefits, not heretofore paid, draw interest at five percent per annum until paid and should be paid periodically thereafter. (Turner to Representative Lipsky and Comptroller Selden, 4-11-74) #74-4-10

Honorable Joan Lipsky, State Representative and Mr. Marvin R. Selden, Jr., State Comptroller: You have each requested an opinion of the Attorney General as to whether Chapter 605A, Code of Iowa, 1971, as amended by Chapter 262, 64th G.A., First Session, 1971, provides an annuity for surviving spouses of certain judges eligible for retirement compensation under the judicial retirement system. The principal provision is now §605A.15, Code of Iowa, 1973. Your specific inquiry is as follows:

"1. Who is eligible?

(a) Does it cover only survivors of Judges who have died on or after July 1, 1971, or

(b) Does it cover all survivors of Judges who have died since the beginning of the Judicial Retirement System.

2. If your answer to (b) is yes, when does eligibility for payments begin?

(a) The effective date of this Act, or

(b) The day the survivor applies for benefits, or

(c) The first of the month following application, or

(d) Some other alternative.

3. If your answer to 1(b) is yes, we need answers to the following questions:

(a) The Judge may have died after receiving only part of his contributions in the form of annuities, the remainder being refunded to his widow. Does the widow have to return the amount of contributions refunded to her before she is eligible for payments?

(b) The Judge may have died while still in service to the state and his total contributions were refunded in a lump sum payment to his widow. Does the widow have to return the amount of contributions refunded, plus the amount for prior service if applicable, before she is eligible for payments?"

Section 605A.5 Code of Iowa, 1971, as amended by this new law, provides:

"No person, *except the survivor of a person qualified to receive an annunity,* shall be entitled to receive an annuity under this chapter unless he shall have contributed, as herein provided, to the judicial retirement fund for the entire period of his service as a judge of one or more of the courts included in this chapter." (Amendment emphasized)

Section 605A.8 of said Code, as amended, provides:

"The amounts deducted and withheld from the basic salary of each judge of the municipal, superior, district or supreme court for the credit of the judicial retirement fund and all amounts paid into such fund by each judge shall be credited to the individual account of such judge. In the event a judge of the municipal, superior, district or supreme court becomes separated from service as such judge before he completes an aggregate of six years of service as a judge of one or more of such courts, the total amount of his contribution to the fund shall be returned to said judge or his legal representatives, and in the event a judge who has completed an aggregate of six years or more of service as a judge of one or more of such courts, dies before retirement, *without a survivor,* the total amount of his contribution to the fund shall be paid in one sum to his legal representatives, and in the event an annuitant under this section dies *without a survivor,* without having received in annuities an amount equal to the total amount remaining to his credit at the time of his separation from service, the amount remaining to his credit shall be paid in one sum to his legal representatives." (Amendment emphasized)

Section 605A.10, as amended by the Act provides:

"No annuity shall be paid to any person, *except a survivor,* entitled to receive an annuity hereunder while he is serving as a state officer or employee." (Amendment emphasized)

To the aforesaid, the following new section (now §605A.15, Code 1973) was added:

"*The survivor of a judge who was qualified for retirement compensation under the system at the time of his death, is entitled to receive* an annuity of one-half the amount of the annuity the judge was receiving or would have been entitled to receive *at the time of his death,* or *if the judge died before age sixty-five,* then one-half of the amount he would have been entitled to receive at age sixty-five based on his years of service. Such annuity shall begin *on the judge's death, or* on the date the judge would have been sixty-five *if he died earlier* than age sixty-five, or upon the survivor reaching age sixty, whichever is later.

"For the purposes of this chapter 'survivor' means the surviving spouse of a person who *was* a judge, if married to the judge for at least five years *next preceding his death,* but does not include a surviving spouse who remarries.

"In the event the judge *dies* leaving a survivor but without receiving in annuities an amount equal to his credit, the balance shall be credited to the account of his survivor, and if the survivor *dies* without remarrying and without receiving in annuities an amount equal to said balance, the amount then remaining shall be paid to the survivor's legal representative." (Emphasis added)

Unlike Chapter 605A, which is retirement compensation for the benefit of the judge during his life (1968 OAG 423), Chapter 262 of the 64th G.A., 1st, 1971, was enacted for the benefit of the surviving spouse of a judge, rather than the judge himself. Thus, the annuity provided the spouse is a pension rather than retirement pay or compensation. A pension is distinguished from the latter because it is an allowance, made out of hand, gratuitously, not purely for past services, by the government, with all the attributes of a pension. Retirement compensation, on the other hand, is paid under a system established during the course of employment and to which the employee usually contributes a part of his salary or wages along with a sum contributed by the employer. *Talbott v. Independent School District,* 1941, 230 Iowa 949, 299 N.W. 556; 1971 OAG 152; 1968 OAG 423. However, recent cases in the Iowa Supreme Court have emphasized that such systems have undergone a substantial change in recent years with a gradual trend away from the gratuity theory of pensions based upon the recognition that the employee's consideration flows to the employer as a result of the pension plan and the more stable and contented labor force which it produces. Such reasoning gives rise to a contractual right in the employee who has complied with all conditions of the plan, even though he has made no monetary contributions to the fund. *Van Hosen v. Bankers Trust Company,* 1972 Iowa, 200 N.W.2d 504.

Iowa has given a liberal construction to pension acts, *Flake v. Bennett,* 1968, 261 Iowa 1005, 156 N.W.2d 849; *Rockenfield v. Kuhl,* 1951, 242 Iowa 213, 46 N.W.2d 17; 70 C.J.S. 425, Pensions §2; 40 Am.Jr. 963, Pensions §4, and follows a number of common law principles given below:

"When an employee of any retirement system has fully complied with all the requirements making him eligible for a retirement allowance, whether he chooses to ask for it then or later, he has a vested right to such allowance which cannot be affected by subsequent legislation, except for a cause (fraud, felonies, etc.) * * *. Until the employee has become eligible, * * * his right to the retirement allowance is inchoate, and it may be affected by subsequent legislation." *Talbott v. Independent School Dist. of Des Moines,* supra; *Nelson v. Board of Directors,* 1955, 246 Iowa 1079, 70 N.W.2d 555; *Rockenfield v. Kuhl,* supra.

Increased retirement benefits due to statutory amendments apply to persons who have retired and draw benefits under the prior law. The number of years of service required to qualify for pensions includes service prior to enactment of the pension statute. *McCord v. Iowa Employment Security Commission,* 1952, 244 Iowa 97, 56 N.W.2d 5; *Mathewson v. Board of Trustees of Firemen's Pension Fund,* 1939, 226 Iowa 61, 283 N.W. 257.

The granting of pension benefits under an amended pension statute for a disability occurring under an old statute which did not provide pensions for such disabilities "does not result in a retroactive application of the statute as amended, because the pension rights of an applicant are governed by the law in effect either (a) at the time the application is filed; or (b) at the time the pension board acts on the application, and is not governed by the law in effect at the time of the injury". *City of Iowa City v. White,* 1961, 253 Iowa 41, 111 N.W.2d 266. *McCord v. Iowa Employment Security Commission,* supra.

On the other hand, all statutes including pension statutes are to be construed as prospective in operation unless the contrary is expressed or clearly implied, except where the statute relates solely to remedies or procedure. *Flake v. Bennett,* supra and *Young v. O'Keefe,* 1957, 248 Iowa 751, 82 N.W. 2d 111, hereinafter called *Young* and not to be confused with an earlier case on a similar question, *Young v. O'Keefe,* 1955, 246 Iowa 1182, 69 N.W.2d 534, the first Young case.

In *Young,* the Iowa Supreme Court held that the surviving spouse of a policewoman who died prior to enactment of an amendment which seemed to include the surving husband within the class entitled to receive benefits under the police pension statute, was not entitled to benefits because a retroactive application was not clearly provided in the statute.

Since both *Young v. O'Keefe,* supra, and *City of Iowa City v. White,* supra, appear to result in conflicting holdings as to the retroactive effect of amendments, it is necessary to compare the facts and the reasoning of the two cases to determine if they are consistent. Both cases involved a change or amendment to firemen's and policemen's pensions increasing the class or creating a new class of beneficiaries. In *Young* the statute prior to amendment provided benefits to widows whereas the amendment increased the class or created a new class of beneficiaries, the husband, by the replacement of the word widow with the word spouse. In *White* the statute prior to amendment provided disability benefits for injuries and accidents occurring in connection with employment, whereas the amendment created a new class of disability beneficiaries or increased the existing class to those suffering from diseases of the heart and lung, etc. In both cases claimants were not entitled to benefits prior to amendment when the injury occurred. In both cases an amendment increased the class or created a new class of persons entitled to benefits after the event or injury which gave rise to the parties' status and claims. In both cases the parties could have obviously qualified for benefits if the injury had occurred after enactment of the amendment. In both cases the issue was whether the parties were entitled to benefits under the new act and whether granting of such benefits was a retroactive application of the statute.

It is thus apparent the facts are almost identical except for the following differences: (1) Slight differences in the statutes involved in both cases may exist, (2) *Young* involved a new class of beneficiaries, husbands, while *White* involved a new class of beneficiaries, those disabled by heart and lung disease,

(3) *Young* involved a party who had previously applied for benefits and had been refused with affirmation of the decision by the Iowa Supreme Court while *White* involved a party who had not previously applied for benefits or been refused.

In considering the differences in statutes, *Young* concerns §§410.10, 411.1 and 411.6, Code of Iowa, 1971, with the court noting that the only difference in the two chapters was the difference in class of city to which each applied. *White* concerns Chapter 411 which tends to emphasize a rather elaborate set of boards, procedures and applications. However, the court in *Young* said there was no real difference in the two chapters involved. In either case parties must ultimately fill out an application prior to receiving benefits under rules which the normal administration of such a system requires. It thus appears the two cases did cover the same identical statutes.

It is also difficult to see how the difference between a pensioner and a disability beneficiary would matter significantly where the apparent purpose of the pension funds is to provide the employee and his family with more security and thereby to obtain and hold better public employees. The provision for widow's or spouse's benefits provides the employee with additional security as does the creation of new benefits for disability. Perhaps more. In fact, spouse benefit programs may more completely meet the needs which prompts such legislative action. At least the basic purpose of such plans, the pension in the interest and security of an employee and his survivor, and disability relief, is substantially alike. The person who actually receives the pension or benefits makes no real difference in the two cases.

In *Young* the court dwelt upon the wording of the statute which provided spouse benefits "upon the death or in event of the death". Yet *White* considered the same statute and even quoted the "upon and in event" language without holding that such words indicate any significance whatsoever. Such points do not explain the case differences where the court has specifically noted in *White* the time of application was the determining factor. In comparing the amendment in *Young* to the judicial retirement amendment, the latter does not have any of the "upon and in event" language.

From the clear and plain meaning of the words used, it is necessarily implied that the legislature intended to provide an annuity to the survivor without regard to the time of the judge's death. While a superficial examination of *Young* might indicate otherwise, a careful examination shows the clear distinction between the words of the statutes involved there and here. This statute does not say "the survivor of a judge who *is* qualified" but rather "who *was* qualified". Nor does it say, comparable to the statute in *Young*, "upon the death of a judge who was qualified". And while it does not expressly say "regardless of the time of the judge's death" those words are nevertheless necessarily implied by the words, "who was qualified at the time of his death". The liberal construction required should not be defeated and eligibility of the class limited by dredging up the spectre of retroactive operation when the clear words warrant no such strained construction. Section 4.2, Code, 1971. The real question is not whether the statute operates prospectively or retroactively. It is simply a question of definition of the class benefited and eligible.

Two distinguished former senators in capacities of leadership from both political parties, both of whom are experienced lawyers, say they deliberately wrote the bill in its present terms in order to make eligible the survivors of

judges who had either died or retired prior to the effective date of the Act, as well as to the survivors of judges dying thereafter. And many legislators with whom I've discussed the question have told me such was their understanding of what was intended. No one has indicated otherwise. Thus, even if this law is viewed as being for the benefit of judges rather than their survivors, it can be argued that a retroactive operation was clearly stated and intended as to the class of survivors eligible. If so, the law does not prohibit such operation. *Flake v. Bennett,* supra.

As pointed out by the Iowa Supreme Court in *Flake:*

"'When a statute provides for a computation date earlier than the effective date of the statute, the entire statute becomes effective and operative on the effective date, using new computations made as of the earlier computation date.', citing Gulf Shipside Storage Corp. v. Thames, 217 La. 128, 46 So.2d 62 (1950.)"

In the *Young* amendment the words "surviving spouse" were substituted for "surviving widow" while in the *White* amendment there were complete paragraphs added and existing sentences were modified as in this judicial retirement plan. Such volume of change and additions of paragraphs indicates that there was a greater effort by the legislature to create a new class of beneficiaries.

In *Young* the denial of benefits had been made prior to passage of the new act. *Young v. O'Keefe,* 1955, 246 Iowa 1182, 69 N.W.2d 534. In *White* no denials had ever been made. It is also clear that our court did not believe the legislature had adequately modified the earlier *Young* decision by express language in the amendment. Rather, it appears the legislature as a result of the first *Young* case took limited action to correct the effect of a statute, knowing the court's harsh application, but without adequately expressing that the correction was to apply in the past as well as the future. The amendment in *White* and the judicial retirement plan contains no such past history of legislative intent to limit benefits but only indicates the legislative intent to create a new class of pensioners for anyone who meets the established conditions either before or after the effective date of the Act.

The principal difference in *White* and *Young* appears to be the time of application for benefits. In the first *Young* the party had previously applied for benefits and not only been refused but the Iowa Supreme Court held he was not entitled to such. It seems that in *Young* the denial prior to passage of the new act was the overriding consideration. Indeed, still a *third Young* case, *Sioux City v. Young,* 1959, 250 Iowa 1005, 97 N.W.2d 907, 910, so indicated:

"May the legislature by a later enactment direct the courts to give an interpretation to a statute different from the one which they have already applied to the same law in a case involving the same claim, the same state of facts and the same parties? We think it clear that it may not."

Stressing the res judicata significance of the first *Young* case, the court said:

"The legislature had a right to say whether its enactments were retrospective or prospective, as applied to future interpretations; it did not have the right to direct the courts how its statutes were to be construed with reference to matters already decided. We have construed the amendments made by the Fifty-sixth General Assembly *as applied to a certain case;* the legislature may not, by later enactment, direct us to change our interpretation as it affects this same litigation."

* * *

"We also said 'The spectre of res judicata arises to haunt plaintiff. The record conclusively establishes that his case was already adjudicated when the statutory change occurred."

* * *

"What we held in the second case, supra, was that the amendments made by the Fifty-sixth G.A. were not retroactive; and that, if we should so construe them, the plaintiff's claim would *still* be defeated by the doctrine of res judicata because it had been litigated and denied by the first case, Young v. O'Keefe, 246 Iowa 1182, 69 N.W.2d 534, supra." 97 N.W.2d 910.

We have tried very hard to distinguish *White* from *Young* because *White,* decided in 1961, does not by its terms overrule *Young,* decided four years earlier. The similarities of these cases, which reach opposite conclusions, have presented us with a dilemma, particularly because it seems presumptuous for the attorney general to conclude that the state's highest court has overturned a decision so close to the point with another such which seemingly simply ignores it. (There is no mention of *Young* in *White!)* Unhappily, the general assembly has repeatedly failed to act upon bills to clarify the dilemma. For all of these reasons, we conclude that the later of the two cases is the one we must follow.

The more recent case, *White,* cited several foreign state cases in support of its holding that its application of the amendment was not retroactive. In addition, several common law principles have been established by the courts of other states:

A statute is not retroactive merely because it draws on antecedent facts for a criterion in its operation. 82 C.J.S. 980 Statutes §412; 50 Am.Jr. 492, Statutes §476; *United States Steel Credit Union v. Knight,* 1965, 32 Ill.2d 138, 204 N.E.2d 4 (regulatory fees for year enacted are not retroactively applied) *Sitzman v. City Board of Education of City of Eureka,* 1964, 37 Cal. Rptr. 191, 389 P.2d 719 (dismissal hearing in the year enacted as applied to prior contracts was not retroactive); *Public School District No. 35 v. Cass County Board of Comrds,* 1963, 123 N.W.2d 37, (combining school districts which were nonoperative for the past two years in the year enacted was not retroactive); *Burks v. Poppy Construction Co.,* 1962, 20 Cal. Rptr. 609, 370 P.2d 313 (prior public assistance contracts subject to subsequent discrimination legislation); *Nacirema Operating Co. v. Andruzzi,* 1960, 185 F.S. 344 (statutory ban on a contract voiding clause as applied to contracts made prior to enactment was not a retroactive application); *United Engineering & Foundry Co. v. Powers,* 1960, 171 Ohio St. 279, 169 N.E.2d 697 (Tax on the average inventory as applied to the year in which it was enacted is not retroactive application); *Hill v. City of Billings,* 1958, 134 Mont. 282, 328 P.2d 1112 (Pay scales based upon the years of service prior to enactment of a statute is not a retroactive application); *Sipples v. University of Ill.,* 1955, 4 Ill.2d 593, 123 N.E.2d 722, (Complying C.P.A. test given prior to enactment was valid and a nonretroactive application); *Holt v. Morgan,* 1954, 128 C.A.2d 113, 274 P.2d 915 (nontransferable liquor license law applied to preenactment debt is nonretroactive application).

Increases or changes in pension benefits based upon prior service or facts are not retroactive statutory changes. *Eichelberger v. City of Berkley,* 1956, 293 P.2d 1, (increases in pension due to general pay increases is not retroactive as to existing retirees); *Fuller v. United States, 1891, 48 F. 654 (soldiers pension*

changes not retroactive as to existing pensioners.); Reynolds v. United States, 1934, 292 U.S. 443, 78 L.Ed. 1353 (addition of hospitalization to pension not retroactive benefits.).

The rule that statutes are to be given a prospective operation, like other rules of interpretation, is only used to give effect to the intention of the legislature when the statute does not make the legislative intention clear and cannot be invoked to change the intention when it is apparent by the terms of a clear and unambiguous statute. The re-enactment of a statute with amendments does not prevent the application of the re-enacted portion of the statute to matters existing before the re-enactment. 50 Am. Jur. 502, Statutes §479. See also *Appleby v. Farmers Bank,* 1953, 244 Iowa 288, 56 NW2d 917.

Beyond this it may well be that this act was intended for the benefit of *both* the judge and his survivor; that it was, as it appears to be, an enhancement of the judicial retirement system. If so, it could be judicially determined that the act is remedial and not simply creative of an entirely new substantive right. In that case it might be construed retroactively as well as prospectively as far as those entitled to benefits are concerned. *Schmitt v. Jenkins Truck Lines, Inc.,* 1967, 260 Iowa 556, 149 N.W.2d 789. Cf. *Barad v. Jefferson County,* 1970 Iowa, 178 N.W.2d 376. See also 50 Am. Jur. 505, Statutes §482.

So, in my opinion, the question of retroactivity, if any real problem exists, with reference to the class to whom the annuity is to be paid, ought to be resolved in favor of the spouse of "any judge who was qualified for retirement compensation under the system at the time of his death," regardless of whether his death occurred or occurs before or after the effective date of the act, and provided the spouse survives, otherwise qualifies, and applies after the enactment of the amendment. Nor does it make any difference whether the judge was retired prior to the effective date of the act but did not die until afterwards. If the legislature intended to limit eligibility to survivors of judges who died on or after the effective date of the act, it should have said so. But the legislative intent must be gathered from what the legislature said, rather than from what it should or might have said. Rule 344(f)(13), Iowa Rules of Civil Procedure; *Snook v. Herrmann,* 1968, Iowa, 161 N.W.2d 185.

"The survivor of a judge who was qualified for retirement compensation under the system at the time of his death" is clear and means any survivor of any such judge regardless of when he died—not merely the survivor of a judge dying after the effective date of the Act. The word "qualified" is a participle and, generally, there is no tense to a participle. If one says "Birds hatched in the spring fly by fall," the participle "hatched" means in all springs, past, present and future. So in the case before us, the legislature clearly meant to benefit the survivor of a judge "qualified" at the time of his death, whether the judge had died in the past or after the Act was passed.

In answer to the first question of your request, it is my opinion that the surviving spouse of each judge of the municipal, superior, district or supreme court who was or is qualified for retirement compensation under the system at the time of his death, regardless of whether the death occurred before or after the effective date of the Act, is eligible for the annuity provided the survivor was married to the judge for at least five years next preceding the judge's death and has not remarried. In other words, a survivor otherwise qualified is entitled to the annuity regardless of whether the judge died before or after July 1, 1971.

II

In Division I, we dealt with one problem of retroactive or retrospective construction: whether the statute was intended to be applied retroactively as to the class of survivors covered. As we noted, the spectre of retroactive operation which might arise from *Young,* but which was seemingly ignored in *White,* causes some legal confusion in what is essentially a question of defining the class to be benefited. But your second question presents an entirely different problem of retroactivity: When does eligibility for payments begin for the survivor of a judge who died prior to the effective date of the Act? Time of operation of a statute presents a much more typical problem of retroactivity than that involved in definition of the class and certainly one more susceptible of an easy and clear-cut answer.

In this instance, eligibility for payments cannot begin prior to the effective date of the law because nothing in the statute expressly so provides. Nor do I find anything which necessarily implies that the legislature intended a retrospective operation entitling the survivor of a judge who was qualified and died prior to the effective date of the Act to receive benefits even before the law existed. Statutes are presumed to be only prospective as to their time of operation, rather than retrospective or retroactive, unless the contrary clearly appears or is very clearly, plainly and unequivocally expressed, or necessarily implied. *City of Monticello v. Adams,* 1972 Iowa, 200 N.W.2d 522 and *City of Iowa City v. White,* supra. Accordingly, eligibility for payments of an annuity of one-half the amount of the annuity a qualified judge "was receiving or would have been entitled to receive at the time of his death (or if the judge died before age sixty-five, then one-half of the amount he would have been entitled to receive at age sixty-five based on his years of service)" would commence to accrue and should be paid to his survivor beginning on the later of the following dates:

1. On the date of the judge's death, or

2. On the date the judge would have been sixty-five if he died earlier than age sixty-five, or

3. Upon the survivor reaching age sixty, or,

4. July 1, 1971, the effective date of the Act.

§4, Ch. 262, 64th G.A., 1st Session, 1971 — now §605A.15, Code of Iowa, 1973.

The legislature requires all computations under the amendment to be made from the effective date of that amendment. The comptroller's duties here are ministerial. *Flake v. Bennett,* supra is distinguishable on the ground of practical necessity resulting from the system used in funding the pension, which required a delay of a year in the payment of pension increases after the effective date of the Act, in order to allow increased contributions to accumulate for the purpose of paying the pension increases by the same method as had been included in the original Act for the first year of the system's operation. The alternative in *Flake* would have been to make the new pensions payable from a time three days prior to the effective date of the Act. No such problem exists under this Act and there are no deficiencies created in the original initial retirement system which impair or affect any contractual obligations, or stir up any vested rights, or which need somehow to be made up. Nothing in the

Act must be construed to require an increase in the amount which any judge must contribute, nor does anything therein diminish the amount he receives in retirement.

As I understand it, you have probably not been paying the annuity to the survivors of judges who died before the effective date of this Act pending resolution of this question, whether they have applied for such benefits or not. Of course, you could not properly pay them without being satisfied as to the date of a qualified judge's death and that he left a survivor entitled to such payment. But once applied for with the necessary proofs provided, any benefits so accrued, whether heretofore applied for or not, would draw interest at the rate of five percent per annum from July 1, 1971, or from the date of the survivor's eligibilty thereafter, until paid up to date; then periodically on a regular basis without interest thereafter. §535.2(1)(b), Code of Iowa, 1973.

III

The answers to your questions 3(a) and 3(b) may be deduced from the third paragraph of the newly added section (§4, Chapter 262, 64th G.A., 1st Session, 1971). As to 3(a), there is no provision requiring the survivor to refund any of the judge's contributions that had been previously paid over to the survivor following the judge's death occurring either during his retirement or while still in active service. A claimant reaches a pensionable status by fulfilling all the conditons required by the statute. Such status does not depend on a debtor-creditor relationship, but once created is constant and terminable only upon the happening of the conditions expressed in the statute. The survivor did not cease to be the survivor when a sum of money was paid on account of the judge's death. Thus, a widow upon a judge's death should receive not only the pension benefits then provided by the retirement system but any benefits which the legislature, in its discretion, may thereafter provide *Jorgensen v. Cranston,* 1962, 211 Cal. App.2d 292, 27 Cal. Rptr. 297.

In answer to your question 3(b) if the judge died while still in service to the state and his total contributions were refunded in a lump payment to his widow, assuming he was "qualified for retirement compensation under the system at the time of his death," before a survivor could be eligible under these circumstances, the survivor would have to either return the amount of the contribution refunded, plus the amount for prior service if applicable, or the total thereof should be debited to the survivor's account and the survivor should be paid no annuity until such time as the account is brought into balance by the annuity the survivor otherwise would have received.

April 11, 1974

ELECTIONS: Primary, vacancy in nomination; manner of filling. §§43.84, 43.101, 43.106, Code of Iowa, 1973. In primary elections for state senator and representative: (1) Where no candidate receives 35% of the vote and the legislative district is smaller than a county or coextensive with a county, the legislative representative central committee may make a nomination if the convention is held following the preceding primary election. §43.84(2). (2) Where the district is smaller than the county or coextensive with a county and no candidates names are printed on the ballot and there are no write-in candidates, there is no statutory provision for a nomination subsequently to be made by either the legislative representative central committee or the district convention. (3) Where the legislative representative district is larger than a county and no candidate receives as much as 35% of the vote, a

nomination could be made by either the legislative representative central committee under §43.84(2), or the district convention under §43.101(1). (4) Where the legislative representative district is larger than a county and no nomination exists due to the failure of a candidate to file nomination papers for the office in question and no write-in candidate meets the 35% requirement of §10 of H.F. 1399, the district convention may make a nomination under the provisions of §43.106. (Haesemeyer to Curtis, State Senator, 4-11-74) #74-4-11

The Honorable Warren E. Curtis, State Senator: By your letter of April 10, 1974, you have requested an opinion of the Attorney General with respect to the following:

"Questions have recently arisen as to the proper procedures for a political party to follow to fill its slate of candidates. Several positions for candidates for seats in the Iowa General Assembly remain unfilled due to the failure of any person to file nomination papers. These positions will remain unfilled after the June 4, 1974 primary because no candidates will be nominated prior to that time and because no write-in candidate will receive the necessary vote to qualify for the general election ballot.

"House File 1399, which has passed the House this session, will be coming up in the Senate in the very near future. As Chairman of the Senate State Government Committee, which handled this bill, I want to be able to assure my colleagues that problems regarding vacancies are either covered adequately under the present Code or that the present Code is in need of revision in this area. House File 1399, as you may be aware, is a bill to correct and revise the elections laws.

"The Code of Iowa provides conflicting and ambiguous language on the proper method to be used in filling vacancies which exist in general assembly races after a primary election. Section forty-three point eighty-four (43.84) sets up the 'legislative representative central committees' and gives them the following power:

2. Make nominations of candidates for the party to membership in the general assembly when no candidate for such office has been nominated at the preceding primary election by reason of the failure of any candidate to receive the legally required number of votes cast by such party therefor, if such convention is held following the preceding primary election.

"This language seems to place authority in the legislative representative central committees to fill vacancies after the primary election. However, sections forty-three point one hundred one (43.101) and forty three point one hundred six (43.106) as amended by §59, Chapter 136, 65th G.A., First Session (1973), contain conflicting language, to wit:

43.101 DISTRICT CONVENTION. Each political party shall hold a senatorial, representational or congressional convention in districts composed of more than one county:

1. When no nomination was made in the primary election for the office of senator or representative in the general assembly, or of representative in Congress, as the case may be, because of the failure of any candidate to receive the legally required number of votes cast by his party for such candidates.

43.106 NOMINATIONS PERMITTED. A district convention of a party may be held to nominate candidates for any office for which no nomination exists due to the failure of a candidate to file nomination papers for such office, or due to failure to place a name on the ballot as authorized under subsection 1 of section 43.59.

"The conflict is readily apparent. On one hand the Code seems to say that the legislative representative central committee shall be the body to fill vacancies which exist after the primary election and, on the other hand, the Code seems to say that the district convention (appointed by the county convention under section forty-three point ninety-seven (43.97) of the Code) shall be the body to fill such vacancies.

"The question upon which your opinion is respectfully requested is this:

"Which body, the legislative representative central committee or the district convention, has the responsibility to fill vacancies which exist in seats for the general assembly after the primary election in the following circumstances:

"1. When there are no candidates on the primary ballot and some write-in votes are received (but not enough to constitute 35% as would be required with the passage of House File 1399), or

"2. When there are no candidates on the primary ballot and no write-in votes are received by any candidate?

"Because of the rapidly approaching end of the current legislative session and the need to act on House File 1399 in the very near future, a prompt response would be very much appreciated."

Under §43.84, Code of Iowa, 1973, which you have set forth in part, a legislative representative central committee is established for each legislative district regardless of whether or not the district is larger than a county, coextensive with a county or smaller than a county. And under subsection 2 of §43.84, it may make nominations when no candidate has been nominated at the preceding primary election by reason of the failure of any candidate to receive the legally required number of votes if such district convention is held following the preceding primary election. Under §43.65 the candidate for nomination in the primary election who receives the most votes cast by his party is nominated except that where there are more than two candidates the winner must receive at least 35% of the votes cast by voters of his party for that nomination. If no candidate receives 35% the nomination is to be filled as provided in §43.101(1). Section 43.66 formerly required that a write-in candidate receive at least 10% of the whole number of votes cast for governor at the last general election in the district on the ticket of the party with which such candidate affiliates. However, §44, Chapter 136, 65th G.A., First Session, (1973) amended §43.66 so that it now provides:

"The fact that the candidate who receives the highest number of votes cast for any party's nomination for an office to which section 43.65 of the Code is applicable is a person whose name was not printed on the official primary election ballot shall affect the validity of the person's nomination as a candidate for that office in the general election."

Thus, we presently now have a situation where if there are more than two candidates for a nomination a minimum of 35% of the vote is required but if there are two or less candidates, there is no minimum. For example, if no candidates were nominated by petition and there was a single vote for a write-in candidate, such individual would be nominated. However, this anomolous state of affairs would be corrected by H.F. 1399, a measure which was amended and passed by the House and is now pending in the Senate. Section 10 of H.F. 1399 would amend §43.66 to require in effect a 35% minimum in all cases.

Section 43.84(2) of the Code has application only when no candidate has been nominated at the preceding primary election by reason of failure of any

candidate to receive the legally required number of votes. Assuming §10 of H.F. 1399 is adopted, the only legal requirement as to number of votes is the 35% requirement of §§43.65 and 43.66. Section 43.101(1) by its terms applies only to districts composed of more than one county and like §43.84 authorizes the district convention (as apposed to the legislative representative central committee) to make a nomination where there was a failure of any candidate to receive the legally required number of votes cast. Section 43.106 authorizes a district convention to nominate candidates for any office for which no nomination exists due to the failure of a candidate to file nomination papers for such office.

Thus, we have the following situation: (1) Where no candidate receives 35% of the vote and the legislative district is smaller than a county or coextensive with a county, the legislative representative central committee may make a nomination if the convention is held following the preceding primary election. §43.84(2). (2) Where the district is smaller than the county or coextensive with a county and no candidates names are printed on the ballot and there are no write-in candidates, there is no statutory provision for a nomination subsequently to be made by either the legislative representative central committee or the district convention. A prior attorney general's opinion dated October 4, 1966, has stated that where there are no primary candidates names printed on the primary election ballot a primary candidate must have received at least one vote before it can be said that there has been a failure of any candidate to receive the number of votes required for nomination. (3) Where the legislative representative district is larger than a county and no candidate receives as much as 35% of the vote, a nomination could be made by either the legislative representative central committee under §43.84(2) or the district convention under §43.101(1). Since the statutes give this power to both bodies, presumably whichever one acted first would make the nomination. (4) Where the legislative representative district is larger than a county and no nomination exists due to the failure of a candidate to file nomination papers for the office in question and no write-in candidate meets the 35% requirement of §10 of H.F. 1399,[1] the district convention may make a nomination under the provisions of §43.106.

[1] At least thirty-five percent of the total vote cast for all of that party's candidates for that office in the last preceding primary election for which the party had candidates on the ballot for that office.

April 15, 1974

CITIES AND TOWNS: Resolutions and Motions. §§2(20), 74 and 75, Chapter 1088, Acts of the 64th G.A., Second Session. Resolutions and Motions are generally synonymous. A vote on an ordinance, amendment or resolution must be recorded. (Blumberg to Rodenburg, Pottawattamie County Attorney, 4-15-74) #74-4-12

Mr. Lyle A. Rodenburg, Pottawattamie County Attorney: This is written in answer to your opinion request of March 1, 1974. There, you asked for a definition of the distinction between a resolution and a motion. You also wanted to know when a recorded vote by a city council is necessary. The above is asked with reference to Chapter 1088, Acts of the 64th G.A., Second Session.

Section 2(20), Chapter 1088 provides that a resolution or motion "means a council statement of policy or a council order for action to be taken, but 'mo-

tion' does not require a recorded vote." In 5 E. McQuillan, Municipal Corporations (1969), is a discussion of resolutions, motions and ordinances. It is stated there that a resolution is not an ordinance and is something less formal. Resolutions deal with matters of special or temporary nature and are simply an expression of opinion or mind concerning some particular item of business within the municipality's official cognizance. They are ordinarily ministerial in nature, relating to the administrative business of the municipality. Thus, all acts done by a municipality in its ministerial capacity and for a temporary purpose may be put in the form of a resolution. 5 E. McQuillan, Municipal Corporations §15.02. Examples of actions by resolutions, found in §15.07 of McQuillan, are: consenting to the annexation of territory; creating or abolishing an office; appointing a city attorney; fixing salaries; authorizing eminent domain proceedings; initiating street improvements; authorizing the issuance of bonds; and the like.

In discussing "motion" it is said that authority to do a specified act may sometimes be conferred in the form of a motion, as, for example, the removal of an order. 5 E. McQuillan, §15.08. Many times the terms "motion" and "resolution" are synonumous. For example, proceedings in the form of a motion duly carried and entered of record are frequently equivalent to a resolution. §15.08, citing to *Mill v. Denison,* 1946, 237 Iowa 1335, 25 N.W.2d 323; *Monroe v. Pearson,* 1916, 176 Iowa 283, 157 N.W. 849; and *Sawyer v. Lorenzen,* 1910, 149 Iowa 87, 127 N.W. 1091. However, a mere motion is not a resolution. In 27A *Words and Phrases* 352 (1961) it is stated that a resolution or order is an informal enactment of a temporary nature, which does not differ from a motion. It is also stated at page 359 that resolutions and motions are synonymous. Suffice it to say that what a city council may do by motion it may also do by resolution. The only distinctions seem to be that some statutes may specifically require a resolution, a resolution requires a recorded vote and a mayor need not take any action on a motion. See sections 74 and 75, Chapter 1088, Acts of the 64th G.A.

In answer to your second question, section 74, Chap. 1088 provides, in the last sentence, that a councilman's vote on an ordinance, amendment or resolution must be recorded.

Accordingly, we are of the opinion that a resolution and motion are generally synonymous except that a vote on a resolution must be recorded. In addition, a vote on an ordinance and an amendment must be recorded.

April 15, 1974

STATE OFFICERS AND DEPARTMENTS: Iowa Commission on Alcoholism. §123B.4, 1973 Code of Iowa. The Iowa Commission on Alcoholism is not required to pay one-half of the cost of treating an alcoholic at a qualified treatment facility unless it agrees to pay one-half. (Haskins to Cochran, State Representative, 4-15-74) #74-4-13

Dale M. Cochran, State Representative: You ask our opinion as to whether the Iowa Commission on Alcoholism ("the commission") is required to pay one-half of the cost of treatment of an alcoholic at a qualified facility for the treatment of alcoholism. It is our opinion that the commission is not required to pay one-half of that cost unless the commission agrees to pay one-half.

Under Section 123B.4, 1973 Code of Iowa, the Iowa Commission on Alcoholism may enter into agreements with qualified treatment facilities to

pay one-half of the cost of the treatment of an alcoholic confined as a voluntary patient in the facility. Section 123B.4 states in relevant part:

"The commission may enter into written agreements with any qualified facility to pay for one-half of the cost of the care, maintenance, and treatment of an alcoholic confined in that county.

* * *

"The contract may be in such form and contain provisions as agreed upon by the parties."

Clearly, the use of the word "may" in the above section means that the decision whether to initially enter into a contract with a qualified facility is within the discretion of the commission. The word "may" in a statute denotes discretion, *see Dennison v. Dennison,* 134 N.E.2d 574, 576 (Ohio 1956), and is permissive, rather than mandatory, *see In Re State in Interest of Elliott,* 206 So.2nd 802, 805 (La. App. 1968); *Cannizzo v. Guarantee Ins. Co.,* 53 Cal. Rptr. 657, 658-659 (Cal. 1966). Thus, the commission may, if it desires, refrain altogether from entering into an agreement with a qualified facility. Since it may so refrain, it may enter into an agreement with the facility to pay less than one-half of the cost of treatment. The power to refrain from entering into an agreement at all with a qualified facility implies the power to enter into an agreement with such a facility to pay less than one-half of the cost of treatment. This latter power is also inferred from the sentence in Section 123B.4 authorizing the contract between the commission and the facility to contain such provisions as are agreed upon by the parties. That is, implicit statutory authorization exists for the contract between the commission and the facility to provide for the commission to pay less than one-half of the cost of treatment.

Of course, the commission can, if it wishes, enter into an agreement to pay one-half of the cost of treatment, but it is not required to do so and can, in its discretion, enter into an agreement to pay an amount which is less than one-half. In sum, it is our opinion that the Iowa Commission on Alcoholism is not required to pay one-half of the cost of treating an alcoholic at a qualified treatment facility unless the commission has agreed to pay one-half.

April 16, 1974

ENVIRONMENTAL PROTECTION: Federal Sewage Works Construction Grants — Industrial Cost Recovery — Section 204(b)(1) of the Federal Water Pollution Control Act Amendments of 1972 — Chapters 393 and 394, Code of Iowa, 1973 — City Code of Iowa (Home Rule Act), Chapter 1088, Laws of the 64th G.A., 2nd Session. To qualify for federal sewage works construction grants, cities may, under City Code of Iowa, initiate proportional federal grant recovery from industrial users of sewage works. (Davis to Karch, Executive Director, Department of Environmental Quality, 4/16/74). #74-4-14

Mr. Kenneth M. Karch, Executive Director, Department of Environmental Quality: You have requested an opinion of the Attorney General relating to construction of Chapters 393 and 394, Code of Iowa, 1973, as they relate to the requirements of Section 204(b)(1) of the Federal Water Pollution Control Act Amendments of 1972 and the regulations adopted thereunder as 40CFR 30 as amended by Part 35, and specifically referring to Subpart 35.928, Industrial Cost Recovery, and any guidelines adopted under Section 204(b)(2).

In reviewing the provisions of Iowa law as it related to the federal grant requirements for industrial cost recovery, the City Code of Iowa, also known as the Home Rule Act, enacted as Chapter 1088, Laws of the Sixty-fourth General Assembly, Second Session, must be examined since it will supersede the Chapters your question relates to, as of July 1, 1974, under Section 9.3 thereof. This legislation has not been codified for reasons enumerated by the Iowa Code Editor under Title XV on page 1629 of the 1973 Code of Iowa. It may, however, be applicable to a city, as defined therein in Section 2, if the city council elects to make it, or a section of it, effective under Section 9.2 thereof.

Section 204(b)(1) of the Federal Water Pollution Control Act Amendments of 1972, states:

"204(b)(1) Notwithstanding any other provision of this title, the Administrator shall not approve any grant for any treatment works under section 201(g)(1) after March 1, 1973, unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, will pay its proportionate share of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant; (B) has made provision for the payment to such applicant by the industrial users of the treatment works, of that portion of the cost of construction of such treatment works (as determined by the Administrator) which is allocable to the treatment of such industrial wastes to the extent attributable to the Federal share of the cost of construction; and (C) has legal, institutional, managerial, and financial capability to insure adequate construction, operation and maintenance of treatment works thoughout the applicant's jurisdiction, as determined by the Administrator."

As to requirement (A) of §204(b)(1), authority which allows a city to comply therewith is found in Section 165 of City Code of Iowa.

"Section 165

"1. The governing body of a city utility, combined utility system, city enterprise, or combined city enterprise may establish, impose, adjust, and provide for the collection of rates to produce gross revenues at least sufficient to pay the expenses of operation and maintenance of the city utility, combined utility system, city enterprise, or combined city enterprise and, whenever revenue bonds or pledge orders are issued and outstanding pursuant to the provisions of this part, shall establish, impose, adjust, and provide for the collection of rates to produce gross revenues at least sufficient to pay the expenses of operation and maintenance of the city utility, combined utility system, city enterprise, or combined city enterprise, and to leave a balance of net revenues sufficient at all times to pay the principal of and interest on the revenue bonds and pledge orders as the same become due and to maintain a reasonable reserve for the payment of such principal and interest, and a sufficient portion of net revenues must be pledged for such purpose. Rates must be established by ordinance of the council or by resolution of the trustees, published in the same manner as an ordinance.

"2. The governing body of a city utility, combined utility system, city enterprise or combined city enterprise may:

"a. By ordinance of the council or by resolution of the trustees published in the same manner as an ordinance, establish, impose, adjust, and provide for the collection of charges for connection to a city utility or combined utility system.

"b. Contract for the use of or services provided by a city utility, combined utility system, city enterprise, or combined city enterprise with persons whose type or quantity of use or service is unusual.

"c. Lease for a period not to exceed fifteen years all or part of a city enterprise or combined city enterprise, if the lease will not reduce the net revenues to be produced by the city enterprise or combined city enterprise.

"d. Contract for a period not to exceed forty years with other governmental bodies for the use of or the services provided by the city utility, combined utility system, city enterprise, or combined city enterprise on a wholesale basis.

"e. Contract for a period not to exceed forty years with persons and other governmental bodies for the purchase or sale of water, gas, or electric power and energy on a wholesale basis."

Note that in line six the language of the statute says the gross revenues from the rates must be "at least sufficient" to meet operating expenses and bond payments.

Section 10 of the City Code states:

"Section 10 A city may, except as expressly limited by the Constitution, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents. This grant of home rule powers does not include the power to enact private or civil law governing civil relationships, except as incident to an exercise of an independent city power."

Hence, unless specifically restricted by the Constitution of Iowa or laws of the General Assembly, the city may set rates for use of its sewerage system sufficient to pay each users proportionate share of the costs of operation and maintenance, including replacement, of the waste treatment services provided by the city.

The Constitution of Iowa contains no prohibition against such a charge or fee. Its limitations on the power of cities, as set out in Opinions of the Attorney General, September 19, 1973, Blumberg to Nuzum, (O.A.G. #73-9-14) relate to the levy of taxes, and does not limit a city's authority in setting fees.

The only enactments of the general assembly which conflict with this power, Sections 393.8 and 393.9, Code of Iowa 1973, are repealed by electing to effectuate the city code or by the July 1, 1974 effective date thereof.

Neither the Constitution nor general assembly of Iowa having limited a city, it has the power to adopt charges meeting the requirements of §204(b)(1)(A).

As to requirement (B) of §204(b)(1), authority which allows a city to comply therewith is found in Section 165.2(b) [supra] which allows for contracting with users for service, the type or quantity of whose sewage (in this instance) is unusual. A utilities governing body may determine [and must to comply with §204(b)(1)(B)] that the waste from the industries on its sewerage system is of a type (including nature or strength) or quantity which is unusual and fix contract fees in accordance with the requirements of the Federal Act.

As to requirement (C) of §204(b)(1), authority which allows a city to comply therewith is found in the City Code of Iowa, Chapter 1088, Laws of the 64th

General Assembly, Second Session, as a body and particularly Division VII and VIII thereof.

Industrial cost recovery as required in Section 204(b)(1) of the Federal Water Pllllution Control Act Amendments of 1972 is beyond the allowable rate and financing structure of Chapters 393 and 394, Code of Iowa, 1973, to which your question related; since §393.2 requires rates proportional to the service rendered considering strength and quantity of sewage and §394.9 specifies the areas of use of funds from sewage treatment rates which does not include certain requirements of §204(b)(1). However, as set out above, any city in Iowa now has the authority to adopt the cited portions of the City Code of Iowa, thereby enabling itself to initiate industrial cost recovery as required and specifically qualifying for the federal grant program as it relates to industrial cost recovery. After July 1, 1974, of course, every city in Iowa will have that capability since the City Code of Iowa becomes the general law on that day.

As to the second part of your question, I find no guidelines established as yet under §204(b)(2) of the Federal Act.

April 16, 1974

TAXATION: Personal Property taxes payable in extended fiscal year. Ch. 1020, Acts of 64th G.A., Second Session; §§428.4, 428.17, 445.37. A retail business which was properly assessed for personal property tax purposes by the assessor in the year 1973 was liable for all 1973 personal property taxes, payable in the extended fiscal year, notwithstanding that such retail business either was terminated or changed ownership during the 1973 taxable year. (Griger to Fenton, Polk County Attorney, 4-16-74) #74-4-15

Mr. Ray A. Fenton, Polk County Attorney: You have requested the opinion of the Attorney General concerning the effect of the fiscal year law on the 1973 property taxes on personal property. Chapter 1020 Acts of the 64th G.A., Second Session, enacted in 1972, is designed to change the budget year of political subdivisions from a calendar year to a fiscal year beginning July first and ending the following June thirtieth. In order to implement this new law, the budget year which would have begun on January 1, 1974 and would have ended on December 31, 1974 was extended to include the six month period commencing January 1, 1975 and ending June 30, 1975. This eighteen month period is known as the extended fiscal year.

In your opinion request, you have posed two questions as follows:

"1. A retail store which closes doors during the calendar year of 1973 and disposed of its entire inventory, was properly assessed by the assessing office for said calendar year and now receives an 18 month tax liability statement which is covering an additional 6 months tax. Must the County Treasurer pursue collection of this extra 6 months taxes?

"2. A retail business changed ownership during the taxable year of 1973. Said business was properly assessed for the calendar year of 1973 and was by law obligated for the 12 months taxes. The now previous owner of said retail business receives a tax liability statement for a period of 18 months and said liability covers the first six months taxes for 1974. Must the County Treasurer pursue collection of the 18 months taxes from the original retail store owner or is the new retail owner obligated for the last six months of taxes for this 18 months tax period?"

Personal property which is located in Iowa on January 1 of the tax year is subject to property tax to the owner thereof at that time, notwithstanding that such property is thereafter removed from the state or changes ownership during that tax year. *In Re Kauffman's Estate,* 1898, 104 Iowa 639, 74 N.W.8; *Fennell v. Pauley,* 1900, 112 Iowa 94, 83 N.W. 799, §428.4, Code of Iowa, 1973. Retail merchants' inventories are valued in accordance with §428.17, Code of Iowa, 1973. *Larson v. Hamilton County,* 1904, 123 Iowa 485, 99 N.W. 133; 1928 O.A.G. 324; 1948 O.A.G. 200. Therefore, prior to the enactment of Chapter 1020, there was no question but that the retail merchant was required to pay personal property taxes on property assessable to him, notwithstanding that during the tax year, that merchant closed his business or sold it to another.

Section 3 of Chapter 1020 provides in relevant part:

"For the extended fiscal year, budgets shall be prepared in the same manner as prepared for a calendar year, except that they shall include estimated expenditures for the extended year of eighteen months. The amounts certified by the various taxing districts to the county auditor shall be for the extended year of eighteen months. The county auditor shall cause the taxes to be levied for the extended eighteen-month period in the same manner as previously accomplished under a twelve-month period, and based on the property tax valuations of January 1, 1973. Any annual millage limitation, including those for emergency levies, applicable to the taxing districts otherwise provided by law shall for this extended period be increased by fifty percent.

"The county treasurers for the period beginning January 1, 1974 and ending June 30, 1975, shall cause the levy received from the county auditor for cities, counties, and other political subdivisions budgeted on a calendar year period but which will levy for the extended year beginning January 1, 1974 to be paid in three equal installments, on the dates provided in section four hundred forty-five point thirty-seven (445.37) of the Code in effect prior to July 1, 1975, for the calendar year 1974 and the first six-month period in the year 1975.

"All statutes relating to delinquencies, liens, tax sales, and the like shall be in full force and effect, except that applicable dates shall be extended in the same manner as the payment dates."

Chapter 1020 does not change the rule of property taxation that the property was taxable in the year 1973. Section 445.37, Code of Iowa, 1973 authorizes payment of property taxes for the tax year in the following year in two installments. *Schoenwetter v. Oxley,* 1931, 213 Iowa 528, 239 N.W. 118. Chapter 1020 provides that the 1973 property taxes can be paid in three equal installments, namely, before April 1, 1974, before October 1, 1974, and before April 1, 1975. However, one should not confuse the dates for the payment of these property taxes with the year for which the personal property is taxable. With reference to taxation of property, it is essential that there be a listing and assessing and a levy in order to constitute a valid tax. *Bennett v. Finkbine Lumber Co.,* 1924, 199 Iowa 1085, 198 N.W. 1. This was all done in 1973.

It is the opinion of this office that the retail store mentioned in your first question is liable for the entire amount of personal property taxes which are attributable to the personal property assessed to it and which are to be paid during the extended fiscal year. Further, it is the opinion of this office that the original retail store owner mentioned in your second question is liable for the entire amount of personal property taxes which are attributable to the personal property assessed to it and which are to be paid during the extended fiscal year.

April 18, 1974

CITIES AND TOWNS: Business Powers—A city council may bind future councils by contract when made in the course of a city's business power. (Blumberg to Lamborn, State Senator, 4-18-74) #74-4-16

Honorable Clifton C. Lamborn, State Senator: We are in receipt of your opinion request of April 11, 1974. From your request the following facts are evident. The City of Maquoketa, with the assistance of the Economic Development Administration (EDA) of the Federal Government, completed a number of municipal projects in connection with the development of an industrial park in the city. These projects included improvements to the local airport, new streets, a second water tower, pipes to the industrial site and sanitary sewer and surface drainage systems. The city, in order to receive federal funds, agreed that it would retain its title to the above facilities and to the real estate upon which they are located for the useful life of the facilities. The federal funds were received and the work has been completed. Now the EDA wants the city to sign an agreement evidencing the terms upon which the federal funds were given. Your question is whether the present city council can sign this agreement and thereby bind future city councils.

The general rule is that a city council may bind its successors in office by a contract for a term of years where such contract is made in the exercise of its proprietary or business powers. 63 C.J.S., *Municipal Corporations* §987 (1950). In *First National Bank v. Emmetsburg,* 1912, 157 Iowa 555, 566, 567, 138 N.W. 451, the Supreme Court of Iowa held:

"A city has two classes of power — the legislative, public, governmental in the exercise of which it is the sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. . . . But in the exercise of the powers of the latter class . . . it is acting and contracting for the private benefit of itself and inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation." [Citations omitted]

In that case the question dealt with the power of a city to contract for the construction of sewers and the like. It was held that such was within the business powers of the city. See also, *Incorporated Town of Sibley v. Ocheyedan Electric Co.,* 1922, 194 Iowa 950, 953, 187 N.W. 560; *Dodds v. Consolidated School District of Lamont,* 1935, 220 Iowa 812, 263 N.W. 522.

In *Iowa-Nebraska Light and Power Co. v. City of Villisca,* 1935, 220 Iowa 238, 261 N.W. 423, the city contracted to construct an electric power plant and fixed the rates to be charged. The Court stated that there was no constitutional provision prohibiting the Legislature from empowering one city council from making a contract binding upon future councils. See also *Des Moines v. West Des Moines,* 1948, 239 Iowa 1, 30 N.W.2d 500, where the question evolved around a contract between the two cities for the use of one's sewer system. The Court held the matter to be a business contract. Therefore, future city councils could be bound by it.

Applying these cases to your facts, it is apparent that the construction and improvements were for the benefit of the inhabitants and the city itself. Thus they were within the business powers of the city. The agreement for funds with which to do these projects would, of necessity, also be within the business

power. Therefore, the present city council may sign the agreement which could bind future councils.

April 22, 1974

TAXATION: Real Estate Taxes payable in extended fiscal year. Ch. 1020, Acts of 64th G.A., Second Session; §§428.4, 445.16, 445.37. Real estate which was properly assessed for real estate tax purposes by the assessor in the year 1973 was liable for all such 1973 taxes payable in the extended fiscal year. The mere fact that a building which was subject to taxation for 1973 was removed during that year would not be grounds for cancellation of the third installment of the 1973 taxes. (Griger to Erhardt, Wapello County Attorney, 4/22/74) #74-4-17.

Mr. Samuel O. Erhardt, Wapello County Attorney: You have requested the opinion of the Attorney General concerning the effect of the fiscal year law on the 1973 property taxes on real estate. Your opinion request poses two situations. In the first situation, you state that, pursuant to an urban renewal program, the City of Ottumwa condemned certain real estate and the property owner relinquished possession on April 1, 1974. The question is whether the Wapello County Treasurer must enforce collection of all 1973 property taxes attributable to that real estate, including those payable for the third installment due on or before March 31, 1975.

In the second situation, you state that a taxpayer reported to the Wapello County Assessor that a building was removed from his property in February, 1973. You then inquire whether this taxpayer may have the third installment of the 1973 taxes attributable to that building cancelled or forgiven.

In 1972, the legislature enacted Chapter 1020, Acts of the 64th G.A., Second Session, which is designed to change the budget year of political subdivisions from a calendar year to a fiscal year beginning July first and ending the following June thirtieth. In order to implement this new law, the budget year which would have begun on January 1, 1974 and would have ended on December 31, 1974 was extended to include the six month period commencing January 1, 1975 and ending June 30, 1975. This eighteen month period is known as the extended fiscal year. Section 3 of Chapter 1020 provides that the 1973 property taxes will be based upon the property tax valuations as of January 1, 1973 and will be payable in three installments on the dates provided for in §445.37, Code of Iowa 1973 in effect prior to July 1, 1975. In short, these three installments are due on or before March 31, 1974, on or before September 30, 1974, and on or before March 31, 1975.

In a recent opinion of the Attorney General, O.A.G. Griger to Fenton, April 16, 1974, a copy of which is attached hereto, it was opined that a retail business which was properly assessed for 1973 personal property taxes was liable for all such taxes, payable in the extended fiscal year, notwithstanding that such business was terminated or changed ownership in 1973. While this opinion pertained to personal property taxes, the same result is reached with reference to real estate taxes.

In *Churchill v. Millersburg Savings Bank,* 1931, 211 Iowa 1168, 235 N.W. 480, the Court stated at 211 Iowa 1171:

"Under the provisions of Section 6959 of the Code of 1927, real estate is listed, assessed, and taxed, year by year, for the period of a year, as of the first of January of each year. The listing and valuation occurs, however, only once

in two years, on the odd-numbered year. There is no taxation for six months, or any fraction of a year. The 'taxes' are for a year."

Section 6959 of the 1927 Code is now, in substance, §428.4, Code of Iowa, 1973. See also 1954 O.A.G. 58, 1940 O.A.G. 517.

Chapter 1020 does not change the rule of property taxation that the real estate was taxable in the year 1973. Chapter 1020 provides that the property taxes can be paid in three equal installments. However, one should not confuse the dates for the payment of real estate taxes with the year for which the real estate is taxable. Consequently, with reference to the first question, since the real estate was taxable for the year 1973, the Wapello County Treasurer must enforce collection of all 1973 property taxes attributable to that real estate.

As to your second question, the building was subject to property tax for the entire year of 1973 because it was taxable as of January 1 of that year. *Churchill v. Millersburg Savings Bank,* supra; §428.4. Section 445.16 authorizes the Board of Supervisors to compromise delinquent property taxes, under certain circumstances, which obviously does not apply to the third installment of the 1973 taxes. Therefore, it is the opinion of this office, that, based upon the facts you have presented, the third installment of the 1973 real estate taxes which is attributable to the removed building and which is due on or before March 31, 1975 cannot be cancelled or forgiven.

April 22, 1974

WEAPONS: Manner of Conveyance. §110.24, Code of Iowa, 1973. A gun must be held within restraints so that it may not be dislodged from its container. (Coleman to Edwards, Judicial Magistrate, Osceola, 4/22/74) #74-4-18

Mr. Charles Edwards, Judicial Magistrate, Clarke County Courthouse: This is to acknowledge receipt of your letter in which you requested the following opinion from this office:

"This court would like an interpretation of the Section 110.24 (manner of conveyance). What I would like to know is what contained actually means. Does the case have to be completely zipped? Is a gun hanging on a gun rack in a pickup with a case over it, but not zipped, considered to be "contained"? Also, if the case is zipped over the triger housing but not over the stock, is it "contained"?

Section 110.24, "1973 Code of Iowa", provides:

"No person, except as permitted by law, shall have or carry any gun in or on any vehicle on any public highway, unless such gun be taken down or contained in a case, and the barrels and magazines thereof be unloaded."

In 1948, an opinion was issued by this office (48 Op. Atty. Gen., 265-266) which stated:

"By letter opinion of this office dated March 1, 1946 directed to the Iowa Conservation Commission, it was held that the intent of the foregoing section was the prevention of the possession of a gun available for instantaneous firing. The opinion noted that the legislature obviously had in mind that preparatory action would be required before a gun would be available and in a condition to be used as a firearm. It was therefore required that the gun be

taken down or contained in a case, either of which situations would necessitate acts preparatory to availability for use. An additional requirement was that in all instances the gun be unloaded."

Applying your question as to "what contained actually means", in light of the foregoing language which related that the intent of the legislature was "the prevention of possession of a gun available for instantaneous firing", we find the following. The *Random House Dictionary of the English Language* (Unabridged Edition, 1971) defines the word "contained" as; "to hold or include; to keep under proper control or restraint", and lists by synonym the word "hold" which "emphasizes the idea of causing to remain in position, or keeping within bounds".

When the words "contain" and "contained in" have come before courts as to the meaning to be ascribed thereto, courts of varying jurisdictions have basically subscribed to the same meaning. In *Neher v. McCook County* 78 N.W. 998, 999; 11 South Dakota 442, (1899), the South Dakota Supreme Court was concerning itself with the word "include", and with respect thereto stated:

"Webster defines "include" to mean *"to confine within; to hold; to contain; to shut up"*; and gives as synonyms, "to contain, inclose; comprise; comprehend; embrace; involve." (Emphasis added)

Similarly in *State ex rel. Davis, Atty. Gen., v. Clarke,* 188 N.W. 472, 474; 108 Nebraska 638 (1922), the Nebraska Supreme Court held:

"The word "contain" in its usual and ordinary sense means "contain completely", *for if a thing is not completely contained within another it is not contained at all."* (Emphasis added)

In *Berlin v. Kilpatrick,* 172 N.E.2d 339, 344-345; (Ohio, 1958), the Ohio Court acknowledged as correct a lengthy series of Opinions rendered by the Ohio Attorney General, on the meaning and application of the word "contained", and additionally cited *State ex rel Davis v. Clarke,* supra, as: "a case in point which decides the meaning of the word 'contains' ". Moreover, in *Sabrier v. Central Mutual Insurance Company,* 269 So.2d 504, 506; (Louisiana, 1972), the Louisiana Court was called upon to determine whether property which was stored under an attached carport was within the terms of an insurance policy which called for property to be "contained in" an "occupied dwelling". The Louisiana Court stated that, *"We believe that property placed under a carport is simply not contained in the dwelling."*

It is therefore our opinion that Section 110.24, "1973 Code of Iowa", means that a gun must actually be held in restraints in a manner that will prevent the gun from dislodging from its container by either being dropped, shaken, bumped, etc. This would mean that an unzippered case would not be permissible under the law, in that by merely holding a case or container at a certain angle the gun would slip out. Accordingly a case merely laid on top or over a gun would also be impermissible, as with an enclosure of the trigger housing, in that the statute calls for the gun, not merely the trigger housing to be "contained in a case". The case or container must be such that it is impossible to remove the gun for use, without adjusting, opening, or removing the case or container/restraint.

April 23, 1974

STATE OFFICERS AND DEPARTMENTS: Department of Health; Venipuncture by Chiropractors; Section 151.1(2), 1973 Code of Iowa — Venipuncture, or the drawing of blood, is not within the prerogative of a chiropractor. (Haskins to Pawlewski, Commissioner of Public Health, 3/23/74) #74-4-19

Mr. Norman L. Pawlewski, Acting Commissioner of Public Health, State Department of Public Health:: This letter is in response to your request for an Attorney General's Opinion. In your request you ask the following question:

"Considering the definition of chiropractic contained in Section 151.1, Code of Iowa, 1973, may a chiropractor perform venipuncture to obtain blood for laboratory testing?"

The only source of a chiropractor's authority to treat human ailments is found in Chapter 151, Code of Iowa, 1973. The practice of chiropractic, though recognized as a branch of the healing art, is considered to be only one form of the practice, and has well-defined limits. Section 151.1(2), Code of Iowa, 1973, sets forth these limits by defining "Chiropractors" as:

"Persons who treat human ailments by the adjustment by hand of the articulations of the spine or by other incidental adjustment."

In *State v. Boston,* 226 Iowa 429, 431, 278 N.W. 291 (1939), the court indicated that the legislature through Section 151.1(2) has defined what such treating of human ailments consists of, i.e., adjustment by hand of the articulations of the spine or other incidental adjustments. It is the opinion of this office that venipuncture, or the drawing of blood, does not fall within the purview of Section 151.1(2). Venipuncture is not articulation of the spine by hand, nor is it an incidental adjustment. *State v. Boston* has, in essence, limited the practice of chiropractic specifically to adjustments made by hand.

When a chiropractor professes to use or uses modalities other than those stated in the Code as curative means or methods, the conclusion seems unavoidable that he is attempting to function outside the restricted field of endeavor to which the legislature has limited the practice of chiropractic. A chiropractor may not assume the duties of a physician and surgeon or use other modalities as an aid to the use of chiropractic, or as preliminary or preparatory to the use of chiropractic. Neither may he use any mode or general course of treatment other than chiropractic adjustments. *State v. Boston* at 435.

Therefore, venipuncture, or the drawing of blood, is not with the preogative of a chiropractor; a chiropractor is specifically limited to adjustments made by hand.

April 23, 1974

SCHOOLS: School Funds — §278.1(7). Schoolhouse tax voted pursuant to §278.1(7) must be used for one of the purposes specified by that section of the Code. There is no statutory authority for the voters to vote a tax to create a fund to be used solely for investment purposes. (Nolan to Priebe, State Senator, 4/23/74) #74-4-20

Honorable Berl E. Priebe, State Senator: You have requested an opinion from the office of the Attorney General on the following question:

"Can school districts establish a fund and invest the monies to build the fund bigger and bigger or when voting a tax under §278.1(7), Code of Iowa, 1973, must they establish a specific purpose for such fund."

The language in §278.1(7) authorizes the voters at a regular election to:

"Vote a schoolhouse tax, not exceeding two and one-half mills on the dollar in any one year, for the purchase of grounds, construction of schoolhouses, the payment of debts contracted for the erection of schoolhouses, not including interest on bonds, procuring libraries for and opening roads to schoolhouses. The power to levy said tax, when voted, shall continue for such period of time as may be authorized by the voters and shall not be affected by any change in the boundaries of the school district, in whatever manner effected, except in case the school district is reorganized pursuant to sections 275.12 to 275.23, both inclusive."

Any tax voted pursuant to the statutory authority of §278.1(7) must be used for one of the purposes specified therein. A school board may not levy taxes for a purpose not authorized by the electorate. 1964 O.A.G. 357.

There is authority for the school board to invest funds which were created by direct vote of the people and not currently needed pursuant to §453.10 of the Code. However, there is no authority under Chapter 278 for the voters of the district to vote a tax to create a fund solely for investment purposes; and such action would appear to be in direct conflict with the provisions of Article VII, §7 of the Iowa Constitution which requires every law which imposes, continues, or revives a tax to distinctly state the tax and the object to which it is to be applied. School districts, being governmental subdivisions, derive their powers from the state government and cannot do what is prohibited under the Iowa Constitution.

Under the provisions of Chapter 442.15 of the Code, the voters of the school district may vote a surtax to supplement the state school foundation program to meet the requirements of its general funds budget. Thus, it is possible for a school district to obtain adequate operating funds. However, even this authorization is a clear indication that school districts are required to exist on a fund voted for a specific purpose. Accordingly, such districts are not authorized to build unrestricted funds solely for investment purposes.

April 25, 1974

STATE OFFICERS AND DEPARTMENTS: Iowa Board of Physical Therapy Examiners; §§147.2, 147.72, 147.74, 148A.1, 148A.2, 148A.3, 1973 Code of Iowa. A person licensed in another state to practice physical therapy who assumes a teaching position at an Iowa school and holds himself out to be a physical therapist must become licensed in Iowa; a person licensed as a physical therapist in another state may not use the letters "L.P.T." after his name in Iowa without being licensed in Iowa; no physical therapist in Iowa, even one licensed here, may use the letters "R.P.T." after his name. (Haskins to Rogers, Member, Iowa Board of Physical Therapy Examiners, 4/25/74) #74-4-21

Warren J. Rogers, L.P.T., Member, Iowa Board of Physical Therapy Examiners: You ask an opinion of the Attorney General as to the following questions:

"1. May a person licensed to practice physical therapy in another state assume a teaching position as a physical therapist on an Iowa school's faculty

and hold himself out to be a physical therapist without being licensed by the State of Iowa?

"2. May a person licensed as a licensed physical therapist in another state who lives in Iowa use the abbreviation 'L.P.T.' behind his name without holding an Iowa license?

"3. May a person licensed as a registered physical therapist who lives in Iowa use the abbreviation 'R.P.T.' behind his name without being licensed in Iowa?"

§148A.2, 1973 Code of Iowa, sets forth the class of persons deemed to be engaged in the practice of physical therapy. That section states:

"For the purpose of this chapter the following classes of persons shall be deemed to be engaged in the practice of physical therapy:

"1. Persons who treat human ailments by physical therapy as defined in this chapter.

"2. *Persons who publicly profess to be physical therapists* or who publicly profess to perform the functions incident to the practice of physical therapy." [Emphasis added].

It can be seen that persons in Iowa who publicly profess to be physical therapists by holding themselves out to be such would fall within the ambit of practicing physical therapy in Iowa. Subject to certain exceptions, no person can practice physical therapy in Iowa without a license from the Iowa Department of Health. *See* §147.2, 1973 Code of Iowa. The only exception to the licensing requirement for physical therapists relevant to the present case is set forth in §148A.3, 1973 Code of Iowa, as follows:

"Section 148A.1 shall not be construed to include the following classes of persons:

* * *

"3. Physical therapists of the United States army, navy, or public health service, *or physical therapists licensed in another state, when incidentally called into this state in consultation with a physician and surgeon or physical therapist licensed in this state."*[Emphasis added]

However, this section does not apply here. Persons licensed to practice physical therapy in another state who assume a teaching position at an Iowa school and hold themselves out to be physical therapists clearly would not fall within the exception for physical therapists licensed in another state who are incidentally called into Iowa in consultation with a physician or physical therapist licensed in Iowa. Hence, such a person must be licensed by the State of Iowa.

As to the second and third questions, §147.72, 1973 Code of Iowa, sets forth the limitations on the use of a professional designation by a non-licensee. That section states:

"Any person licensed to practice a profession under this title may append to his name any recognized title or abbreviation, which he is entitled to use, to designate his particular profession, but no other person shall assume or use such title or abbreviation, and no licensee shall advertise himself in such a matter as to lead the public to believe that he is engaged in the practice of any other profession than the one which he is licensed to practice."

The above section clearly prohibits a person not licensed as a physical therapist in Iowa from using the professional physical therapists designation in this state. The issue then arises as to what the proper designation is for a physical therapist licensed by Iowa. §147.74, 1973 Code of Iowa, implies that no physical therapist, even one licensed in Iowa, may use the designation "R.P.T." by his name. Rather a physical therapist must use the designation "licensed physical therapist" or signify it by the letters "L.P.T.". §147.74, 1973 Code of Iowa states in relevant part:

"Any person who falsely holds himself out by the use of any professional title or abbreviation, either in writing, cards, signs, circulars, or advertisements, to be a practitioner of system of the healing arts other than the one under which he holds a license or who fails to use the following designations shall be guilty of a misdemeanor and shall be fined not less than twenty-five dollars, nor more than one hundred dollars, or sentenced to thirty days in jail.

* * *

"A physical therapist shall be entitled to use the words 'licensed physical therapist' after his name or to signify the same by the use of the letters 'L.P.T.' after his name."

It appears that no physical therapist, even one licensed in Iowa, could use in Iowa the designation "R.P.T.". Had the legislature intended that this designation could be used by physical therapists, it would have so stated.

In sum, a person who assumes a teaching position at an Iowa school and holds himself out to be a physical therapist must become licensed in Iowa. Moreover, a person licensed as a physical therapist in another state may not use the letters "L.P.T." after his name without being licensed in Iowa. And no physical therapist in Iowa, even one licensed here, may use the letters "R.P.T." after his name.

April 25, 1974

COUNTIES: COUNTY OFFICERS: COMPENSATION: DEPUTIES: §340.4 and 332.3(10) Code 1973. Although a first deputy county treasurer's salary is limited to 80% of the salary received by the county treasurer, §340.4 permits the board of supervisors to appoint a special clerk in the county treasurer's office and to fix his compensation in an amount greater than the compensation of the first deputy. (Turner to Lamborn, State Senator, 4-25-74) #74-4-22

The Honorable Clifton C. Lamborn, State Senator and Majority Floor Leader: You have requested an opinion of the attorney general as follows:

"We have a situation in Jackson County of which I would like your opinion. The county treasurer has an employee who is not called a deputy, but who performs the usual duties of a deputy. The reason for giving him another title is that his compensation exceeds substantially the amount which would be permitted to a deputy. As a matter of fact, he receives almost as much as a county treasurer. It is necessary that there be such an employee since the treasurer would be unable to function without assistance of this kind.

"It is true that the board of supervisors has the right to fix the salary for clerks and special help in the treasurer's office, however, it is my belief that it was the intent of the legislature that no person should receive a salary in excess of that provided for the deputy other than the officeholder himself. You are doubtless familiar with the provisions of Section 340.4 of the code which provides for compensation of deputies and also for clerks and special help.

"Will you please give me your opinion at the earliest possible date since this situation, if illegal, should be corrected."

I have investigated and determined that the county treasurer of Jackson County receives his statutory annual salary of $9,800 and pays a "special clerk" $5.00 per year less than that amount. He also has a "first deputy" but no "second deputy". The first deputy receives 80% of the treasurer's salary, obviously less than the salary of the special clerk.

Three other clerks receive salaries less than the first deputy.

The special clerk's salary is fixed by the board of supervisors at $5.00 less than that of the treasurer and the treasurer, at least superficially, has nothing to do with it. Moreover, my investigation discloses that the special clerk would quit his job if paid as first deputy.

§340.4, Code of Iowa, 1973, states as follows:

"Deputies compensation. The first and second deputies and the deputy in charge of the motor vehicle registration and title department, may be paid an amount not to exceed *eighty percent* of the amount of the annual salary of his or her principal. In counties where more than two deputies are required, deputies in excess of two may be paid an amount not to exceed seventy-five percent of the annual salary of his or her principal. Upon certification to the board of supervisors by the elected official concerned, the amount of the annual salary for each deputy as above provided, the board of supervisors shall certify to the county auditor of any such county the annual salary certified by the elected officials, but in no event shall said board of supervisors be required to certify to the auditor of any such county an amount in excess of the amounts authorized above. *The board of supervisors shall fix all compensation for extra help and clerks.*" (Emphasis added)

Under the circumstances, with the board of supervisors fixing the salary of the special clerk, it appears to me that there is no violation of §340.4 of the Code. If as you suggest it was the legislature's intent that no person except the officeholder himself "should receive a salary in excess of that provided for the deputy" as you submit, the legislature should have said so. "In construing the statutes the courts search for the legislative intent as shown by what the legislature said, rather than what it should or might have said." Rule 344(f)(13) of the Iowa Rules of Civil Procedure and *Osborne v. Edison,* decided by the Iowa Supreme Court on October 17, 1973, 211 N.W.2d 696; *Cochran v. Lovelace,* 1973 Iowa, 209 N.W.2d 130; *Iowa Civil Rights Commission v. Massey-Ferguson, Inc.,* 1973, Iowa, 207 N.W.2d 5.

As a matter of further fact, §332.3(10) of said Code provides that the board of supervisors at any regular meeting shall have power:

"10. To fix the compensation for all services of county and township officers not otherwise provided by law, and to provide for the payment of the same."

In 1951 OAG 37, it is said:

"In exercising this power of fixing compensation, the Board should bear in mind that in so far as deputies are concerned, the compensation attaches to the office and not to the person who occupies the office. In so far as extra help and clerks are concerned, the standard should be the nature and amount of service required of such extra help and clerks."

I am informed by the treasurer of Jackson County that the special clerk in question performs services greater than those of his first deputy and, indeed, beyond those normally performed by a deputy. In any event, the issue is one more properly resolved by the legislative, rather than the judicial, department.

April 25, 1974

CITIES AND TOWNS: Regional Housing Authority — §§28E.2, 28E.3, 28E.4, 403A.2, and 403A.9, Code of Iowa, 1973. An entity created by section 28E.4 may not create another entity under chapters 28E or 403A. (Blumberg to Pellett, State Representative, 4-25-74) #74-4-23

Wendell C. Pellett, State Representative: We are in receipt of your opinion request regarding a regional housing authority. The Southern Iowa Regional Planning Agency (SIRPA), a Chapter 28E body, wants to set up a regional housing authority for a number of cities and counties under Chapters 403A and 28E of the Code. Your question is whether SIRPA can do this.

Section 403A.9, Code of Iowa, 1973 provides that any two or more municipalities may join or cooperate with one another in the exercise of the powers conferred in chapter 403A. "Municipality" is defined in section 403A.2 as a city, town or county. Section 28E.3 provides that any public agency of the State can exercise its powers and authorities jointly with any other public agency of this state, any other state or agency of state government. Section 28E.4 permits public agencies to enter into agreements with other public or private agencies, including the creation of a separate entity. "Public agency" is defined in section 28E.2 as any political subdivision of this State.

We believe the above sections are controlling on your question. They permit political subdivisions to enter into agreements and create separate entities. We can find no authority in either chapters 403A or 28E that an entity created under section 28E.4 may create another entity to exercise other and additional powers than it has. Accordingly, we are of the opinion that SIRPA may not create a regional housing authority under either chapters 403A or 28E. Any housing authorities created under those chapters can only be created by the political subdivisions involved.

April 25, 1974

TOWNSHIPS: Cemeteries — §359.35, Code of Iowa, 1973. If a township has maintained a cemetery that has been utilized by people of the township for burial purposes for more than twenty-five years, the township shall continue to maintain the cemetery, even if it is located within a city. (Blumberg to Plymat, State Senator, 4-25-74) #74-4-24

Honorable William N. Plymat, State Senator: We are in receipt of your opinion request regarding the control and maintenance of township cemeteries. It appears that the City of Johnston annexed territory in 1969. Included in that territory were two cemeteries, Ridgedale and Valley View. These were township cemeteries prior to annexation, and were maintained by township funds. The question presented is whether the city or the township must now maintain these cemeteries.

Section 359.35, Code of Iowa, 1973, provides:

"Cemetery tax funds of a township may be used for the maintenance and support of cemeteries in adjoining counties and townships and in cities and towns, *if such cemeteries are utilized for burial purposes by the people of the*

township and, when any such cemetery has been so utilized for more than twenty-five years and has been maintained by township funds, the township trustees of the township where the cemetery is located *shall continue to improve and maintain the same."* [Emphasis added]

The township trustees have indicated that Ridgedale Cemetery was maintained by them and utilized by people of the township for more than twenty-five years. If that is the case, then Section 359.35 mandates that the township continue to improve and maintain the cemetery at least as long as people from the township utilize it for burial purposes.

With respect to the other cemetery, the problem is more difficult. The township trustees state that this was a family cemetery which was taken over by the township, but that the people of the township did not utilize it. The city states its records indicate that the township maintained said cemetery for more than twenty-five years and that people in the township utilized it for burial purposes for that period of time. This discrepaency in the facts cannot be reconciled by our office. If what the city says is fact, the result would be the same as with Ridgedale Cemetery. However, if the facts are as the township trustees state, the township does not have to maintain said cemetery. Nor can we find anything in the Code mandating the city to maintain it. The best solution for this problem is to have the city and the township enter into a Chapter 28E agreement for joint maintenance of the cemeteries.

Accordingly, we are of the opinion that if a township cemetery has been maintained by the township and utilized by people in the township for burial purposes for more than twenty-five years, the township shall continue to maintain said cemetery, even if it is located within a city.

May 3, 1974

COUNTIES: Official Newspaper — Chapter 349. The fact that two newspapers have the same owners, offices and subscribers does not preclude either paper from consideration as an official county newspaper where the papers are separate corporate entities or attract separate reading interests. (Nolan to Branstad, State Representative, 5-3-74) #74-5-1

Honorable Terry E. Branstad, State Representative: This is written in response to your request for an attorney general's opinion. According to your letter, the two official newspapers for Kossuth County have the same offices, employees, owner and subscription list. The question presented is whether in such factual circumstances both papers are capable of being selected as the official papers, or whether, in fact, because the two papers have the same owners, offices and subscribers, they must be regarded as a single newspaper.

The pertinent Code sections are §§349.1 and 349.2, Code of Iowa, 1973:

"349.1 Time of selection. The board of supervisors shall, at the January session each year, select the newspapers in which the official proceedings shall be published for the ensuing year."

"349.2 Source of selection. Such selection shall be from newspapers published, and having the largest number of bona fide yearly subscribers, within the county. When counties are divided into two divisions for district court purposes, each division shall be regarded as a county."

In our view, if, in fact, the two papers present distinctly different editorial policies or carry different kinds of syndicated articles or features so as to at-

tract separate reading interests and to maintain two distinctive identities, then there would be two newspapers, regardless of the fact that they both are published by a single corporate entity. On the other hand, an absence of such facts would probably indicate publication of two editions of the same newspaper.

If the two newspapers are organized as separate corporations, it is immaterial whether the ownership of such corporations is identical and whether or not they are housed in the same offices and have the same subscribers. In such case, both newspapers could be the official newspapers.

Where a newspaper sells its subscription list to another paper and the subscribers receive issues of the purchasing paper for a number of weeks without objection, they become bona fide subscribers of the purchasing paper and should be counted in a contest for the selection of an official newspaper. *In re selection of Official Newspaper for Wayne County*, 1917, 181 Iowa 255, 164 N.W. 600. Where such subscribers have duly signed subscription cards it is not material that the subscriptions were a gift to them. *Times-Guthrian Pub. Co. v. Guthrie County Vedette*, 1964, 256 Iowa 302, 125 N.W.2d 829.

May 3, 1974

ELECTIONS: Precincts. (H.F. 1399, 65th G.A., 1974 Session) Recent legislation amending §49.8, Code of Iowa, when signed and published could make possible the merger of election precincts too small to warrant the cost of the purchase of voting machines. (Nolan to Stephens, State Representative, 5-3-74) #74-5-8

The Honorable Lyle R. Stephens, House of Representatives: This is written in response to your request for an attorney general's opinion on the question of whether or not Plymouth County Board of Supervisors have authority to merge precincts too small to warrant the cost of a voting machine in any year other than the year in which the decennial census is taken.

Section 49.3, Code of Iowa, 1973, as amended by §109, Chapter 136, Laws of the 65th General Assembly, 1973 Session, controls. This section provides:

"Election precincts shall be drawn by the county board of supervisors in all unincorporated portions of each county, and by the city council of each city in which it is necessary or deemed advisable to establish more than one precinct. Precincts established as provided by this chapter shall be used for all elections, except where temporary merger of established precincts is specifically permitted by law for certain elections, and no political subdivision shall concurrently maintain different sets of precincts for use in different types of elections. Election precincts shall be drawn so that:

"1. No precinct shall have a total population in excess of three thousand five hundred, as shown by the most recent federal decennial census.

"2. Each precinct is contained wholly within an existing legislative district, except:

"a. When adherence to this requirement would force creation of a precinct which includes the places of residence of fewer than fifty qualified electors.

"b. When the general assembly by resolution designates a period after the federal decennial census is taken and before the next succeeding reapportionment of legislative districts required by Article three (III), section thirty-five (35), Constitution of the State of Iowa as amended in 1968, during

which precincts may be drawn without regard to the boundaries of existing legislative districts."

I find nothing in the above statutory language which would preclude the supervisors from combining such small precincts into a single election precinct so long as it does not exceed the population maximum. Although, §49.7 as amended by §113, Laws of the 65th General Assembly, supra, requires the board of supervisors to make changes in precinct boundaries "not earlier than July first nor later than December thirty-first of the year immediately following each year in which the federal decennial census is taken". This section of the Code appears to be directed to a means of enforcing the changes made requisite by the decennial census. Then, §49.8 as amended by §114 of the Laws of the 65th General Assembly, supra, prohibits any further change in precinct boundaries until after the next federal decennial census, except in four specified circumstances. These are:

"1. When deemed necessary by the board of supervisors of any county because of change in the location of the boundaries, dissolution of establishment of any civil township, the boundaries of precincts actually affected may be changed as necessary to conform to the new township boundaries.

"2. When territory is annexed to a city the city council may attach all or any part of the annexed territory to any established precinct or precincts which are contiguous to the annexed territory, however this subsection shall not prohibit establishment of one or more new precincts in the annexed territory.

"3. A city may have on special federal census taken each decade and the population figures obtained may be used to revise precinct boundaries in accordance with the requirements of sections forty-nine point three (49.3) and forty-nine point five (49.5) of the Code.

"4. When the boundaries of any county supervisor, city council, or school director district, or any other district from which one or more members of any public representative body other than the general assembly are elected by the voters thereof, are changed by annexation, reprecincting or other means, the change shall not result in the term of any officer elected from the former district being terminated before or extended beyond the expiration of the term to which the officer was last elected."

The foregoing statute has been amended by House File 1399 of the 65th General Assembly and the enrolled bill could become law prior to the primary election in June, 1974.

The amending legislation adds a new subsection to §49.8 which will authorize the merger you suggest. This amendment provides:

"Sec. 21. Section forty-nine point eight (49.8), Code 1973, as amended by Acts of the Sixty-fifth General Assembly, 1973 Session, chapter one hundred thirty-six (136), section one hundred fourteen (114), is amended by inserting after subsection three (3) the following new subsection:

"*NEW SUBSECTION.* Precinct boundaries established by or pursuant to section forty-nine point four (49.4) of the Code, and not changed under subsection one (1) of this section since the most recent federal decennial census, may be changed once during the period beginning January first of the second year following a year in which a federal decennial census is taken and ending June thirtieth of the year immediately following the year in which the next succeeding federal decennial census is taken, if the commissioner recommends and the board of supervisors finds that the change will effect a substantial savings in election cost."

May 3, 1974

COUNTIES: Supervisors. §332.3(13). Real estate or other property no longer needed for the purpose for which it was acquired by the county may be converted to other use, sold or leased at fair value for a reasonable period of time. (Nolan to Monroe, State Representative, 5-3-74) #74-5-9

The Honorable W. R. Monroe, State Representative: This will acknowledge receipt of your letter of April 16, 1974 in the office of the Attorney General. In that letter you request an opinion interpreting §332.3(13), Code of Iowa, 1973, and, specifically, you state that you are concerned as to the limitations on the length of time that a board of supervisors may lease property. The code section you have cited confers certain statutory powers to the board of supervisors and provides:

"When any real estate, buildings, or other property are no longer needed for the purposes for which the same were acquired by the county, to convert the same to other county purposes or to sell or lease the same at a fair valuation."

The history of this section indicates that originally the power to dispose of county property not needed for county purposes was limited to leases or sales to school districts. Within the limitations of the statutory authority at that time, this office advised that the county might lease such property on terms and conditions as the "the board shall determine". 1932 O.A.G. 231.

Subsequently, on June 14, 1939 this office, upon an inquiry from the Auditor of State, stated that the board of supervisors had no authority to lease an un-used portion of the courthouse to a private abstract company. This opinion advised that there was no provision in the statute conferring any express power to rent any portion of the courthouse or any other county property for private use and that such power could not be implied from the power granted to the board of supervisors to have general management and care of the county property.

In 1945, §323.3(13) was amended by §2, Chapter 158, Acts of the 51st G.A., to remove the specific reference to school districts in connection to the sale or leasing of county land no longer needed for county purposes.

In recent years, with the advent of the statutory authority for the contractual joint exercise of governmental powers by political subdivisions, a practice appears to be growing whereby the public property of one political subdivision is made avilable to another for terms in excess of one year. In such cases, this office has advised that lands may be transferred or leased for such longer periods of time when, in the good faith determination of the boards involved, it is necessary to do so to exercise some statutory authority otherwise granted. The reasonableness of such period of time is not a question on which a legal opinion can be given. 1964 O.A.G. 351.

May 6, 1974

TAXATION: Property Tax — Homestead Tax Credit and Military Service Exemption; Sections 425.1, 425.11, 427.6, 1973, Code of Iowa; Chapter 1020, Acts 64th G.A., §3. A purchaser of a homestead on contract who has paid at least 10 percent of the contract price at the time he applies for the homestead credit and military exemption, is an "owner" and qualifies for the credit and exemption against taxes for the year in which claim is made. (Capotosto to Fitzgerald, Judicial Magistrate, Kossuth County, 5-6-74) #74-5-2

Hon. Dennis P. Fitzgerald, Judicial Magistrate, Kossuth County: You have requested an opinion of the Attorney General regarding application of the homestead tax credit and the military service exemption to the extended fiscal year as enacted by Ch. 1020, Acts 64th G.A. Specifically your inquiry is as follows:

"An individual purchases a house in August, 1973, on a contract and prior to the June 1, 1974 deadline has a down payment in excess of 10% on the property. The taxpaper makes a proper application for the homestead tax credit as well as the military exemption which should apply to his 1974 real estate taxes.

During the same time the State has been involved in converting its tax year from a calendar year to a fiscal year and the last assessment and certification period included 18 months. Because of this the taxpayer is told he will not receive and cannot get his homestead credit nor his military exemption for the first six months of 1974.

It would appear to me that the Code is fairly clear in that where these exemptions qualify they should be given, regardless of any additional paper work which might be incurred in the various Auditors' and Treasurers' offices. For the most part taxpayers in this category will have claims that do not exceed $1,000 which, of course, would put the claim into Magistrate's Court. I would very much appreciate your clarifications and opinion on this matter."

Chapter 1020, Acts 64th G.A. implements the transition of the budget year of Iowa's cities, counties and other political subdivisions from a calendar year to a fiscal year. In order to facilitate the continuity of local property tax collection during the change-over from calendar to fiscal year the legislature created an extended fiscal year. Ch. 1020, Acts 64th G.A., §3. As you are undoubtedly aware, property taxes are customarily paid in two equal installments, the first by April 1, and the second by October 1. As you are also aware, property tax collection always runs a year behind. That is, your 1971 taxes were actually paid by April 1 and October 1 of 1972; your 1972 taxes were paid by April 1 and October 1 of 1973. Chapter 1020 created a change in this collection process with respect to property taxes for 1973. That statute increased all millage rates by fifty percent and made the 1973 taxes payable over a period of eighteen months in three installments. Ch. 1020, §3. Hence, property taxes for 1973 are payable by April 1, 1974, October 1, 1974, and April 1, 1975. All three installments constitute payment of the 1973 taxes. They are based on the assessed value of the property as of January 1, 1973. §428.4, Code of Iowa, 1973. Collection of property taxes for subsequent years will then be on a fiscal year basis. That is, 1974 taxes will be collectible by October 1, 1975 and April 1, 1976, and so on for all later years.

Within this framework of property tax assessment and collection we have the homestead tax credit and the military service exemption. Requirements for claiming the homestead tax credit are set out at §425.2, Code of Iowa, 1973:

"Any person who desires to avail himself of the benefits provided hereunder shall each year on or before July 1 deliver to the assessor, on blank forms to be furnished by the assessor, a verified statement and designation of homestead as claimed by him, . . ."

Section 427.6, Code of Iowa, 1973 governs claims for the military service exemption:

"Said claim for exemption, if filed on or before July 1 of any year and allowed by the board of supervisors, shall be effective to secure an exemption only for the year in which such exemption is filed."

The time limitations for filing claims for the homestead tax credit and military service exemption were not changed by Ch. 1020, Acts 64th G.A. Moreover, the filing statutes permit a credit or exemption only against taxes *for* the year in which the claim was filed. Thus, if your taxpayer has filed claims in 1974 prior to July 1, 1974, and if he qualifies for the credit and exemption in all other respects, he is entitled to the benefits of the statutes with respect to his 1974 taxes payable by October 1, 1975 and April 1, 1976. His filing of claims in 1974 does not affect or change in any way the 1973 taxes which are payable in 1974 and the first half of 1975.

In paragraph two of your letter you state the fact that the taxpayer purchased his homestead on contract and that at some point in 1974 prior to July 1, he had paid in excess of ten percent of the contract price. The question arises as to whether or not this fact affects his entitlement to the homestead tax credit or the military service exemption for his 1974 taxes. We believe that the taxpayer is entitled to the credit and exemption for all of his 1974 taxes. In reaching this conclusion resort must be had to the respective statutes. First, with respect to the homestead tax credit, the first requirement is that there indeed be a "homestead". §425.1, Code of Iowa, 1973. "Homestead" is defined in §425.11(1)(a) as the "dwelling house in which the owner is living as the time of filing" his application for the credit. The owner must also intend to occupy that home for at least 6 months in the year for which the credit is claimed. "Owner" is defined at §425.11(2) as the holder of a fee simple, or as a contract purchaser who has paid off ten percent of the contract price. Thus, if a contract purchaser is occupying a homestead, and if by the time he applies for the homestead tax credit he has paid ten percent of the contract price, he is the "owner" of the homestead for purposes of the credit and thus is entitled to it.

As far as the military service exemption is concerned, §427.6, Code of Iowa, 1973 requires only that the person claiming the exemption be the "legal or equitable owner of the property". A contract purchaser is the equitable owner of a homestead. Therefore, your taxpayer would be eligible for the military service exemption. 1922 O.A.G. 198.

In conclusion, it is the opinion of the Attorney General that a purchaser of a homestead on contract is entitled to the military service exemption if he makes a claim therefor on or before July 1 of the year for which the exemption is sought. Furthermore, he is eligible for the homestead tax credit if at the time claim is made the taxpayer has paid ten percent of the contract price.

May 6, 1974

STATE OFFICERS AND DEPARTMENTS: Vital Statistics — §674.1, 1973 Code of Iowa. An inmate of a penal institution cannot obtain a change of name under Chapter 674 if he was convicted of an offense punishable by imprisonment in the penitentiary. (Haskins to Pawlewski, Commissioner of Public Health, 5-6-74) #74-5-3

Mr. Normal L. Pawlewski, Commissioner, State Department of Health: You ask whether an inmate of a penal institution has the right to a change of name under Chapter 674, 1973 Code of Iowa. It is our opinion that such an inmate does not have a right to a change of name under Chapter 674 if he was convicted of an offense punishable by imprisonment in the penitentiary.

Chapter 674 provides a statutory procedure for a change of name. The key section of that chapter is §674.1, 1973 Code of Iowa, which states:

"Any person *under no civil disabilities,* who has obtained his or her majority, desiring to change his or her name, may do so by filing a verified petition as provided in this chapter." [Emphasis added]

The issue is whether an inmate of a penal institution is under "civil disabilities". The phrase "civil disabilities" refers generally to those legal limitations attendant on criminal conviction. *See* 21 Am. Jr.2d *Criminal Law* §616, at 566. Specifically, in Iowa, the phrase must be construed to apply only to limitations resulting from conviction of an offense punishable by imprisonment in the penitentiary. A person who has been convicted of an offense punishable by imprisonment in the penitentiary loses his right to vote and hold elective office. The source of this loss of rights is a provision of the Iowa Constitution, Art. II, §5, which states:

"No idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privelege of an elector."

An "infamous crime" is one punishable by imprisonment in the penitentiary. *See State ex. rel. Dean v. Haubrich,* 248 Iowa 978, 83 N.W.2d 451, 452 (1957); *Blodgett v. Clarke,* 177 Iowa 575, 159 N.W. 243, 244 (1916); *Cf. Flanagan v. Jepson,* 177 Iowa 393, 158 N.W. 641, 643 (1916). Hence, a person who has been convicted of an offense punishable by imprisonment in the penitentiary is under "civil disabilities." Accordingly, an inmate of a penal institution does not have a right to a change of name under Chapter 674 if he was convicted of an offense punishable by imprisonment in the penitentiary.

May 6, 1974

LIQUOR, BEER AND CIGARETTES — use or consumption of alcoholic liquor upon public streets — §123.46, 1973 Code of Iowa. Use or consumption of alcohol upon a public street must be shown to warrant conviction pursuant to §123.46, 1973 Code of Iowa. Proof of possession of an open container of alcoholic liquor is merely an evidentiary fact, not an ultimate fact. (Sullins to Rolfe, Union County Attorney, 5-6-74) #74-5-4

Mr. Robert A. Rolfe, Union County Attorney: You have requested an opinion from this office concerning what action constitutes a violation of the first clause of §123.46, 1973 Code of Iowa, which, in pertinent part, reads as follows:

"It is unlawful for any person to use or consume alcoholic liquor or beer upon the public streets or highways . . . ."

It is the opinion of this office that mere possession of alcoholic liquor or beer upon public streets or highways is of itself not sufficient to warrant conviction pursuant to §123.46, 1973 Code of Iowa. Nor is possession of an open container of alcoholic liquor on a public highway sufficient to warrant a conviction pursuant to the first clause of this section. Section 123.46, 1973 Code of Iowa.

The statute is clear. It is the use and consumption of alcoholic liquor or beer that is prohibited upon public streets and highways. Possession of alcoholic liquor and beer, however, is prohibited only at two specific locations — public school property, and public and private school related activities.

The distinctive meanings of the words "use" and "consumption" and "possession" pursuant to §123.46, 1973 Code of Iowa have not been judicially determined in Iowa. However, the likely interpretation of these words as used in this statute may be determined from the statute itself and from closely related Iowa Supreme Court decisions.

The Iowa Legislature apparently intended to distinguish between the words "use" and "possession" in this statute. The words "use" and "consume" are used to define what is prohibited with respect to alcoholic liquor and beer upon public streets. The words "use" and "consume" are also used to define what is prohibited with respect to alcoholic liquor in any public place, except premises covered by a liquor control license. However, the words "possess" and "consume", not the words "use" and "consume", are used to define what is prohibited with respect to alcoholic liquor or beer on public school property. (Section 123.46, 1973 Code of Iowa).

Such a distinction in the employment of words within a single statute is important. In *State v. Reeves,* 209 N.W.2d 18 at 21-23 (Iowa 1973), the Iowa Supreme Court defined the meaning of the word "possession" of a narcotic drug. Within the meaning of §204A.3(2), 1971 Code of Iowa, "possession" was interpreted to mean "domain and control over the contraband." In *Ury v. Modern Woodman,* 149 Iowa 706, 127 N.W. 665 at 666 (1910), the Iowa Supreme Court defined the word "use" in the context of the by-laws of a mutual benefit insurance society. Those by-laws provided insurance coverage for its members upon their death, unless death was occasioned by the use of intoxicating liquor. "Use" defined in this case denotes employment or utilization of intoxicating liquors.

Indeed, if prohibition of possession of alcoholic liquor or beer was not limited to specific locations but was intended to apply to possession everywhere, the practical effect would be to nullify part of the Iowa Liquor and Beer Control Act. For if possession of alcoholic liquor or beer on any public place was prohibited, no one would legally be able to carry a package of beer out of a store.

A distinction between the words "use" and "consume" must also be made. As the Iowa Supreme Court stated in *State v. Lagomarcino-Grupe Co.,* 207 Iowa 621, 223 N.W. 512 at 513 (1929), a case discussing a statutory imposition of a tax on the sale of cigarettes to a consumer, the word "consume" ought to be given its plain ordinary meaning. In that decision, the Court defined "consume" as: "to use up; expend; waste; devour" and synonymous with "swallow-up; absorb; destroy."

Comparing the *Ury* definition of "use" (above), and the *Lagomarcino* defintion of "consume" it is apparent that "consume" is a sub-category of "use", (i.e., to devour or swallow-up is a utilization). Some courts have, with respect to particular statutes, defined these two words as synonymous. *In Re Lane,* 990 Misc. 103, 106 N.Y.S.2d 987 (1951). *Osgood v. Peterson,* 231 Wisc. 541, 286 N.W. 54 (1939). But the word "use" may have broader meaning than "consume." "Consume" has a destruction connotation, while "use" has both destructive and constructive connotations.

It is the destructive connotation that is important. Because the prohibition stated in the first clause of §123.46, 1973 Code of Iowa, is phrased in the disjunctive, it is apparent that the Iowa Legislature intended that something more

than consumption of alcoholic liquor on public highways be prohibited. To what other uses alcoholic liquor may be put, and therefore be prohibited on a public highway, is speculative and can only be determined on a case by case method. It is our opinion that whatever the use, it *is* the *use or consumption* of alcoholic liquor that is prohibited by this section and not the use or consumption of the closed or open container in which the liquor is carried.

May 6, 1974

LIQUOR, BEER, AND CIGARETTES: Class "C" liquor licensee with a restaurant license but no Sunday liquor sales permit. Chapter 123 and 170, 1973 Code of Iowa; Chapter 163, 65th G.A., First Session. A Class "C" Liquor License holder who also has a restaurant license but who has no permit to sell liquor on Sundays may remain open on Sundays to sell food. (Coriden to Norpel, State Representative, 5-6-74) #74-5-5

The Honorable Richard J. Norpel, Sr., State Representative: You have requested an opinion as to whether a tavern operator who has both a Class "C" Beer and Liquor License and a restaurant license but who has no permit to sell beer and liquor on Sundays may stay open on Sundays to sell food.

Section 123.1, 1973 Code of Iowa, declares that it is:

". . . public policy that the traffic in alcoholic liquors is so affected with a public interest that it should be regulated to the extent of prohibiting all traffic in them, except as provided in this chapter."

However, none of the provisions in Chapter 123, 1973 Code of Iowa, or in Chapter 163, 65th General Assembly, First Session, which deals with Sunday sales of beer and liquor, purports to limit the sale of food on Sundays by a Class "C" liquor licensee who has no Sunday sales permit.

Regulation of the production, preparation, distribution, and service of food is covered in Chapter 170, 1973 Code of Iowa and in the rules of the Department of Agriculture, 1973 Iowa Departmental Rules. Nowhere in these provisions, either, is found any prohibition against allowing a Class "C" liquor licensee who has no Sunday sales permit to sell food on Sundays.

It is our opinion, therefore, that a Class "C" Liquor License holder who also has a restaurant license but who has no permit to sell liquor on Sundays may remain open on a Sunday to sell food.

May 6, 1974

COURTS: Judicial Magistrates. §§595.10, 602.51, 602.60, 748.2, 1973 Code of Iowa; Chapter 282, §45, Acts of the 65th G.A. A part-time judicial magistrate can solemnize a marriage. (Haskins to Newell, Muscatine County Attorney, 5-6-74) #74-5-6

David W. Newell, Muscatine County Attorney: You ask the opinion of our office as to whether a part-time judicial magistrate can solemnize a marriage. It is our opinion that he can.

Section 595.10, 1973 Code of Iowa, sets forth the persons who may solemnize a marriage. That section states:

"Marriages must be solemnized by:

"1. A judge of the Supreme or District Court, including a district associate judge, or *a judicial magistrate.*

"2. Some minister of the gospel, ordained or licensed according to the usage of his denomination." [Emphasis added]

The words "judicial magistrate" plainly encompass both full-time and part-time judicial magistrates. Nothing else in the Code indicates that part-time magistrates do not have the power to solemnize marriages. The present Code section governing the jurisdiction of part-time and full-time magistrates does not distinguish between the two for purposes of solemnizing a marriage. That section, Section 602.60, 1973 Code of Iowa, states:

"Judicial magistrates shall have jurisdiction of nonindictable misdemeanors, including traffic and ordinance violations, preliminary hearings, search warrant proceedings, forcible entry and detainer actions, and small claims. They shall also have the powers specified in section 748.2. They shall have power to act any place within the district as directed, and venue shall be the same as in other district court proceedings. Judicial magistrates serving on a full-time basis and district associate judges shall have jurisdiction of indictable misdemeanors. While exercising that jurisdiction they shall employ district judges' practice and procedure."

Section 748.2, 1973 Code of Iowa, mentioned in the above section does not pertain to solemnizing a marriage. Section 602.60 is amended by Acts of the 65th G.A., Ch. 282, §45, effective July 1, 1974, to read as follows:

"Judicial magistrates shall have jurisdiction of nonindictable misdemeanors, including traffic and ordinance violations, preliminary hearings, search warrant proceedings, and small claims. They shall also have jurisdiction to exercise the powers specified in sections seven hundred forty-eight point two (748.2), six hundred forty-four point two (644.2), and six hundred forty-four point twelve (644.12) of the Code. They shall have power to act any place within the district as directed, and venue shall be the same as in other district court proceedings. In addition, judicial magistrates appointed pursuant to section six hundred two point fifty-one (602.51) of the Code shall have jurisdiction of indictable misdemeanors, the jurisdiction provided for in section two hundred thirty-one point three (231.3) of the Code when designated a judge of the juvenile court, and jurisdiction in civil actions for money judgments where the amount of controversy does not exceed three thousand dollars and while exercising that jurisdiction, judicial magistrates shall employ district judges' practice and procedure.

"For purposes of administration judicial magistrates shall be under the jurisdiction of the chief judge of the judicial district. Judicial magistrates shall be subject to the same rules and laws that apply to district judges except as otherwise provided in this chapter."

Section 602.51, 1973 Code of Iowa, referred to in the above section, recognizes full-time judicial magistrates. None of the other sections cited in the new Section 602.60 deals with solemnizing marriages. Accordingly, as can be seen, the new Section 602.60 does not draw a distinction between part-time and full-time magistrates for the purpose of solemnizing a marriage.

In conclusion, it is our opinion that part-time judicial magistrate may solemnize a marriage.

May 6, 1974

HIGHWAY: Counties, Cities and Towns, Streets. §§306.5, 311.5, 314.5, 1973 Code of Iowa; 1970 O.A.G. p. 476. County Board of Supervisors has authority to aid city in street repair if street is secondary road extension. (Tangeman to McKey, Hancock County Attorney, 5-6-74) #74-5-7

Mr. J. Ramsey Mc Key, Hancock County Attorney: You have requested an Attorney General's Opinion regarding the ability of a county to enter into a street repair project with a city or town. Your request is substantially contained in the first and last paragraphs of your letter which are as follows:

"My board of supervisors has requested of me a legal opinion as to whether or not they have statutory authority to assist a city or town in either repairing or rebuilding a street within the municipal boundaries of the city or town."

* * *

"The only authority which I have found to date is an opinion rendered by your office pursuant to the provisions of §311.5. However, the opinion, I feel, makes it clear that in order for the county to assist a city or town, the particular street for which monies are to be spent must be a part of the secondary road or farm to market systems. I am unaware of any other statutory authority which might allow our board of supervisors to assist a city or town in this plight. Therefore, your kind cooperation will be greatly appreciated."

§306.5, 1973 Code of Iowa, gives the board of supervisors of each county the duty and authority to alter the classification of roads under its jurisdiction with the approval of the functional classification board (as provided in §306.6).

§311.5 provides as follows:

"Any road or street which is a continuation of a secondary road within any city or town and which the county board desires to improve . . . may by resolution of the county board and concurrence by the council of the city or town be improved as a secondary road assessment district project . . . ."

§314.5 provides:

"The board . . . in control of any secondary road . . . is authorized, subject to approval of the council, . . . to construct, reconstruct, improve, repair, and maintain any road or street which is an extension of such road within any town or city. Provided that this authority shall not apply to the extensions of secondary roads located in cities over twenty-five hundred population, where the houses or business houses average less than two hundred feet apart.*** The locations of such road extensions shall be determined by the board or commission in control of such road or road system."

These sections are cited as authority for the county board and city council to work together cooperatively to effect the repair of the damaged road through either of two alternative procedures i.e. either under the assessment district procedure or under the general provisions of §314.5. See also 70 O.A.G. p. 476 for a further discussion of this problem and with special reference to the discussion of §314.5 of the 1966 Code of Iowa (same as 1973 Code of Iowa). That opinion substantiates the authority of the board of supervisors to select the secondary road route extensions through cities and towns and also discusses some of the ancillary questions that may arise in circumstances such as you have described.

May 7, 1974

COUNTIES AND COUNTY OFFICERS: Hospitals — §347.13, Code of Iowa, 1973. If land of a county hospital is received by gift, devise or bequest the hospital trustees may sell or exchange said property on a concurring vote of all trustees. If the land is received by condemnation or purchase it may not be sold unless approved by the voters. Hospital trustees may not

give property to a city without consideration therefor. (Blumberg to Oliver, Madison County Attorney, 5-7-74) #74-5-10

Jerrold B. Oliver, Madison County Attorney: We are in receipt of your opinion request of April 15, 1974. In it you ask whether a county hospital may dedicate land to a city for use as a public street without an election. You specifically refer to section 347.13 of the Code.

Section 347.13, Code of Iowa, 1973, lists the powers and duties of the board of hospital trustees. Section 347.13(11) provides that the trustees may accept property by gift, devise or bequest and may sell or exchange said property by a concurring vote of the majority of the board members. Section 347.13(12) provides that the trustees may sell or lease any sites or buildings, except those in subsection 11, upon submission to and approval of the voters at a special or general election. We can find nothing in that chapter which gives the trustees any authority to give away its property without consideration.

If the land in question was received by gift, devise, bequest or the like, the trustees may sell or exchange it. If the land was received by condemnation or purchase, they may only sell said land upon approval of the voters. The trustees may not give the land to the city without condieration therefor.

May 9, 1974

ENVIRONMENTAL PROTECTION: Sale of county park lands — §§111.32, 111A.4 and 332.3(13), Code of Iowa, 1973. In counties having a county conservation board, the county board of supervisors can not sell county park lands without a determination by the county conservation board that the park lands proposed for sale are no longer needed for park purposes. (Peterson to Anderson, Washington County Attorney, 5-9-74) #74-5-11

Mr. Tracy Anderson, Washington County Attorney: You have requested an opinion of the Attorney General in terms as follows:

"May a County Board of Supervisors sell a parcel of land which is under the custody, control, and management of the County Conservation Board without first obtaining the approval of that [Conservation] board?"

County boards of supervisors have general authority to dispose of county property under the provisions of Section 332.2(13), Code of Iowa, 1973, which, in pertinent part, states:

"332.2 General powers. The board of supervisors at any regular meeting shall have power:

* * *

13. When any real estate, buildings, or other property are no longer needed for the purposes for which the same were acquired by the county . . . to sell . . . the same . . ."

This section first appeared in the Code of 1924.

Chapter 111A of the Code, enacted in 1955, provides for the creation of county conservation boards by vote of the people of the county and Section 4 thereof sets out the powers and duties of such boards. Section 111A.4 in pertinent part states:

"111A.4 Powers and duties. The county conservation board shall have the custody, control and management of all real and personal property heretofore or hereafter acquired by the county for public museums, parks, preserves, parkways, playgrounds, recreation centers, county forests, county wildlife areas, and other county conservation and recreation purposes and is authorized and empowered:

"1. To study and ascertain the county's museum, park, preserve, parkway, and recreation and other conservation facilities, the need for such facilities, and the extent to which such needs are being currently met, and to prepare and adopt a co-ordinated plan of areas and facilities to meet such needs.

"2. To acquire in the name of the county by gift, purchase, lease, agreement, or otherwise, in fee or with conditions, suitable real estate within or without the territorial limits of the county areas of land and water for public museums, parks, preserves, parkways, playgrounds, recreation centers, forests, wildlife and other conservation purposes . . ."

Thus, county property may be disposed of only by the county board of supervisors and then only when no longer needed for the purposes for which acquired. In counties with conservation boards duly established under the provisions of Chapter 111A, the power and duty to determine the needs of the county with respect to parks is specifically vested in the county conservation board. Thus, in practical effect, both the board of supervisors and the conservation board must concur in the sale of county property used for park purposes.

This system is quite comparable to that provided by a related statute, §111.32, governing the sale by the Executive Council of public lands under the jurisdiction of the State Conservation Commission, which statute, in pertinent part, provides:

"§111.32 Sale of park lands-conveyances to cities, towns or counties. The executive council may, upon a majority recommendation of the commission, sell or exchange such parts of public lands under the jurisdiction of the commission as in its judgment may be undesirable for conservation purposes, . . ."

Custody, control and management of park lands and the power and authority to determine the need therefor having been delegated by statute to county conservation boards in counties where such boards have been established pursuant to Chapter 111A, the county boards of supervisors in such counties can not sell park lands without a determination by the county conservation board that the park lands proposed for sale are no longer needed for park purposes.

May 9, 1974

ENVIRONMENTAL PROTECTION: Notice of acceptance of real estate option contracts. In the absence of any prescribed mode of acceptance in an option contract relating to real estate, the parties are bound to the option contract when written notice of the unqualified acceptance thereof is received by the optionor. (Peterson to Priewert, Director, 5-9-74) #74-5-12

Mr. Fred A. Priewert, Director, State Conservation Commision: Receipt is hereby acknowledged of your request for an opinion of the Attorney General as to the exact time that the Conservation Commission becomes obligated to purchase real estate pursuant to an option from the owner.

We are advised that negotiated purchases of real estate by the Commission usually are consummated by exercise by the Commission of an option to purchase given by the seller. The option form routinely used by the Commission makes the option subject to the following conditions:

"Acceptance of this offer must be by written notice within 120 days from the date hereof and if not accepted this option shall become null and void."

The option contains an acknowledgment of receipt of cash consideration therefor.

The only fixed rule in Iowa regarding the manner of the exercise of an option under a contract granting it is to discover from the language of the option instrument the intent of the parties with reference thereto. *Breen v. Mayne,* 1908, 141 Iowa 399, 118 N.W. 441; quoted in *Figge v. Clark,* 1970, 174 N.W. 2d 432, and in *Steele v. Northrup,* 1966, 259 Iowa 443, 143 N.W.2d 302.

The acceptance of an option must be unqualified and unequivocal and must be communicated to the party giving the option. *Breen v. Mayne,* supra.

In the absence of any prescribed mode of acceptance in the option contract, no particular form of notice is required. *Figge v. Clark,* supra; *Steele v. Northrup,* supra.

If the option authorizes or requires the acceptance to be sent by mail, the option would be exercised upon the posting of the notice of acceptance to the optionor. If not so authorized or required, as in this case, the option would be exercised only upon receipt of the notice by the optionor. *Wheeler v. McStay,* 1913, 160 Iowa 745, 141 N.W. 404, cited in 1 *Williston on Contracts,* §87 and 1 *Corbin on Contracts.*

In summary, we are of the opinion that, in the absence of any prescribed mode of acceptance in an option contract, the parties are bound to the option contract when written notice of the unqualified acceptance thereof is received by the optionor.

May 9, 1974

MOTOR VEHICLES: Registration fees. §§321.105, 321.109, 321.161. The Department of Public Safety may not increase the factory list price as certified by the manufacturer at any time during the year, but only annually, on or before the first day of August. The County Treasurer must collect this increased fee, but may not collect the increase retroactively. (Voorhees to Kayser, Marshall County Attorney, 5-9-74). #74-5-13

Mr. Ronald M. Kayser, Marshall County Attorney: You have requested an opinion of the Attorney General with respect to certain questions which have been presented to you by the Marshall County Treasurer involving §§321.157 and 321.161 of the 1973 Code of Iowa. Your letter states the following:

". . . When 1973 cars were manufactured in August or September of 1972, the new fees, weight and list prices were mailed to all of the counties by the State Motor Vehicle Department. This year, in August, the County Treasurer received a new rate book for 1973 cars which increased the fees for most vehicles registered from August, 1972, to and including August, 1973 . . . . The following questions are submitted:

"1. Does §321.161 authorize the State Motor Vehicle Department to increase the factory list price at any time during the year when an increase is certified by the manufacturer?

"2. By what authority does the County Treasurer collect an increase in the fee at the time the owner of the vehicle registers the car for 1974?

"3. Does the County Treasurer have the authority to collect an additional fee for the prior year, even though he has already paid the fee which was determined when he purchased his car and registered it initially?"

In reviewing the provisions of Chapter 321 of the 1973 Code of Iowa, we find that the County Treasurer is required by §321.105 to collect an annual fee for motor vehicle registration. That fee is to be computed by applying the formula found in §321.109 to the value and weight of each vehicle, as fixed by the Department of Motor Vehicles (Department of Public Safety). The fixing of value and weight by the department must conform to the provisions of §321.161, which states as follows:

"The department shall, on or before the first day of August, annually, and at such other times as new makes or models of motor vehicles are offered for sale, or sold in this state, fix the value and weight of each of the different makes and models of motor vehicles which are sold or offered for sale within the state."

In light of the above Code sections, our opinion as to the question you raised are as follows:

1. §321.161 does not authorize the Department of Motor Vehicles to increase the value fixed for a motor vehicle at any time during the year. By that section, the department may fix the value only annually unless the value is for that of a new make or model. Nothing in this section, however, prevents the department from increasing the fixed value from one year to the next. As your letter pointed out, this occurred this year because of price increases during the model year.

2. The County Treasurer must collect the increased registration fee by authority of the increased fixed value of the motor vehicle. §321.109 requires the fee to be based upon the value and weight of the motor vehicle fixed by the department. Therefore, any increase in the fixed value determined by the department must be followed by the treasurer in collecting the next year's registration fee.

3. It would appear that there is no provision that would allow the County Treasurer to collect an additional fee for prior years. Since the Department of Public Safety has not attempted to require the collection of increased fees for previous years, we will not consider further the question of whether such a practice would be permissible. However, the County Treasurer cannot collect any registration fee, retroactive or otherwise, unless the amount of those fees is authorized by the Department of Public Safety. In this instance is was the clear intent of the department that the increases were to apply only to 1974 registration fees. We do not believe that the County Treasurer has the authority, on his own initiative, to apply the increased values retroactively.

May 10, 1974

PLATS: Subdivisions or additions. §§409.1, 355.3, Code of Iowa, 1973. A surveyor may set a concrete or iron pin to establish a corner, and such pin constitutes a permanent monument. (Nolan to Kelley, Mills County Attorney, 5-10-74) #74-5-14

Michael E. Kelley, Mills County Attorney: Reference your letter of October 19, 1973, in which you ask:

"Does the setting by a surveyor of a 'pin' which is not declared to be a corner or monument and which in unrelated to any other congressional corner or marker, adequately satisfy the requirements of section 409.1 of the Code 'which calls for known or permanent monuments;' or must he commence his survey from a previously established monument or corner?"

Section 409.1, Code of Iowa, 1973, provides as follows:

"Every original proprietor of any tract or parcel of land, who has subdivided, or shall hereafter subdivide the same into three or more parts, for the purpose of laying out a town or city, or addition thereto, or part thereof, or surburban lots, shall cause a registered land surveyor's plat of such subdivisions, with references to known or permanent monuments, to be made by a registered land surveyor holding a certificate issued under the provisions of chapter 114, giving the bearing and distance from some corner of a lot or block in said town or city to some corner of the congressional division of which said town, city, or addition is a part, which shall accurately describe all the subdivisions thereof, numbering the same by progressive numbers, giving their dimensions by length and breadth, and the breadth and courses of all the streets and alleys established therein."

Section 355.5, Code of Iowa, 1973, in referring to the county surveyor provides:

"The county surveyor shall, when requested, furnish the person for whom the survey is made with a copy of the field notes and plat of the survey, and such copy, certified by him, and also a copy from the record, certified by the county auditor with the seal, shall be presumptive evidence of the survey and of the facts herein required to be set forth, and which are stated accordingly, between those persons who join in requesting it.

"Such field notes and plat of survey shall not, however, be presumptive evidence in any action in court as opposed to the field notes and plat of survey made by any other competent surveyor at the instance of any party not joining in the request for the survey by the county surveyor."

12 Am. Jur.2d, *Boundaries*, §71 (1964), states:

"A stake when once placed, however, fixes the corner as conclusively as if it were marked by a natural object or a more permanent monument. Owing to the fact that it may be removed or obliterated, it's location is frequently more difficult of proof, but if proved, it fixes the corner with the same certainty as where the mark is a permanent object.

"Although monuments set at the time of an original survey on the ground and named or referred to in the plat are the best evidence of the true line, if there are none such, then stakes actually set by the surveyor to indicate corners of lots or blocks or the lines of streets, at the time or soon thereafter, are the next best evidence. A building or fence constructed according to stakes set by a surveyor at a time when these were still in their original locations may become a monument after such stakes have been removed . . . ."

12 Am. Jur.2d, *Boundaries*, §4 (1964), states:

"Natural monument is any 'physical object' and when used with reference to boundaries means a 'permanent object'. Natural monuments include such natural objects as mountains, streams, rivers, creeks, springs, trees, etc. Artificial objects and monuments consist of marked lines, stakes, roads, fences, buildings . . . placed on the ground by the hand of man."

27 Wisc. Stat. Ann., *Platting Lands*, §236.15(1) (1973),

"The external boundaries of a subdivision shall be monumented in the field by monuments of . . . ."

* * *

". . . 30″ concrete rods 4″ square or 5″ in diameter or 30″ iron rods 2″ in diameter."

1 Ohio Rev. Code, §711.03 (1972) provides that at the time of the laying out of a subdivision, village, or addition to a municipal corporation, corners of the public ground or one of the in-lots, and each of the out-lots shall be marked with 30″ concrete rods 4″ in diameter or 4″ square, or 30″ iron rods 1″ in diameter, flush with finished grade, ". . . for a corner from which to make future surveys. . . ."

It is our opinion that the above statutes and §355.3, Code of Iowa, 1973, recognize concrete and iron pins as being permanent monuments sufficient for the purpose of §409.1 of our Code. Accordingly, a surveyor may commence his survey from such a pin, provided that the true coordinates or calls of that pin can be proved by reference to other established monuments.

May 17, 1974

SCHOOLS: Schoolhouse construction. §279.12. The Camanche Community School District may employ a construction manager to superintend the construction of the school and to let bids for specific parts of the construction at different times as the building progresses. Original plans and specifications may provide acceptable alternates so that the school board retains control of the scope of the project. Funds available in the school house fund may be utilized for construction of the building. (Nolan to Pillers, Clinton County Attorney, 5-17-74) #74-5-15

Mr. G. Wylie Pillers, III, Clinton County Attorney: We have received your letter of May 2, 1974 and the documents you transmitted therewith pertaining to the construction of a new high school building in Camanche, Iowa for a fixed cost of $1,446,500, including construction management fees, if any, and general conditions cost. We quote that part of your letter pertinent to your request for an opinion from the Attorney General on the legality of the proposed procedure:

"In February of this year the voters of the Camanche Community School District approved a $1,595,000 School Building Bond Issue for the purpose of carrying out a building program consisting of constructing and equipping a new senior high school building and remodeling the existing Central Middle School in the school district.

"The school district has engaged architects and plans are under way for designing the new high school.

"In the past when the Camanche School District has voted bond issues, it has followed the procedure of hiring architects and following completion of the CONSTRUCTION DOCUMENT PHASE, the entire project has been let for bids.

"By following the foregoing method the school district has had the assurance that the designed building would be completed within the funding capabilities of the district, or the project was reduced in scope or finish and re-bid again until funds available were adequate to complete a smaller project.

"Because no work is undertaken on the project, for example, in the area of excavation, grading, concrete footings, etc., until the point of completion of

the CONSTRUCTION DOCUMENT PHASE, actual work on the project does not occur for a period of several months. In this case, 3-1/2 months will elapse before commencement. Construction costs are increasing at a rate of at least 1% per month.

"At this point, several terms should be defined:

"*Construction Management.* Construction Management Services are services beyond the normal architectural services on a project for the purpose of controlling cost and time. They consist of comprehensive quantity cost surveys during preliminary design, recommendations of construction methods of materials, pre-bidding conferences with each of the multiple trades and multiple contractor coordination when the building is under construction.

"*Phased Design and Construction.* Designing, bidding and starting construction of various early portions of the work prior to completing drawings, bidding and starting construction of the entire project.

"*Multiple Contract Construction.* Bidding and awarding plus or minus 25 contracts for the complete construction of a project rather than one to five contracts normally bid and awarded. These multiple contracts are A.I.A. A-101 Agreement and A.I.A. A-201 General Conditions. These contracts are all advertised and bid competitively in accordance with Iowa Code Sections 23.2, 23.3 and 23.18.

"*Construction Documents.* Detailed plans and specifications necessary to provide prospective bidders an accurate description of the materials and workmanship required to submit a proposal for a trade or, in the case of a general contractor, a group of trades.

"The school district has been approached by a corporation named Durra-Built, Inc., the shareholders of whom are also partners in the architectural firm employed by the district, with the recommendations that the normal procedure not be followed and rather that the school district enter into an agreement entitled 'Standard Form of Agreement Between Owner and Construction Manager'. The format of the proposed Construction Manager Agreement is that the Construction Manager guarantees a high school building would be completed for an amount not to exceed a fixed cost. Those who propound this approach do so primarily on the basis that certain of the initial stages of the work could be commenced at an earlier point without the necessity of waiting for the completion of the CONSTRUCTION DOCUMENT PHASE.

* * *

'It is further proposed that phased construction be used to start construction work early and substantially reduce the cost of the project. Under this proposal, the construction manager guarantees the cost of the project and as each trade is bid, adjustments are made in scope or finish of the project to complete the project within budget. Adjustments include quality and number of coats of paint, amount and quality of interior walls, acoustic tile, carpet, ceramic tile, cabinets, doors and hardware, air handling units, site development work, paving, seeding or sodding.'

"The suggested paragraph is subject to the comment that 'cost of the improvement' is not defined at the time of the hearing required pursuant to Chapter 23 of the Code, and further subject to the comment that the Construction Manager guarantee as to cost is accomplished by reducing the scope of the project and not by guaranteeing that a set project will be accomplished for a set price.

"In addition to submitting a copy of the contract which had been proposed by Durra-Built, a copy of proposed revisions in the contract prepared by the attorneys for the School Board is also submitted covering such items as personal guarantees, elimination of provisions with regard to a bonus for cost savings, etc.

"Notwithstanding the foregoing risk of disproportionate allocation of funds, the School Board would like to follow the Construction Manager approach both because earlier construction could be anticipated and because of their assumption that inflation will continue and the earlier that some of the work can be bid and let, the greater the likelihood that they will get more school building for dollars expended than if they have to wait until the completion of all plans.

"Based on Iowa Code Sections 23.1 et seq and 297.7, the attorneys for the School Board have given an opinion to the district expressing doubt that the Durra-Built approach meets the requirements of Iowa law. The Board's attorneys have made reference to an opinion of the Attorney General, dated August 24, 1950, page 185, which contains language to the effect that 'The statutory powers vested in a school district to make a contract for construction of a school building contemplate a completed building for which a fixed amount will be paid.

"Based on the foregoing it is herewith requested that an opinion of your office be prepared and issued covering the legality of the following:

"1. Utilization of a Construction Manager through a Construction Management Agreement using multiple contracts for the work to be accomplished.

"2. The legality of a contract between the Camanche Community School District and a Construction Manager for the construction of a high school whereby rather than having the work let in a single package for a fixed cost, the work would be let in phases with a guarantee by the Construction Manager as to the total cost which would be accomplished by reduction in project scope through adjustments in scope or finish of project with the possibility involved that certain phases could not be completed as originally contemplated.

"The School Board also calls our attention to the fact that the district now has a substantial amount of two and one-half mill money available as a result of a levy voted several years ago whereby the district was authorized to levy a tax not to exceed two and one-half mills in any one year for a period of ten years for the purpose of building and equipping school buildings and purchasing sites in and for said school district. In the event that you should find that the Construction Management Agreement using phased construction is not permitted by law, would you give the district an opinion as to whether the two and one-half mill funds may be used to let contracts as soon as possible for grading, footings and foundations and structural sttel in order to start construction early. The remaining work would then use bond referendum funds and involve one or more contracts and no phased construction."

I

Although there appears to be no specific authority authorizing the school district to employ a construction manager under a Construction Management Agreement using multiple contracts for the work to be accomplished, the power to do so may be fairly implied. Under §279.12, Code of Iowa, 1973:

"The board shall carry into effect any instruction from the regular election upon matters within the control of the voters, and shall elect all teachers and

make all contracts necessary or proper for exercising the powers granted and performing the duties required by law . . ."

The power to employ someone other than an architect to superintend the construction of a school house has been recognized in this state for some time. *Green Bay Lumber Co. v. Independent School District of Odebolt,* 1904, 125 Iowa 227, 101 N.W. 84. However, it is our view that before undertaking the construction of a school house, the school district is required under §23.2 of the Code to hold a public hearing on the proposed plans and specifications and proposed form of contract for the construction of the school. At such time, the public is entitled to know the scope of the contemplated project.

In an opinion dated August 24, 1950, 1950 O.A.G. 185, the Attorney General advised that insertion of an amendment permitting the stoppage of work in a public construction contract was in excess of the powers of the school district.

". . . The statutory powers vested in the school district in the making of contracts for the construction of school buildings contemplates a construction contract to completion for which a firm and fixed amount will be paid. Any dilution of the powers to make a contract for a complete building must arise from legislative authority. No such authority has been granted."

The opinion cited was dealing with a situation where a project once started, might, under the terms of the contract, be abandoned at some time after it has been started, but prior to completion. As I understand the proposed contract for the Camanche school district, there is no exculpatory clause involved, but rather, the proposed contract contemplates bidding the project in a number of stages and taking the bid of the lowest responsible bidder in each stage, as long as the money lasts. In *City National Bank v. Independent School Districts,* 1920, 190 Iowa 25, 179 N.W. 947, it was held that the "contract" may consist of at least three instruments which are mutually related to each other by appropriate reference. In that particular case, the contract consisted of the document designated "contract" and the "specifications" and also the "contractor's bond". The case further held that the school district had a right to insist upon any provision which it originally made as a condition to final payment under its contract. While it is clear that there is no statutory authority for the payment of the cost of construction on an installment plan, yet there is no prohibition in the statutes or otherwise, against letting bids for specific parts of the construction at different times as the building progresses. (e.g. site excavation before masonry, roofing, lights and interior finishing)

II

The second question you pose must be answered no if, in fact, the object of the contract between the school district and the construction manager is to avoid the requirements of the public bidding law. Assuming that the public bidding statute is to be followed, then the answer given under paragraph number one (1) above should suffice. On the other hand, it is the school district acting through its board, rather than the construction manager, who should control what is to be accomplished within the scope of the project, and the original plans and specifications should contemplate that bids are to be let in a certain sequence so that a provision may be made for acceptable alternate proposals within the allowable fixed cost.

III

Your letter also refers to the fact that the school board has a substantial amount of money in the school house fund as a result of the two and one-half mill tax levy voted several years ago which is available for the purpose of building and equipping school buildings and purchasing sites in the district. You ask if this money may be used to let contracts for gradings, footings and foundation and structural steel for the school house project. It appears from your statement that the proposition voted upon by the electors of the district is sufficiently broad to permit the money raised by the tax levy to be used for this purpose.

May 17, 1974

ELECTIONS: Chapter 43, Code of Iowa, 1973. Where the number of candidates running for nomination as candidates for at-large supervisor seat is so numerous that some would not receive the required number of votes to be placed on the ballot for the general election then the nominees for the supervisor seats to be filled would be selected at the county convention. (Nolan to Kiser, State Representative, 5-17-74) #74-6-2

The Honorable Jean Kiser, State Representative: Pursuant to your request for an attorney general's opinion, we have considered the situation you described in Scott County, where a number of candidates in each of the two major political parties have announced their candidacy for the three supervisor seats to be elected at large. Your recent letter asks:

1. What percentage is necessary for a candidate to be nominated, since it is nearly impossible for one candidate to get 35% of the vote in the primary election.

2. In the event no candidate gets 35%, does this decision go to a County Convention?

The following language from §37, Chapter 136, Acts of the 65th General Assembly, First Session, which amend §43.42, Code of Iowa, 1973, is controlling:

". . . When two or more nominees are required, as in the case of at-large elections, the nominees shall likewise be the required number of persons who receive the greatest number of votes cast in the primary election by the voters of the nominating party, but no candidate is nominated who fails to receive thirty-five percent of the number of votes found by dividing the number of votes cast by voters of the candidate's party for the office in question by the number of persons to be elected to that office. If the primary is inconclusive under this paragraph, the necessary number of nominations shall be made as provided by section forty-three point ninety-seven (43.97), subsection one (1) of the Code."

Accordingly, we advise:

1. In the event only one of the candidates receives sufficient votes to be nominated and to have his name appear on the general election ballot, the nominees for the remaining supervisor seats to be filled (no candidate receiving the required thirty-five percent of the vote) would be selected at the county convention.

2. In the event no candidate gets the required thirty-five percent of the vote, then the county convention shall nominate all of the supervisor candidates pursuant to §43.97 of the Code.

May 17, 1974

CITIES AND TOWNS: Reimbursement to a county — §§306.10 and 332.3, Code of Iowa, 1973. Under Home Rule, a city may enter into an agreement to reimburse a county for damages paid by the county on account of improvements made to a city airport. The Board of Supervisors may defer action on closing a road or make it contingent upon the happening of another event. (Blumberg to Smith, O'Brien County Attorney, 5-17-74) #74-5-16

Mr. R. T. Smith, County Attorney: We are in receipt of your opinion request of May 1, 1974 regarding the closing of a county road. The facts, as stated by you, are that the city of Sheldon wishes to improve its airport with federal funds. Said improvement will consist of extending a runway. There is a county road which abuts the area of the extension. Federal Aeronautics Administration rules provide for clearance around a runway. Such a clearance here would necessitate closing a portion of the road. The federal authorities will not invest any federal funds until the clearance requirements are met. Your questions, as stated in your request and in subsequent conversations, and based upon the assumption that the county closes the road, are whether a Board of Supervisors may agree to close or close a road subject to a future event occurring, and whether the city can agree to reimburse the county for any damages paid on account of the closing.

In response to your first question, section 306.10 of the Code provides that the board in control of a highway may, upon its own motion, vacate or close it. The Board of Supervisors would be the body in control of the road in question and would have the general powers set forth in §306.10. Section 332.3 of the Code sets forth powers that the supervisors may exercise at its meetings. Subsections 2, 3, 4 and 6 of that section allow the supervisors to make rules not inconsistent with existing laws, adjourn from time to time, make orders concerning corporate property of the county, and represent and manage property not provided for in any other provision of law. Within these general powers is the inherent power to defer rulings and make rulings and orders contingent upon other events. With respect to your fact situation, we see no prohibition of the supervisors defering an order closing the road until the federal money is granted, or the project is completed.

With respect to your second question, the home rule amendment of the Constitution provides that municipalities may do anything in furtherance of local affairs not inconsistent with the laws of the State. The Legislature or the Constitution must now specifically prohibit an Act of a municipality.

We can find no prohibition in the Code barring an agreement of this nature on behalf of the city. Nor do we find it to be inconsistent with any existing statute. Therefore, we are of the opinion that the city may enter into an agreement to reimburse the county for any damages paid by the county as a result of the improvement of the city's airport.

May 23, 1974

MOTOR VEHICLES: Trailers. §321.310, Code of Iowa, 1973. A trailer may not be towed behind another trailer unless it is: (1) a four-wheeled trailer towed by a truck tractor or road tractor registered at ten tons or more, or; (2) a farm oriented vehicle within the meaning of §321.310. (Voorhees to Nelson, Assistant County Attorney, 5-23-74) #74-5-17.

Mr. David M. Nelson, Assistant County Attorney: This is in response to your request for an opinion on the following question:

"I want to know if a person can tow a trailer behind a motor vehicle and fasten another trailer to the one being towed by the motor vehicle if it is securely fastened, as well as properly fastened, to the frame of the first towed trailer, which is defined as a vehicle."

We believe §321.310 of the Code of Iowa, 1973, is controlling here. That section states as follows:

"No motor vehicle shall tow any four-wheeled trailer with a steering axle, or *more than one trailer or semitrailer,* or both in combination, with the exception that this section shall not apply to any motor truck, truck tractor or road tractor registered at a combined gross weight of ten tons or more nor to a farm tractor towing a four-wheeled trailer, or to any farm tractor or motor vehicle towing implements of husbandry, or a wagon box trailer used by a farmer in transporting produce, farm products or supplies hauled to and from market. Any four-wheeled trailer towed by a truck tractor or road tractor shall be registered under the semitrailer provisions of §321.122, provided, however, that the provisions of this section shall not be applicable to motor vehicles drawing box trailers used by a farmer in transporting produce, farm products or supplies hauled to and from market." (Emphasis added).

In light of the above statutory provisions, it is our opinion that unless the vehicle is registered at ten tons or more, or if it is a farm oriented vehicle, within the exceptions of §321.310, only one trailer may be pulled behind a motor vehicle.

May 23, 1974

STATE OFFICERS AND DEPARTMENTS: Iowa State Fair Board — §173.14(6), 1973 Code of Iowa. The Iowa State Fair Board may lease or rent any state fair building or facility to a private person or commercial interest for the purpose of making sales to the general public, either through the medium of an auction, or by any other accepted business sales method, so long as the building or facility is not needed for a state fair purpose. (Haskins to Fulk, Manager, Iowa State Fair, 5-23-74). #74-5-18.

Kenneth R. Fulk, Manager, Iowa State Fair: You ask our opinion as to the following three questions:

"1. May the Iowa State Fair Board lease or rent any state fair building or facility to a private person or commercial interest for the purpose of making sales to the general public, either through the medium of an auction or by any other accepted business sales method?

"2. May the Iowa State Fair Board permit private persons or commercial interests to hold a public auction or to make sales to the public from a building or other facility leased or rented from the fair board?

"3. Can the Iowa State Fair Board refuse to so permit private persons or commercial interests even if a reasonable fee is offered?"

The answer to all three questions is basically "yes."

§173.14, 1973 Code of Iowa, sets forth the powers of the Iowa State Fair Board. That section states in relevant part as follows:

"The state fair board shall have the custody and control of the state fairgrounds, including the buildings and equipment thereon belonging to the state, and shall have power to:

* * *

"6. The state fair board may grant a written permit to such persons as it deems proper to sell fruit, provisions, and other articles not prohibited by law, under such regulations as the board may prescribe."

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

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

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

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

Likewise, we believe that the fair board has discretion to refuse to permit private persons or commercial interests to hold a public auction or to make sales from a building or other facility leased or rented from the fair board. §173.14(6) states that the fair board "may" grant a written permit to sell articles "to such persons as it deems proper." The use of the word "may" and the language "to such persons as it deems proper" clearly confers discretion. It makes no difference that the persons or commercial interests seeking to lease facilities offer a reasonable fee. The fair board may simply decide that it will placed a limit on the amount of selling that may go on fair property. This is its prerogative under the statute.

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

May 23, 1974

HIGHWAYS: Equalizing the condition of primary roads — §313.8, 1973 Code of Iowa. The Highway Commission must make the conditions of the primary roads as equal as possible. The only factor that must be considered is the condition of the primary road. (Schroeder to Blouin, Kennedy and Tieden, State Senators and Carr, Clark, McCormick and Norpel, State Representatives, 5-23-74) #74-5-19

Honorable Michael T. Blouin, State Senator; Honorable Gene V. Kennedy, State Senator; Honorable Dale L. Tieden, State Senator; Honorable Robert M. Carr, State Representative; Honorable Joseph W. Clark, State Representative; Honorable Harold C. McCormick, State Representative; Honorable Richard J. Norpel, State Representative: This is in reply to your letter of April 8, 1974, requesting an opinion on Section 313.8, Code of Iowa, 1973. Section 313.8 states:

"313.8. Improvement of primary system. The state highway commission shall proceed to the improvement of the primary road system as rapidly as funds become available therefor until the entire mileage of the primary road system is built to established grade, bridged, and surfaced with pavement or other surface suited to the traffic on such road. Improvements shall be made and carried out in such manner as to equalize the condition of the primary roads, as nearly as possiable, in all sections of the state."

In your letter you ask three questions about §313.8:

1. What does this section require the Highway Commission to do "to equalize the conditions of the primary roads, as nearly as possible, in all sections of the state?"

2. What factors must be taken as a consideration by the Highway Commission in equalizing the condition of the primary roads?

3. Must the Highway Commission consider the following factors:

   a. Adequacy of existing roads?
   b. Population?
   c. Degree of urbanization?
   d. Degree of industrialization?
   e. Trade activity?
   f. Daily vehicle — miles of travel?

The applicable part of this Section was first adopted in 1927 as part of Chapter 101, Acts 42nd G.A. and stated "Improvements shall be made and carried on in such manner as to equalize work in all sections of the state, as nearly as possible, giving special attention to bringing the sections of the state, where improvements have been retarded, to an equality on the same basis with the more advanced sections."

Chapter 101, Acts 42nd G.A. gave control of the primary highways in the state to the Highway Commission. Prior to the adoption of this Act, the primary highways differed from county to county. The purpose of this section was to have uniformity on the primary road system of the state as one traveled from county to county.

To "equalize" means to make equal or to cause to correspond as compared with something. 14A, *Words and Phrases,* page 439. In answer to your first question, the Highway Commission must make the conditions of the existing primary roads as nearly equal as possible throughout the entire state.

In answer to your second question, the Highway Commission must only consider the conditions of the existing highways. If the highways are below the existing standard for the state, the Highway Commission must upgrade the road to the standard throughout the state. none of the factors listed in your third question need be considered by the Highway Commission. The factors that you state are factors that could be used in determining where primary highways are needed in an area of the state but are not factors to determine whether or not the conditions of the roads are equal throughout the state. In other words, the entire state could, on the basis of those factors, need better roads but the conditions of the highways could be equal.

In summary, it is my opinion that the Highway Commission's duties under Section 313.8, Code of Iowa, 1973, are to ensure that the conditions of the existing primary highways are of nearly equal condition as is possible. That the only factor that need be considered is the condition of the highways.

May 23, 1974

COUNTIES: Board of Supervisors: Poor Fund: Juvenile Probation Officer. §§231.10, 232.1, 232.33(6), 232.34(6), 232.51, 232.52(5), 252.1, Code of Iowa, 1973. Board of supervisors may authorize use of the poor fund by the Juvenile Probation Officer to cover the cost of care and treatment of minors placed in his charge if said minors qualify under the definition of poor entitled to receive said funds. (Boecker v. Braun, Assistant Blank Hawk County Attorney, 5-23-74) #74-5-20

Mr. Robert W. Braun, Assistant County Attorney: You have asked for an opinion of the Attorney General, as to the following question:

"Whether the Chief Probation Officer of the Juvenile Probation Office can order care and treatment of a child under his authority and order that the payments be made from the County Poor Fund?"

The probation officer, under the following Code sections, when directed by the court to take control of the supervision of the child, can authorize whatever proper care and treatment are needed.

Section 231.10, Code of Iowa, 1973, reads:

"231.10 Powers and duties — office and supplies. Probation officers, in the discharge of their duties as such, shall possess the powers of peace officers. They shall be furnished by the county with a proper office and all necessary blanks, books, and stationery. It shall be the duty of said probation officers to make such investigation as may be required by the court; to be present in court in order to represent the interests of the child when the case is heard; to furnish to the court such information and assistance as the judge may require, and to take such charge of any child before and after trial as may be directed by the court."

Section 232.1, Code of Iowa, 1973, reads:

"232.1 Rule of construction. This chapter shall be liberally construed to the end that each child coming within the jurisdiction of the juvenile court shall receive, preferably in his home, the care, guidance, and control that will conduce to his welfare and the best interests of the state, and that when he is removed from the control of his parents, the court shall secure for him care as nearly as possible equivalent to that which he should have been given."

The court can order the care and treatment of a child and the means used for assuring this is done, is the probation officer.

Section 232.33(6) Code of Iowa, 1973, reads as follows:

"232.33 Disposition of case of neglect or dependency. If the court finds that the child is neglected or dependent, the court shall enter an order making any one or more of the following dispositions of the case:

* * *

"6. If the child is in need of special treatment or care for his physical or mental health, the court may order the parents, guardian, or custodian of the child to provide such treatment or care. If the parents, guardian, or custodian fail to provide the treatment or care, the court may order the treatment or care provided."

Section 232.34(6), Code of Iowa, 1973, reads as follows:

"232.34 Disposition of case of delinquency. If the court finds that the child is delinquent, the court shall enter an order making any one or more of the following dispositions of the case:

* * *

"6. If the child is in need of special treatment or care for his physical or mental health, the court may order such treatment or care provided by the parents, guardian, or custodian of the child. If the parents, guardian, or custodian fail to provide the treatment or care, the court may order the treatment or care provided."

Therefore, since this care and treatment may be authorized who must bear the cost? Sections 232.51 and 232.52(5) Code of Iowa, 1973, provides for these costs to be charged against the county. Section 232.51, Code of Iowa, 1973, reads:

"232.51 Expenses. Whenever legal custody of a minor is transferred by the court or whenever the minor is placed by the court with someone other than the parents or whenever a minor is given physical or mental examinations or treatment under order of the court and no provision is otherwise made by law for payment for the care, examination, or treatment of the minor, the costs shall be charged upon the funds of the county in which the proceedings are held upon certification of the judge to the board of supervisors. Except where the parent-child relationship is terminated, the court may inquire into the ability of the parents to support the minor and after giving the parents a reasonable opportunity to be heard may order the parents to pay in the manner and to whom the court may direct, such sums as will cover in whole or in part the cost of care, examination, or treatment of the minor. If the parents fail to pay the sum without good reason, the parents may be proceeded against for contempt or the court may inform the county attorney who shall proceed against the parents to collect the unpaid sums or both.

"Any such sums ordered by the court shall be a judgment against each of the parents and a lien as provided in section 624.23. If juvenile court jurisdiction has been lodged in the municipal court, all such orders and judgments made by that court shall be transferred by the clerk thereof to the district court as provided in section 602.43.* If all or any part of the sums that the parents are ordered to pay, is subsequently paid by the county, the judgment and lien shall thereafter be against each of the parents in favor of the county to the extent of such payments." [footnote omitted]

Section 232.52(5) reads:

"232.52 Expenses charged to county. The following expenses upon certification of the judge or upon such other authorization as provided by law are a charge upon the county in which the proceedings are held.

* * *

"5. The expense of treatment or care ordered by the court under authority of subsection 6 of section 232.33 or subsection 6 of section 232.34."

Section 232.51 refers to the "funds of the county", and since the Poor Fund is a County Fund, it may be used if the minor qualifies as "poor" within the meaning of section 252.1, Code of Iowa, 1973.

Section 252.1 defines those for whom the poor fund may be used and, among those, are persons deemed to need aid by the board of supervisors.

Section 252.1 reads as follows:

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

The Board of Supervisors is given a broad discretionary power to determine who qualifies for funds and the use of the fund requires its approval. Therefore, it may determine that children under the supervision of the probation officer qualify and allow him to use the fund to cover the costs of their care and treatment. Other appropriate county funds must be used, if necessary, in instances where the costs cannot be met from the poor fund.

May 29, 1974

COUNTY AND COUNTY OFFICERS: §§332.28, 368.3, 137.6 and 137.16, Code of Iowa, 1973. A county may not abate a nuisance and assess the property owner for the expenses incurred by the county. (Beamer to Harbor, Chief Clerk of the House, 5-29-74) #74-5-21

William H. Harbor, Chief Clerk of the House: This opinion is in response to your request dated April 3, 1974 regarding county assessments. In your request you stated as follows:

"A county, acting for itself and a city as a board of health, went into a city of approximately 7,000 and cleaned up a rat harborage, due to the state of health being jeopardized by virtue of its being there, because the owners of the property did not have the finances or were unwilling to clean up same.

"The cost of the clean-up was charged back to the property but a subsequent state audit stated that such an activity could not be chargeable back to the property, that the county could not act for the city or itself in this situation, that the city should have found the way to do this clean-up work and then find a way to collect."

The question is: "Can a county go into a city, clean up an undesirable situation such as a rat harborage and then charge the cost of same back to the property?"

In his letter of April 5, 1974 Mr. Dale H. Rogers, Vice-chairman Montgomery County Board of Health, provided the following background information concerning your request:

"As vice-chairman of the Montgomery County Board of Health, I have been requested a couple of times to look into problems of rat harborage, garbage, weeds and junk in general on a couple of properties in the City of Red Oak. As Red Oak has a population of approximately seven thousand, by law it is not required to have a health officer unless the City desires one and it does not. This throws all health problems back to the County Board of Health.

"We had one particular situation that was very bad and the owner had neither the money all at one time to pay to clean it up, nor could he find anyone to do the work. In order to take care of the situation and quiet down the neighborhood, we had the property cleaned up and the County paid for it. This amount was added to the owner's property tax to be paid over a ten-year period. Now the State man auditing the County books says that this is not a legal procedure. According to him this should be handled in some other way. Just how, I am not sure.

"What we require is an opinion from the Attorney General's office as to whether we are right or wrong in our handling of this matter. If we were right, fine. If we are wrong, then we need direction from the Attorney General as to the proper procedure to follow."

It is the opinion of this office that county officials may not abate nuisances on property within the boundaries of one of its cities and then assess the cost of such abatement against the property owner. This office is well aware of the broad powers entrusted to local boards of health under Chapter 137, 1973 Code of Iowa. We are also aware of the authority vested in the county board of supervisors to abate nuisances under Section 332.28, Code of Iowa. However, a review of county taxing and assessment powers did not reveal any authority for an assessment as you have described. Governmental bodies have only those powers granted them or arise from fair implication. Such grants of power are strictly construed against authority claimed. *Cedar Rapids Community School District, Linn County v. City of Cedar Rapids,* 1961, 252 Iowa 205, 106 N.W.2d 655.

Under Section 368.3 of the Code, all cities and towns are empowered to abate, restrain or prohibit any nuisance and assess the cost thereof against the offending property. Section 368.3 further provides as follows:

"The costs so assessed may be paid in annual installments not to exceed ten in number, payable in the manner and bearing interest as provided in section 391.60. The assessment may be, at the discretion of the council, as provided in this section and section 368.4."

Section 137.6 of the Code sets forth the powers of local boards of health. Section 137.6(3) provides a method which you might consider in resolving your problem. It provides that local boards of health have the authority as follows:

"May be agreement with the council of any city or town within its jurisdiction enforce appropriate ordinances of said city or town."

Section 137.6(3) of the Code, in conjunction with Section 368.3 provides a means by which a local board of health could agree to have the city abate the

nuisance and then have the city or town assess such clean-up expenditure against the property.

An alternative solution to this problem would be for the county to pay for the abatement of nuisances from their "local health fund" or have the city pay for the abatement from a similar fund. Local health funds are provided for in the Code Section 137.16 as follows:

"The treasurer of each city which has a city board and the treasurer of each county shall establish a 'local health fund.'"

There is precedent for the use of local health funds for the problem described in your request.

Finally, Section 137.61, 1973 Code of Iowa, provides criminal penalties for any person who violates Chapter 137 or the rules and regulations of a local board of health. You will note that each additional day of neglect or failure to comply after notice is given constitutes a separate offense.

May 30, 1974

COUNTIES: County Funds. Chapter 28E. Under an appropriate agreement for the joint exercise of governmental power, a county probation officer may be employed as a night supervisor at a youth guidance program and paid from funds contributed to the program by the county. (Nolan to Yenter, Deputy State Auditor, 5-30-74). #74-5-22

Mr. Ray Yenter, Deputy Auditor: This is written in response to your letter requesting an opinion as to whether or not county probation officers may serve on the staff as employees of the "youth Guidance Program" and be compensated therefore, in addition to their compensation as probation officers.

The Youth Guidance Program is a joint-governmental project involving the Des Moines Community School District, Polk County and the Law Enforcement Assistance Administration. The project is intended to prevent predelinquent youths from becoming involved in serious crimes by providing evening classes and recreational activities.

It is proposed that probation officers would be employed as evening supervisors and paid an hourly wage. They would be paid by contributions to the program from the county general fund under a Chapter 28E agreement for the joint exercise of governmental powers by the three participating agencies.

It is my opinion that the probation officers of the Polk County Juvenile Court may be employed as evening supervisors in the Youth Guidance Program, and further that they may be paid an hourly wage for such services. It is my understanding that no children involved in the program are, in fact, in the custody of any probation officer. The scope of services to be rendered is outside the scope of their statutory duties.

Accordingly, the statutory limitation on the amount which a probation officer may receive in salary as a county officer under §§231.8 and 231.10, Code of Iowa, 1973, does not preclude the contemplated compensation for services unrelated to the statutory duties of probation officers.

There is no incompatibility of office because the job of evening superintendent is not an "office" within the common meaning of the term. Further, the mere fact that the individual is paid money from two county budget

allocations is not improper where the services are actually furnished to the county under an authorized program and where there is no express statutory prohibition.

May 31, 1974

ELECTIONS: Campaign Financing, income tax check-off. §§19 and 26, Chapter 138, 65th G.A., First Session (1973). Where a taxpayer on his income tax return checks the boxes to contribute one dollar to both the democratic and republican parties the director is not permitted to allocate 50¢ to each party. In this situation there is no contribution to either party. (Haesemeyer to Rehling, Director, Campaign Finance Disclosure Commission, 5-31-74). #74-5-23

Charles G. Rehling, Chairman, Campaign Finance Disclosure Commission: Reference is made to your letter of May 25, 1974, in which you state:

"The Campaign Finance Disclosure Commission has recently submitted three chapters of rules to implement the law governing campaign financing.

"Chapter two of these rules have been approved by your office. The Departmental Rules Review Committee has the following questions about a possible addition to rule 2.1 as follows:

"1. A single taxpayer indicates he wants to contribute to the election fund but marks his return for both the Republican and Democratic parties. Can the Director allocate the $1.00 contribution 50¢ to each party?

"2. Joint taxpayers each indicate a desire to contribute $1.00 but one or both mark the contribution for both parties. Can the director allocate 50¢ to each party if both are marked?"

Sections 19 and 26, Chapter 138, 65th G.A., First Session (1973) provide:

"Any person whose state income tax liability for any taxable year is one dollar or more may designate one dollar of such liability to be paid over to the the 'Iowa election campaign fund' for the account of any specified political party, as defined by section forty-three point two (43.2) of the Code when submitting his state income tax return to the department of revenue. In the case of a joint return of husband and wife having a state income tax liability of two dollars or more, each spouse may designate that one dollar be paid to any such account in the fund. The director of revenue shall revise the income tax form to allow the designation of political contributions to a political party on the face of the tax return and immediately above the signature lines."

"The director of revenue shall provide space for this campaign finance income tax check-off on the most frequently used Iowa income tax form. An explanation shall be included which clearly states that this check-off does not constitute an additional tax liability. The form shall provide for the taxpayer to designate that the check-off shall go to the political party of his choice."

It is to be observed that §19 permits a taxpayer to designate that $1.00, no more no less, may be paid over to the election campaign fund for the account of any specified political party. The section does not authorize a taxpayer to designate more than one party nor does it permit him to designate that a lesser amount be paid. Section 26 requires that the income tax form provide space for the taxpayer to designate that the check-off shall go to the political party of his choice. It does not speak in terms of political party or parties.

In view of the foregoing, it is our opinion that the director of revenue may not allocate contributions 50¢ to each party in either of the situations you describe.

June 3, 1974

STATE OFFICERS AND DEPARTMENTS: Iowa Reciprocity Board — §§326.2(5), 326.5, 326.6 and 326.7, Code of Iowa, 1973. The Reciprocity Board may allow proportional registration of trucks displaying local or reduced fee plates, but only by agreement with one or more jurisdictions. (Blumberg to Howe, Executive Secretary, Iowa Reciprocity Board, 6-3-74) #74-6-1

Richard D. Howe, Executive Secretary, Iowa Reciprocity Board: We are in receipt of your opinion request of May 13, 1974, regarding a prorate question. You specifically asked:

"Can the Iowa Reciprocity Board require an individual or firm operating Nebraska based commercial vehicles displaying a local and/or local commercial license plate to prorate registration fees with the state of Iowa?"

The license plate in question is one for commercial trucks operating within a five or ten mile radius of a city depending upon the weight of the vehicle. Said plates can be purchased for a reduced fee, and are only available to Nebraska residents.

Section 326.5 of the 1973 Code permits the Reciprocity Board to enter into reciprocity agreements with officials of other jurisdications. Section 326.6 provides that the Reciprocity Board, pursuant to §326.5, may provide for proportional registration of fleets of commercial vehicles between this State and other jurisdictions. An alternative proportional registration system is set forth in §326.7. We can find nothing in either section which limits proportional registration to the type of license or fees paid for a license by a non-resident.

However, §326.2(5) defines proportional registration to mean a "division and distribution of registration fees imposed on commercial vehicles between *two or more* jurisdictions . . . ." [Emphasis added] When this definition is read with §§326.6 and 326.7, it is apparent that there may only be proportional registration between two or more jurisdictions. Iowa may not allow proportional registration by itself.

Accordingly, we are of the opinion that the Reciprocity Board may allow proportional registration of trucks displaying the Nebraska local plates. However, same cannot be done in the absence of an agreement with one or more additional jurisdications.

June 4, 1974

COUNTIES: Payment of Claims, §§164.28, 332.3(5). When a claim for indemnity for a condemned animal has been duly certified by the Iowa Department of Agriculture, such claim must be allowed by the county board of supervisors and an appropriate auditor's warrant issued thereon in the amount certified. (Haesemeyer to Johnson, Assistant Fayette County Attorney, 6-4-74) #74-6-3

J. G. Johnson, Assistant Fayette County Attorney: In your letter of March 4, 1974, you ask for an Attorney General's opinion on the following question:

"When a claim, duly certified by the State Department of Agriculture, has been presented to a county under Section 164.21, as amended, does the county have the authority to investigate the facts behind the claim, or is it mandatory upon the county to pay the claim as certified."

Chapter 164, Code, 1973, provides for county indemnification to private individuals whose livestock are condemned. Sections 164.20 and 164.21, as amended by Chapter 170, Acts, 65th G.A., §6 (1973) provide for appraisal of the animals and specifies when payment shall be allowed. Section 164.28, Code, 1973, further states:

"All claims presented under authority of this chapter and chapter 163A shall be certified by the department [of agriculture] and filed with the county auditor, who shall present them to the board of supervisors and such board shall allow and pay the same as other claims against the county."

Claims against the county are paid by warrants issued by the auditor, and such warrants shall not issue until authorized by the board. Section 332.3, Code, 1973,

"The board of supervisors at any regular meeting shall have power . . . * * *

"5. To examine and settle all accounts of the receipts and expenditures of the county, and to examine, settle, and allow all claims against the county, unless otherwise provided by law."

Section 333.2, Code, 1973,

"Except as otherwise provided, the auditor shall not sign or issue any county warrant, unless the board of supervisors by recorded vote or resolution shall have authorized the same, and every such warrant shall be numbered and the date, amount, and number of the same, and the name of the person to whom issued, shall be entered in a book to be kept in his office for that purpose."

While it is arguable that ". . . the same as other claims aginst the county" language of §169.28, implies that the county board may examine state-certified claims before allowing payment thereon, it is our opinion that the legislative intent was to create a uniform state-wide system for condemnation of and reimbursement for infected livestock. We therefore conclude that the "shall allow" language in §164.28 is controlling and indicates that once a claim is certified by the Department of Agriculture the county board has no discretion to examine but, rather, must pay that claim in the amount certified.

June 17, 1974

STATE OFFICERS AND DEPARTMENTS: Constitutional law, compatibility of offices of member of general assembly and soil conservation district commissioner. Art. III, §22, Constitution of Iowa; Chapter 467A, Code of Iowa, 1973. Membership in the general assembly of Iowa is not incompatible with the office of soil conservation district commissioner. (C. Peterson to Greiner, Director, Department of Soil Conservation, 6-17-74) #74-6-4

Mr. William H. Greiner, Director, Department of Soil Conservation: You have verbally requested the opinion of the Attorney General as to whether the offices of soil conservation district commissioner and member of the general assembly are incompatible.

Since soil district commissioners serve without pay, (§467A.6, Code of Iowa, 1973) this is not a lucrative office and does not fall within the constitutional provision prohibiting members of the general assembly from holding other lucrative federal or state office. Art. III, §22, Constitution of Iowa. Nor do we find any statute prohibiting concurrent services in these public offices.

We have also considered the possibility that these offices are incompatible at common law. The leading Iowa case enunciating the common law on incompatibility of public offices is *State, ex rel. LeBuhn v. White,* 1965, 257 Iowa 606, 133 N.W.2d 903, wherein the court stated:

"There is no constitutional or statutory provision which prohibits defendant from holding the two offices in question at the same time. The case therefore turns on the well settled common law rule:

"If a person while occupying one office accept another incompatible with the first, he ipso facto vacates the first office, 'and his title thereto is thereby terminated.' State, ex rel. Crawford v. Anderson, 155 Iowa 271, 272 136 N.W. 128, Ann.Cas. 1915A 523; Bryan v. Cattell, 15 Iowa 538, 550.

"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 the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power', or where the duties of the two offices 'are inherently inconsistent and repugnant.' State v. Bus, 135 Mo. 338 (36 S.W. 639, 33 L.R.A. 616); Attorney General v. Common Council of Detroit, supra; State v. Goff, 15 R.I. 505 (9 Atl, 226, 2 Am. St. Rep. 921).

"A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from consideration of public policy, for an incumbent to retain both.' State, ex rel. Crawford v. Anderson, 155 Iowa 271, 273, 136 N.W. 128."

The *White* case involved concurrent service as a member of a local school board and the county board of education. The court found that these offices were incompatible since the community school board is subordinate to the county board and subject to its direct revisory power. The general assembly does not have direct revisiory power over soil conservation districts and the commissioners thereof. To be sure, the general assembly can review and amend the soil conservation district enabling statutes at any session but this power to amend extends generally to all soil conservation districts and commissioners and the general assembly has this same power with respect to all programs, activities and conduct within its territorial jurisdiction. This is not the "revisory" power held by one office over another that is prohibited by the common law rule enuncated in *White* above.

The general assembly makes no direct appropriation to soil conservation districts. Rather, funds are appropriated to the Department of Soil Conservation which state agency is authorized by statute to "render financial aid and assistance to soil conservation districts." Such financial assistance is rendered by the Department on a need basis for office supplies, postage, etc., in the amount of about five hundred dollars ($500.00) per year per district.

In summary, we are of the opinion that the offices of soil conservation district commissioner and member of the general assembly are not incompatible in that holding both offices at the same time is not prohibited by statute or the constitution; the functions of one office are not subordinate to the other or

subject to its revisory power or power to appropriate funds; and the nature and duties of the two offices are not such as to render concurrent service therein improper as a matter of public policy.

June 17, 1974

TAXATION: Tax on grain handled — §428.35, Code of Iowa, 1973; Ch. 1020, Acts 64th G.A., Second Session, §§3, 69-87, as amended by H.F. 1028, 65th G.A., Second Session. For purposes of the extended fiscal year the tax on grain handled under §428.35 is collected by increasing the statutory millage rate by fifty percent. The taxes are payable in three installments in the same manner as personal property taxes. (Capotosto to West, State Representative, Fortieth District, 6-17-74) #74-6-5

The Honorable James C. West, State Representative: You have requested an opinion of the Attorney General regarding the effect of H.F. 1028, 65th G.A., Second Session, on the annual excise tax on grain handled, which is imposed by §428.35, Code of Iowa, 1973. Specifically, your inquiry is as follows:

"H.F. 1028 established the year and a half necessary to convert the fiscal year, and I would like an opinion as to whether this bill allows a change in a section 428.35. As I have read the bill, it seems to deal with millage; and the grain tax in 428.35 is an excise tax. The Marshall County Assessor has billed this in one billing date which I assume should be in three payments, but I wonder if any change can be made since it is a different tax. The Department of Revenue has informed me that there was a catch-all section in the bill, but I am unable to see how that applies to this particular tax.

I also have some question as to using a figure that will be a year and a half old. It seems that in moving forward to get on the fiscal year and using the old figure and adding one-half may not be realistic, but I assume that it would require legislation to make that change."

As you are undoubtedly aware, H.F. 1028 is a series of amendments to Ch. 1020, Acts 64th G.A., Second Session. Chapter 1020, as amended by H.F. 1028 implements the transition of the budget year for Iowa's cities, counties and other political subdivisions from a calendar year to a fiscal year. In order to facilitate the continuity of local property tax collection during the change over from calendar to fiscal year, the legislature created an extended fiscal year. Chapter 1020, Acts 64th G.A., Section 3. Property taxes are customarily paid in two equal installments, the first by March 31 and the second by September 30. As you are probably aware, property tax collection always runs a year behind. That is, 1971 taxes are actually paid by March 31 and September 30, of 1972; 1972 taxes were paid by March 31 and September 30 of 1973. Chapter 1020 created a change in this collection process with respect to property taxes for 1973. That statute increased all millage rates by fifty percent and made the 1973 taxes payable over a period of eighteen months in three installments. Hence, property taxes for 1973 are payable on or before March 31, 1974, September 30, 1974, and March 31, 1975. All three installments constitute the payment of the 1973 taxes. They are based on the assessed value of the property as of January 1, 1973. Section 428.4, Code of Iowa, 1973. Collection of property taxes for subsequent years will then be on a fiscal year basis. That is, 1974 taxes will be collectible by September 30, 1975, and March 31, 1976, and so on for all later years. Under §428.35(2) Code of Iowa, 1973, an annual excise tax on the handling of grain is imposed at a rate of one-fourth mill per bushel. Section 428.35(2) also provides that grain so handled is exempt from "taxation as property". Thus, the tax is not a property tax. The

procedure for reporting is found at §428.35(3). Persons handling grain must file by March 1 of each year a return showing the number of bushels handled by him during the preceding calendar year. The assessor of the local assessing jurisdiction thereupon assesses to each taxpayer the number of bushels on which he is to be taxed. From that point on, the grain handling tax is levied and collected in the same manner as general personal property taxes. Section 428.35(6) provides:

"Such specific tax, when determined as aforesaid, shall be entered in the same manner as general personal property taxes on the tax list of the taxing district, and the proceeds of the collection of such tax shall be distributed to the same taxing units and in the same proportion as the general personal property tax on the tax list of said taxing district. All provisions of the law relating to the assessment and collection of personal property taxes and the powers and duties of the county treasurer, county auditor and all other officers with respect to the assessment, collection and enforcement of personal property taxes shall apply to the assessment, collection and enforcement of the tax imposed by this section."

The question thus arises as to how the tax on grain handled is affected by conversion of cities and counties to a fiscal year system. Chapter 1020 contains no specific provision with respect to this tax. Neither does H.F. 1028. Both, however, expressly alter the procedures for the levy and collection of general personal property taxes. General personal property taxes for 1973 are assessed as of January 1, 1973, and are levied in September of 1973. However, 1973 personal property taxes have an increased millage rate and are collectible over a period of eighteen months in three installments. Since the excise tax on grain handling is collected in the same manner, as other personal property taxes under §428.35(6) Code of Iowa, 1973, it is the Opinion of the Attorney General that for purposes of the 1973 grain tax (based upon number of bushels handled by taxpayer in calendar 1972), the statutory millage rate should be increased by fifty percent and the tax collected in three installments in 1974 and the first half of 1975. The law clearly dictates this procedure, even though the tax on grain handling and the personal property tax are different types of taxes. The only real difference between the tax on grain handled and other personal property taxes is the measure of the tax. Whereas the personal property tax is an ad valorem tax measured by fair market value of the property, the grain tax is an excise tax measured by the number of bushels handled. The local assessor assesses the personal property tax by assigning a dollar amount to each taxpayer while the grain tax is assessed by attributing a certain number of bushels to the taxpayer. Although the taxes may be different in their nature, the legislature has dictated that the mode of collection for each tax be identical. Therefore it is the opinion of the Attorney General that it is incumbent upon local tax collecting officials to proceed in the collection of this tax on grain handling in the same manner as they would proceed to collect personal property taxes. For purposes of the extended fiscal year this means that local officials should increase the millage rate from one-fourth mill per bushel to three-eights mill per bushel with payment in three installments in 1974 and 1975.

In the final paragraph of your request you point out that the number of bushels on which the tax on grain handling is based is a year and a half old by the time the tax is collected. This is true. For example, the 1973 tax will be paid as late as March 31, 1975. This tax is based upon the number of bushels handled by the taxpayer as far back as 1972. However, the remedy here, as you have pointed out is a legislative one.

June 17, 1974

CONSTITUTIONAL LAWS; CITIES AND TOWNS; COUNTIES AND COUNTY OFFICERS; CRIMINAL LAW; OBSCENITY: Amendments 1, 14, United States Constitution; §9, H.F. 1102, Acts of the 65th G.A. Recent decisions of the United States Supreme Court do not forbid a state from prohibiting its counties, municipalities, or other local units from passing obscenity laws or ordinances. (Haskins to Hill, State Senator, 6-17-74) #74-6-6

Honorable Eugene M. Hill, State Senator: You ask our opinion as to whether the state can prohibit the enactment of obscenity laws or ordinances by counties and municipalities or other local units. It is our opinion that recent decisions of the United States Supreme Court do not forbid a state from doing so. Your question conceals a complicated issue of state law relating to the effect of the Home Rule Amendment of 1968 in the Iowa Constitution. This issue is presently being litigated in the courts and we will not attempt to give an opinion on it at this time. We merely opine that recent decisions of the Supreme Court do not forbid the state from prohibiting counties, municipalities, or other local units from passing obscenity laws.

In *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2nd 419 (1973) and companion cases, the high court laid down the most recent set of standards for state regulation of obscenity. These standards are as follows:

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary *community* standards' would find that the work, taken as a whole, appeals to the prurient interest, . . ., (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." [Emphasis added] 93 S.Ct. at 2615.

Prompted by *Miller v. California,* the Iowa Supreme Court struck down one of Iowa's obscenity statutes (§725.3, 1973 Code of Iowa) as being unconstitutionally vague and overbroad. *See State v. Wedelstedt,* 213 N.W.2d 652 (Iowa 1973). The legislature then passed the present obscenity law, which is H.F. 1102, Acts of the 65th G.A. This bill prohibits the dissemination and exhibition of obscene material to a minor and essentially incorporates the *Miller v. California,* standards in defining obscenity. The provision of the bill in question prohibits municipalities, counties, or other local governmental units in Iowa from passing any obscenity laws. Past laws of such bodies are also voided. §9 of H.F. 1102 states:

"UNIFORM APPLICATION. In order to provide for the uniform application of the provisions of this Act relating to obscene material applicable to minors within this state, it is intended that the sole and only regulation of obscene material shall be under the provisions of this Act, and *no municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials.* All such laws, ordinances or regulations, whether enacted before or after this Act, shall be or become void, unenforceable and of no effect upon the effective date of this Act." [Emphasis added]

The issue is whether the reference in *Miller v. California* to community standards gives municipalities, counties, or other local units the right to pass their own obscenity laws despite the above section. It is assumed that such laws

would incorporate the definition of obscene material found in H.F. 1102. We believe that nothing in the Supreme Court decisions gives the mentioned right.

Before proceeding to a discussion of this issue, one point should be made The states are free under the federal constitution to de-regulate obscenity totally. In *Paris Adult Theatre v. Slaton,* 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), a companion case to *Miller v. California,* the court stated:

"The states, of course, may follow . . . a 'laissez faire' policy and drop all controls on commercialized obscenity, if that is what they prefer, . . ."

Since the states may drop all controls on obscenity, it inescapably follows that they can do as Iowa has done and proscribe the dissemination and exhibition of obscenity only with respect to minors and not for adults. Moreover, the power of a state to drop all obscenity controls also implies the power to prescribe a single state law on obscenity, as Iowa has done.

The requirement in *Miller v. California* that the material be evaluated in light of contemporary standards of the community should not be taken to mean that each community has the power to pass its own obscenity law. Rather, the community standards requirement means only that regardless of the level at which the obscenity law is passed — state, county, or municipality — the determination of whether the material in question is obscene must be evaluated in light of the contemporary standards of the community.

The United States Supreme Court has not yet stated what the relevant community is — whether it is the state or some lesser unit. Nor has the Iowa legislature in H.F. 1102 attempted to define the meaning of the word "community". But the question of what the "community" is is irrelevant to the present issue. The present issue is only whether the states are prohibited by the Supreme Court's recent decisions on obscenity from forbidding counties or municipalities from passing obscenity laws or ordinances. Nothing in these decisions prohibits the states from pre-empting the field of obscenity within state boundaries.

To reiterate, the United States Supreme Court has held only that regardless of the entity passing the obscenity law — be it state, county, parish, city or town, borough, or precinct, or other unit — that entity must apply contemporary standards of the community in determining whether material is obscene. The Supreme Court has not specified what entities, other than the United States and the states, can pass obscenity laws. The Court has not held that counties, municipalities, or other local units can pass such laws. The question of what entity or entities within the state shall regulate obscenity is left by the court entirely to the states themselves. If one state wishes to have both the state and its local units regulate obscenity, that is its federal constitutional prerogative. But if another state such as Iowa desires to have only the state and not its local units regulate obscenity, it may also do so. The Supreme Court has not, in other words, created a constitutionally guaranteed "local option" power of local units to pass obscenity laws. The issue of whether a county, municipality, or other local unit may pass its own obscenity law is purely a question of state law. The federal constitution is not at all involved on that issue. We intimate no opinion as to whether the Iowa, as opposed to the federal, constitution gives counties or municipalities the right to enact their own obscenity laws. We merely opine that the recent decisions of the United States Supreme Court interpreting the federal constitution do not forbid the states from prohibiting their local units from passing obscenity laws or ordinances.

June 17, 1974

BARBERING: S.F. 1093, 65th G.A., 1974 Session. The purpose of S.F. 1093 is merely to allow licensed cosmetologists to cut any person's hair; beyond this, it does not alter the separate schooling, licensing, or inspection of barbers and cosmetologists. (Haesemeyer to Rankin, Executive Secretary, Department of Health, 6-17-74) #74-6-7

Keith Rankin, Executive Secretary, Department of Health, Barbering Division: By your letter of May 10, 1974, you have requested an Attorney General's opinion concerning the effect of the recently enrolled S.F. 1093, Acts, 65th G.A., Second Session (1974) on the practices of barbering and cosmetology. In your letter you state:

"1. Does the amendment in *any* way alter the rules of each board for the operation of their respective schools, their respective requirements for instructors, and their individual examination and licensing procedures?

"2. Does the amendment provide any exemption from the present laws for students in either the cosmetology or the barber schools?

"3. Are barber schools to teach barbering as presently defined under the barber statutes and as interpreted by the Iowa Supreme Court?

"4. Are cosmetology schools to teach cosmetology as presently defined under the cosmetology statutes and as interpreted by the Iowa Supreme Court?"

Senate file 1093 is entitled "An Act Relating to Statutory Provisions Affecting the Legal Treatment of Male and Female Persons and to make an Appropriation". Section 27 of S.F. 1093 reads as follows:

"The provisions of this section shall not be construed as to permit any person other than a licensed barber or students in a barber school approved by the board of barber examiners or registered barber apprentice while pursuing a regular course of study on barbering to shave or trim the beard or cut the hair of any person for cosmetic purposes, except that licensed cosmetologists may cut the hair of any [female] person [and of any male person under twelve years of age]."

It is our opinion that S.F. 1093 was merely designed to end the controversy over the exclusion of licensed cosmetologists from the practice of cutting men's hair. It would appear the barbers and cosmetologists are still to be schooled, licensed, and inspected separately, and that the term barbering does not embrace all cutting of men's hair, but is, rather, a term of art which refers to the cutting of a person's hair by a licensed barber. Therefore, a licensed cosmetologist engaged in the practice of cutting a person's hair is not engaged in the practice of barbering.

This position is further bolstered by §93 of S.F. 1093 which reads in pertinent part as follows:

"There is appropriated from the general fund . . . to the board of barber examiners . . . and to the board of cosmetology examiners . . . to be used by the two examining boards for per diem and expenses of board members and not more than three additional persons appointed by each board for joint meetings held for the purpose of making recommendations to the Sixty-fifth General Assembly, 1975 Session, regarding changes in the cosmetology and barbering laws, including but not limited to the establishment of a joint license for the practice of barbering and cosmetology, the establishment of a joint

board, the scope of practice of barbers and cosmetologists, and licensing educational qualification."

It appears that the legislature felt that the semantic distinction between "barbering" and "cosmetologists-type hair cutting" was a frivolous one, but that they were not possessed of the requisite knowledge to draft sufficiently complete and precise rules regarding the two respective practices.

Accordingly, we would answer your questions 1 and 2 in the negative and questions 3 and 4 in the affirmative. Additionally, we deem it unnecessary to provide answers to your specific questions (i.e., A, 1 through 10; B, 1 through 6) since they all deal with the above-noted dichotomy. Suffice it to say that henceforth, and until new rules are adopted, the practice of cutting hair when performed by a licensed barber may be described as barbering and the same practice when performed by a licensed cosmetologist may be referred to as cosmetology.

June 18, 1974

CONSTITUTIONAL LAW: UNIFORM CONSUMER CREDIT CODE. Article III, §29, Constitution of Iowa, Senate File 1405, Acts, 65th G.A., Second Session (1974). (1) Ordinarily newsboys, doctors, lawyers, dentists, plumbers, landlords, etc. would be "debt collectors" within the meaning of §7.102 of S.F. 1405 if they engage directly or indirectly in collecting "debts" as defined in the act for themselves, their employers or others. (2) The notification and fee payment provision of §§6.202 and 6.203 do not apply to creditors and debt collectors who were in business more than 30 days prior to July 1, 1974. On the face of it persons becoming debt collectors on or after June 1, 1974, would have to comply with the notification and fee payment. (3) However, this requirement that persons becoming debt collectors on or after June 1, 1974, must give notification and pay the fee while others previously in business are exempt is unconstitutional as arbitrary and discriminatory. Sec. 6.203 is unconstitutional also on the further ground that it imposes a tax which is not mentioned in the title of the Act. (Turner to Garrett, Asst. Atty. Gen., 6-18-72) #74-6-8

Mr. Julian Garrett, Assistant Attorney General: You have requested an opinion of the attorney general with respect to certain problems concerning the administration of the debt collector provisions of Senate File 1405, Acts of the 65th General Assembly, 2nd Session, 1974, the Iowa Consumer Credit Code.

First, you inquire as to whether a newsboy is a debt collector under the provisions of the act and, also, whether doctors, lawyers, dentists, plumbers, landlords, grocers etc., ad infinitum, are such. Second, you inquire as to when debt collectors must notify the administrator and pay their $10 annual fees. Third, you inquire as to whether the notification and fee provisions are constitutional.

I

Article Seven, §7.102 of the Act defines "debt", "debt collection" and "debt collector" as follows:

"1. 'Debt' means an actual or alleged obligation arising out of a consumer credit transaction, or *a transaction which would have been* a consumer credit transaction *either if* a finance charge was made, if the obligation was not payable in installments, if a lease was for a term of four months or less, or if a lease was of an interest in land.

"2. 'Debt collection' means an action, conduct or practice in soliciting debts for collection or in the collection or attempted collection of a debt.

"3. 'Debt collector' means a person engaging, directly or indirectly, in debt collection, whether *for himself, his employer, or others,* and includes a person who sells, or offers to sell, forms represented to be a collection system, device, or scheme, intended to be used to collect debts. * * * " (Emphasis added)

It is apparent that debt collector, as defined, is a person engaged in debt collection, as defined, "whether for himself, his employer, or others" and that debt collection, as defined, is, in turn, limited to "debt" as defined, and which definition is slightly more limited than "debt" in its ordinary legal sense. In other words, a debt is a debt, but not quite. As I will show hereafter, the Act refers only to those debts for "goods, services, or [an] interest in land . . . purchased primarily for a personal, family, household or agricultural purpose," or arising out of certain leases. Debts for other purposes are not included. For example, most debts of most businesses are not included and the collector of such would therefore not be engaging in debt collection or a debt collector within the meaning of the act. §1.301(13)(a)(3).

A debt, as the term is defined, is an obligation arising out of a "consumer credit transaction", also a defined term (§1.301(12) and (13)), *"or a transaction which would have been"* a consumer credit transaction if *any* of four separate and distinct conditions were present. A consumer credit transaction is a consumer credit sale or consumer loan, or the refinancing or consolidation thereof, or a consumer lease. §1.301(12). A consumer credit *sale* is defined in §1.301(13) as follows:

"13. 'Consumer credit sale'.

a. Except as provided in paragraph b of this subsection, a 'consumer credit sale' is a sale of goods, services, or an interest in land in which *all* of the following are applicable:

(1) Credit is granted either pursuant to a seller credit card or by a seller *who regularly engages as a seller in credit transactions of the same kind.*

(2) The buyer is a person other than an organization.

(3) The goods, services, or interest in land are purchased primarily for a *personal, family, household or agricultural purpose.*

(4) *Either* the debt is payable in installments *or* a finance charge is made.

(5) With respect to a sale of goods or services, the amount financed does not exceed thirty-five thousand dollars. * * *" (Emphasis added)

So there can be no question that the legislature intended a debt to include something more than an obligation arising out of a consumer credit transaction. A debt also includes "a transaction which *would have been* a consumer credit transaction *either* if a finance charge was made" *or* "if the obligation was *not* payable in installments." Compare §7.102(1) and §1.301(13)(a)(4). One of the five essential elements of a consumer credit sale is "either the debt is payable in installments or a finance charge is made" (1.301(13)(a)(4)) but these elements need not be present to constitute a debt arising out of a transaction which would have been a consumer credit transaction had they been present. A debt may also arise, under the act, out of any consumer lease, even if of a duration of four months or less, if it too is for a personal, family, household or agricultural purpose. §§7.102(1) and 1.103(14).

Applying these interrelated definitions to newsboy, doctor, lawyer, dentist, plumber, landlord, grocer, etc., it appears that any such individual is a debt collector if he engages "directly or indirectly" in collecting a debt, as defined, "for himself, his employer, or others" arising out of his sale of goods, services, or his lease, where:

(1) Credit is granted either pursuant to a seller credit card or by a seller who regularly engages as a seller in credit transactions of the same kind.

(2) The buyer or lessee is a person other than an organization.

(3) The goods, services or interest in land are purchased or leased primarily for a personal, family, household or agricultural purpose.

(4) With respect to a sale of goods or services, or a lease, the amount financed does not exceed $35,000.

Cutomarily, all of such individuals regularly engage in credit transactions "of the same kind." A professional, doctor, lawyer or dentist, is a "seller" of services just as is a plumber. §1.301(38)(39)(41). The "buyer" is often a person other than an organization. The goods, services, or interest in land *are* usually purchased primarily for a personal, family, household or agricultural purpose. Groceries and newspapers as well as medical, legal, dental or plumbing services, and an almost infinite variety of other goods and services are commonly provided on credit for either a personal, family, household or agricultural purpose, and those providing such who collect the debt for themselves or others, as well as their agents and assigns, and most landlords, are debt collectors at one time or another if they regularly extend credit.

It has been argued to me by persons of more than ordinary intelligence that for purposes of this act, there is no credit extended, and no debt, until a time agreed upon by the parties for payment is past due. Such a construction would mean, at least in theory, that a debt collector is not a debt collector until some specified time has elapsed after which he has sold and delivered goods and services, and that during that interval he could engage in practices forbidden him thereafter. Under that theory, a seller could threaten a prospective debtor, who had received the goods and services, before payment was due but not afterwards. And he could communicate information before the debt was due, which he could not communicate afterwards. §7.103. As a practical matter he would not ordinarily do these things before payment was due. But he could. I cannot believe that the legislature intended such possibility. Moreover, I cannot play so fast and loose with the English language.

Credit is extended, and a debt created, at any time a seller of goods or services forebears collection at the time of delivery. Otherwise, there is an implicit agreement between buyer and seller that the transaction is for cash.

If the legislature intended that a time interval might elapse after date of delivery until some time agreed upon for payment, before a debt was created, it should have said so. I cannot twist its actual words into any such strained construction for the sake of expediency. Furthermore, as a practical matter, every business or professional person we have considered herein would nevertheless, at one time or another, in the regular course of his practice of extending credit, become a debt collector when for some reason a time for payment passed without payment and when he thereafter attempted collection. Even a newsboy who might ordinarily collect a week in advance would

sometimes find his customers not at home, or perhaps on vacation for a month. He would then become a debt collector. Once a debt collector, always a debt collector. The suggested solution would solve nothing and merely begs the real question of the moment when credit is extended and a debt created. Every reasonable person knows that moment without my opinion.

II

With respect to your second question as to when a debt collector, as defined, must notify the administrator and pay the $10 "annual fee", §§6.202 and 6.203 provide in pertinent part as follows:

"Sec. 6.202. NOTIFICATION

1. Persons subject to this part shall file notification with the administrator *within thirty days after commencing business in this state, and thereafter, on or before January thirty-first of each year.* * * * " (Emphasis added)

"Sec. 6.203. FEES.

1. A person required to file notification shall pay to the administrator an annual fee of ten dollars. The fee shall be paid with the filing of the first notification and on or before January thirty-first of each succeeding year. * * * "

Thus, a debt collector is required to file notification with the administrator "within thirty days after commencing business in this state" and "thereafter" on or before January 31st of each year. At each such time he is required to pay the $10 fee.

Obviously, it is impossible for a debt collector who has been in business for more than 30 days prior to July 1, 1974, the effective date of the act, to literally comply with the requirement that he file notification and pay the fee "within thirty days after commencing *business.*" If a debt collector has been in business as such for more than 30 days prior to the effective date of the act, is he required to file notification and fee either on the effective date of the *act* or within 30 days after the effective date of the *act?* Perhaps one or the other of such dates was intended, but the legislature didn't specify either and it is a proposition so well settled as not to require citation of authority that, in construing statutes, the courts search for the legislative intent as shown by what the legislature said, rather than what it should or might have said. Rule 344 (f)(13), Iowa Rules of Civil Procedure.

Not only would a selection of either such date constitute an arbitrary legislative act by the administrator, unconstitutional for that reason alone, but I find no authority for reading into the act any such requirement. On the contrary, *State v. Hartford Fire Inc. Co.,* 1893, ___ Ala. ___, 13 So. 362, holds, in considering the *title* of an act to require all corporations to pay a fee or license for the use of the state *"before commencing business in this state",* that the act "is clearly inappropriate to a business already begun and continuing operation. It must and does relate to a business thereafter to be entered upon." This was true, in the Alabama case, even though the "natural import" of the language of the act, aside from the title, embraced such corporations already doing business in the state. In other words, language which appears to apply only within a time "after commencing business" is a grandfather clause which excludes from its terms those businesses already in existence before that time.

So, in this case, all creditors and debt collectors already in business more than 30 days prior to the effective date of the act are not required to file notification or fee before January 31st. Indeed, are they required to file *then?*

The statute requires filing "thereafter" on or before January 31st of each year. But if a debt collector is not required to file in the first instance, he can hardly file "thereafter". "Thereafter" as used in §6.202 appears to me to apply to the time of filing the first notification rather than to thirty days after commencing business, although in view of our subsequent determinations herein, it really makes little difference to what time the "thereafter" applies.

I should perhaps note at this point that the act requires creditors, as well as debt collectors, to file notification and pay the annual fee. A creditor is not necessarily a debt collector because he could assign his debt, or employ another, for collecting it. In any event, for purposes of the notification and fee provisions of this opinion, which apply to creditors as well as debt collectors (§§6.201, 202, and 203), creditors and debt collectors are synonymous.

In my opinion, the notification and fee provisions of the aforementioned sections apply only to creditors and debt collectors in business less than 30 days prior to July 1, 1974, the effective date of this act, and such who were engaged in a particular business more than 30 days prior thereto are never required to file notification or fee for that business. In other words, the act requires notification only by those persons becoming creditors or debt collectors on or after *June* 1, 1974. Under the act, they must pay the fee, and file the notification, within 30 days after commencing business in this state and "thereafter" on or before January 31st of each year.

III

This brings us to your final question as to whether or not the notification and fee provisions so construed are constitutional. The general test is set out in 53 CJS 544, Licenses §22, where it is stated that ". . . a classification is unconstitutional if it is based solely on the length of time in which a person has been engaged in business."

This doctrine was expressed by the California Supreme Court in *Accountancy Corporation of America v. State,* 1949, 34 C.2d 186, 208 P.2d 984, in which the court holds:

"But where a statute discriminates against individuals or corporations solely because they are new to the field and such discriminator does not appear to have any relation to the public interest, the legislation disregards constitutional protection against arbitrary classification." (Citations).

In that case the court had no trouble in finding a statute unconstitutional which allowed certain corporations to continue operation as public accountants while denying others that privilege, because there was no reasonable grounds for this distinction. For a more recent statement of this principle, see *Blumenthal v. Board of Medical Examiners,* 1962, 18 Cal. Reptr. 501, 368 P.2d 101.

The United States Supreme Court has also had occasion to deal with this problem. In *Mayflower Farms, Incorporated v. Ten Eyck,* 1936, 297 US 266, 56 Sup. Ct. 457, a statute allowing dealers who sold unadvertised milk in cities over 1,000,000 inhabitants to sell that milk at 1¢ per quart below that of milk sold under well advertised trade names provided the dealers were engaged in business on or before the effective date of the statute, and preventing dealers in unadvertised milk from selling at the lower price who had gone into business after that date, was held invalid as arbitrary and discriminatory. The court stated that:

"The question is whether the provision denying the benefit of the differential to all who embark in the business after April 10, 1933, works a discrimina-

tion which has no foundation in the circumstances of those engaging in the milk business in New York City and is therefore so unreasonable as to deny appellant the equal protection of the laws in violation of the 14th Amendment.

"The record discloses no reason for the discrimination."

The court therefore held the statute unconstitutional and permitted the appellant to sell milk on the same basis as those who had been in business before him. This case is cited with approval by the U.S. Supreme Court in *Morey, Auditor of Public Accounts of Illinois, et al v. Doud, et al,* 1957, 354 US 457, 77 S.Ct. 1344.

To require a notification duty and fee of a person commencing business after June 1, while not requiring that same notification and fee of a person commencing business on May 31 or before, is unconstitutional as arbitrary and discriminatory. There is no rational reason set forth for this discrimination. And carrying the logic on, if a person already in business is never required to file notification or fee, even on January 31st, a person commencing business after June 1, 1974, cannot be required to do so either.

But there is another fatal defect in the provisions for fees which is more obvious. Senate File 1405 is entitled:

"An Act relating to credit related transactions, acts, practices and conduct, enacting the Iowa Consumer Credit Code, making coordinating amendments to the Code, and providing civil remedies and criminal penalties for violations."

Article III, §29 of the Iowa Constitution provides:

"Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

No mention is made of fees in the title. Are fees constitutional when not mentioned therein? First, let's consider the nature of the fees required by Senate File 1405.

Although the fee involved here is called an "annual fee" (§6.203) and would appear to be in the nature of a license or permit fee, it is clearly a tax, not a license fee. These fees have not been designated or appropriated for administration of the law, nor do they appear to bear any relationship thereto whatsoever. They must go the the state general fund. There is not even a provision that requires the administrator to issue a license or permit upon payment of the annual fee. The legislature has already appropriated $100,000 for enforcement of Senate File 1405, as a part of the supplemental appropriation to the attorney general, whose duty it is to administer the act. Presumably, the legislature believed that appropriation sufficient and I agree. But there are approximately 80,000 holders of retail sales tax permits in Iowa and many thousands of others such as doctors, lawyers, newsboys and landlords, all of whom are potential creditors or debt collectors under the act. Many retail tax permit holders engage in cash transactions and do not extend credit, but the $10 annual fee could obviously raise revenue of a half million dollars or more if all paid who are required to pay. Such revenue would be far in excess of what we and the legislature anticipate will be necessary to police and administer the act, at least at the outset. (We presume the overwhelming majority

of creditors and debt collectors will conscientiously abide by the law — if they can figure out what it is.)

In *State v. Manhattan Oil Co.,* 1925, 199 Iowa 1213, 203 NW 301, our Supreme Court discussed the difference between a tax and a license fee, saying:

"Although it is competent for the legislature to impose license fees, the amount derived thereby must bear a reasonable relation to the actual expense of regulation and administration of the act."

The court went on to hold that the fees imposed bore no such reasonable relation to the expense of regulation and therefore constituted a tax. The court then held:

"Enough has been indicated that we cannot construe the title to embrace the subject-matter of the act, and we find the further fact that the act contains a provision for the creation and levy of a tax for the maintenance and upkeep of public highways not expressed in the title. For these reasons the title must be held to be fatally defective as not in conformity to constitutional limitations."

Similarly, in *Chicago, Rock Island and Pacific Railroad Co. v. Streepy,* 1929, 207 Iowa 851, 224 NW 41, the court considered a statute which among other things created a new fund and conferred power to levy a tax on local municipalities for such fund.

The title to the act in question had to do with the creation of the office of director of the budget and members of an appeal board in defining their powers and duties and making an appropriation therefor.

The court said in referring to the tax:

"Nothing of that kind is indicated in the title to this act; hence we conclude that insofar as the act provides for an emergency fund, and confers power to levy the same, these provisions, not being specified in the title, are in violation of the constitutional inhibition and therefore void. This, of course, is limited to the part of the act which makes these provisions, and does not in any way affect the remainder of the act."

In *Lee Enterprises, Inc. v. Iowa State Tax Commission,* 1968 Iowa, 162 NW2d 730, an act amending the existing sales and use tax law to cover certain services was held to comply with the constitutional requirement that the title modification of existing sales and use taxes" even though no specific mention was made of a tax on services, because the tax on gross receipts from services was considered "in its broad sense or in the sense the term had been used in the amended law" as a sales tax. The case is easily distinguished from *Manhattan Oil Company* and *Streepy.*

For all of these reasons, §§6.202 and 203, relating to notification and fees in Article Six, Part Two of Senate File 1405, are unconstitutional in their entirety, and no creditor or debt collector is required to notify the administrator or to pay the $10 annual fee as required therein on or at any time after July 1, 1974. Nothing herein is intended to affect any other part or section of the Act.

June 19, 1974

STATE DEPARTMENT OF SOCIAL SERVICES: Iowa Annie Wittenmyer Home. Chapter 244, Code of Iowa, 1973; Senate File 1343, 65th G.A. (2nd) 1974 and Chapter 115, 65th G.A. (1st) 1973. The legislature has effectively

mandated the removal of children from the Annie Wittenmyer Home, Davenport, and impliedly suspended the operation of certain sections of Chapter 244, Code of Iowa, 1973, by expressly providing for such removal and providing an inadequate appropriation in an appropriations Act for that institution. (Hronek to Cusack, State Representative, 6-19-74) #74-6-10

Honorable Gregory D. Cusack, State Representative, 81st District: Receipt is hereby acknowledged of your letter of May 21, 1974, wherein you requested an opinion of the Attorney General relating to recent legislation concerning the Annie Wittenmyer Home at Davenport. You stated, in part, as follows:

"The first session of the 65th G.A. passed H.F. 739 (Chapter 115 of the Laws of the 65th G.A., 1973 Session) which appropriated funds for the Home only through June 30 of 1974 *and,* in Section 4 of that Act, directed the Department of Social Services to present a plan for the closing of the Home and development of alternative facilities by December 31, 1974. The Act did not mandate the closing of the Home at that time, but just directed the preparation of a plan to that end. Such a plan was indeed prepared, but the 1974 Session of the G.A. did not formally consider or act on that plan — one way or the other.

"What the 1974 Session *did* do was to pass S.F. 1343 which, among other things, funded the Home at a reduced level through fiscal year 1975. The Act also said that the Home was to be closed no later than June 30, 1975, and that children were to be placed at suitable alternative care locations.

"I have studied your letter and opinion to Senators Hultman and Briles dated December 20, 1973, in which you discuss their questions regarding similar plans by the Department of Social Services to close the Mental Health Institute at Clarinda.

"I grant that the two instances — Clarinda and the Annie Wittenmyer Home — are not exact. Nonetheless, a couple of similarities exist, and it is to these that I request your formal opinion.

"1) H.F. 739 and S.F. 1343 notwithstanding, Chapter 244 of the 1973 Code, specifically 244.1, 244.3, and 244.15, seems to make it clear that 'The commissioner of the department of social services is hereby authorized to establish a detention care program at the Annie Wittenmyer Home in the city of Davenport.' (244.15) Also, '. . . The Iowa Annie Wittenmyer Home shall be maintained for the purpose of providing care, custody and education of such children as are committed thereto. Such children shall be wards of the state. (244.1) Can the General Assembly, without amending Chapter 244 of the Code, close the Home?

"2) Even under the province of H.F. 739 and S.F. 1343, can the Commissioner of Social Services halt the operation of an institution he is mandated to operate under Chapter 244 of the Iowa Code?

"3) Without specific amendments to Chapter 244, can even the Commissioner of Social Services refuse new admittances to the Home, the procedure for which is outlined in 244.3, 244.4, and 244.5?"

Senate File 1343, as enrolled, first appropriated five hundred thousand dollars ($500,000) for the fiscal year beginning July 1, 1974, and ending June 30, 1975, for the operation of the Iowa Annie Wittenmyer Home. On June 3, 1974, the Governor signed Senate File 1343, and in doing so, item vetoed the second paragraph of §1, a portion of the Act which is immaterial to this Opinion. The Department of Social Services states that this amount is wholly inadequate for the continued operation of the Home at its present level.

Senate File 1343 then goes on the state in pertinent part:

"* * *

"Sec. 2. The department of social services shall begin preparations on or before July 1, 1974, to discontinue providing care, custody and eduction of children at the Iowa Annie Wittenmyer Home, and shall make such arrangements as may be necessary to provide these services at other locations to children who are on July 1, 1974, residents of the home. All residents of the home shall be removed as expeditiously as is reasonably possible, but in no case later than June 30, 1975, and the department shall thereafter conduct no activities of any kind at the home except to provide minimum necessary maintenance and protection of its buildings and grounds pending their disposition.

"* * *

"Sec. 4. 1. No funds appropriated by the Act shall be used for capital improvements, furniture, and equipment.

2. Where any of the laws of this state are in conflict with this Act, the provisions of this Act shall govern for the biennium.

3. All federal funds received by the Annie Wittenmyer Home shall be used for the purpose set forth in the federal grant.

"* * *"

It is quite clear, as you note, that Sections two (2) and four (4) of Senate File 1343, as above quoted, are in direct conflict with provisions of Chapter 244, Code of Iowa, 1973. Section 244.1, Code of Iowa, 1973, states in pertinent part:

"* * *

"The Iowa juvenile home and the Iowa Annie Wittenmyer Home shall be maintained for the purpose of providing care, custody and education of such children as are committed thereto. Such children shall be wards of the state." . . .

Section 244.3, Code of Iowa, 1973, states:

"Admissions. Admission to said homes shall be granted to resident children of the state under eighteen years of age, as follows, giving preference in order named:

1. Destitute children, and orphans unable to care for themselves, of soldiers, sailors, or marines.

2. Neglected, dependent or delinquent children committed thereto by the juvenile court.

3. Other destitute children."

In the opinion of the Attorney General issued December 20, 1973, relating to the destruction of the Mental Health Institute at Clarinda, Iowa, it was stated:

"It is so well settled as to require little comment that the powers of administrative officers must be executed in the manner prescribed by statute. If broader powers are desired, they must be conferred by the proper authority; they cannot be merely assumed. Where the legislature directs an agency to supply recommendations and does not direct the method by which such

recommendations are to be implemented, the agency acts unconstitutionally if it usurps the legislative power to determine when the recommendations are to be put into effect. . . ." (citing cases)

While that statement remains correct, we must note the dissimilarities between that situation and the instant one. Here the legislature in Section two (2) of Senate File 1343 has clearly directed the Department of Social Services to remove all residents of the Annie Wittenmyer Home no later than June 30, 1975. In addition the legislature appropriated a wholly inadequate amount of money for the continued operation of the Home at its present level. Consequently, a direct conflict between Senate File 1343 and the above quoted portions of Chapter 244, Code of Iowa, 1973, has been created.

Where two statutes dealing with the same subject are in conflict, the general rule is that if by any reasonable construction the statutes may be reconciled they both may stand. *Bd. of Trustees of Farmers Drainage Dist v. Iowa Resources Council,* 247 Iowa 1244, 78 N.W.2d 798 (1956). Here however, no reasonable construction can reconcile these statutes, at least for this biennium. Senate File 1343 requires the Department of Social Services to remove all children from the Annie Wittenmyer Home by June 30, 1975, while Chapter 244 requires the Department of Social Services to admit certain children to the home with no time limitation.

The question then becomes whether Senate File 1343, while not repealing the applicable provisions of Chapter 244 expressly, has done so by implication. While repeals by implication are not favored, where two statutes are irreconcilable, the last one enacted will by implication repeal the prior one. *Waugh v. Shirer,* 216 Iowa, 68, 249 N.W. 246 (1933). *Owens v. Smith,* 200 Iowa 261, 204 N.W. 439 (1925). This rule of construction is codified in §4.8, Code of Iowa, 1973. Consequently, so far as Senate File 1343 is inconsistent with Chapter 244, the provisions of Senate File 1343 must govern. The answer to your first question is therefore that the General Assembly may close the Annie Wittenmyer Home without amending Chapter 244 of the Code by enacting legislation, later in time, which is in irreconcilable conflict with provisions of Chapter 244, mandating operation of the home.

Senate File 1343 is however, an appropriations measure with limited applicability in time. As is made clear in the measure itself, the Act is intended to govern only for the biennium. The effect of this fact raises important questions which should be dealth with here. If Senate File 1343 does in fact repeal by implication the provisions of Chapter 244 dealing with admissions to the Home, it does so only until the end of the biennium, at which time, if no further legislative action is taken in regard to Chapter 244, the provisions of Chapter 244 again become controlling and the Department of Social Services must again begin admitting children to the Home. By failing to take any action in regard to Chapter 244 when enacting Senate File 1343, the legislature made this rather anamolous conclusion inescapable.

Consequently, the implied repeal of the admission requirements of Chapter 244 is temporary at this time. Although no cases in Iowa have ever confronted this exact problem of construction, other jurisdictions have resorted to the doctrine of implied suspension. *Cunningham v. Smith,* 53 P.2d 871 (Kan. 1936); *Ex Parte Williamson,* 200 P. 329 (Wash. 1921); *Maresca v. United States,* 277 F. 727 (2 Cir. 1921).

The case of *Ex Parte Williamson, supra,* while not exactly on point, is strikingly similar to the Annie Wittenmyer situation. In *Williamson,* the Washington State legislature had, in 1919, created the "Women's Industrial Home and Clinic" and sufficiently funded the same for the biennium. In 1921 however, the legislature provided no funds and the institution was closed. A defendant sentenced to the institution then challenged her sentence and sought release as the institution no longer was operating. The Washington State Supreme Court refused to release her, but did approve the closing of the institution based on the lack of an appropriation for its continued operation, although the substantive provisions mandating commitments to the institution were not repealed. The court stated at 200 P. 330:

". . . Appropriation bills of a Legislature are laws as all other constitutional enactments of a Legislature are laws. While they are limited in duration by reason of constitutional provisions, set, during the period of their existance, they have the same force and effect as do laws of unlimited duration. When therefore, the Legislature fails to make an appropriation for an institution of its own creation — that is to say, an institution the existence of which depends solely upon its own will — its failure operates to suspend the operation of the institution as effectually as it would were an express declaration made to that effect. . . ."

In the present situation, the mandate is even clearer as not only has an inadequate appropriation been made, but, in addition, the legislature has by express language in Senate File 1343 directed the Department of Social Services to remove the children from the Home ". . . as expeditiously as is reasonably possible, but in no case later than June 30, 1975. . . ." Thereafter, only physical plant maintenance is to be continued at the Home.

In *Ex Parte Williamson, supra,* the court also reached the question of whether the executive officer had to continue to operate the institution regardless of lack of appropriations. The Washington Court pointed out that to do so would be a violation of positive law, notwithstanding the provisions mandating commitment. In the Annie Wittenmyer situation, the legislature placed the Department of Social Services on the horns of this dilemma not only by the enactment of Senate File 1343, but also in regard to Art. III, §24 of the Constitution of the State of Iowa, which states:

"Appropriations. Sec. 24. No money shall be drawn from the treasury but in consequence of appropriations made by law."

(See 1967 OAG 355).

One other possible problem relative to the enactment of Senate File 1343 should be mentioned here. Article III, §29, of the Constitution of the State of Iowa states:

"Acts — one subject — expressed in title. Sec. 29. Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The Title of Senate File 1343 states:

"An Act appropriating From The General Fund If The State Of Iowa To The Annie Wittenmyer Home, Davenport, For The Fiscal Year Beginning July 1, 1974, And Ending June 30, 1975."

No mention is made in this title of any provisions in the Act mandating the closing of the Annie Wittenmyer Home or the removal of children therefrom. The intent of the above set out constitutional provision is to prevent the inclusion of incongruous matter in one Act and to prevent surprise and fraud upon the people and the legislature. *Witmer v. Polk County,* 222 Iowa 1075, 270 N.W. 323 (1937); *Long v. Board of Supervisors of Benton County,* 258 Iowa 1278, 142 N.W.2d 378 (1966).

Keeping in mind however that an overturning of this Act or any of its provisions will not affect the above opinion as an inadequate appropriation will still clearly exist for the Wittenmyer Home to operate during this biennium and that the Iowa Supreme Court has repeatedly held that Art. III, §29, is to be liberally construed and not interpreted in a narrow, technical or critical manner, *Frost v. State,* 172 N.W. 2d 575 (Iowa, 1968), we decline to find that the Act is constitutionally infirm on these grounds. Certainly the legislature has approached the limits of Article III, §29, with this title however.

In conclusion, the answers to your questions are therefore as follows. The General Assembly may, by implied repeal, effectively mandate the temporary refusal of the admittance of children to the Iowa Annie Wittenmyer Home. Under the present circumstances however, that mandate is effective only until the close of this biennium without further legislative action.

June 19, 1974

LIQUOR, BEER & CIGARETTES: Beer brand advertising signs. Section 123.51(3), 1973 Code of Iowa. The owner of a beer brand advertising sign erected or placed upon the outside of an establishment licensed to sell beer need remove only those portions of the sign which actually advertise a particular brand of beer, whether it be by use of the actual brand name or by a symbol which, in the public mind, represents a particular brand of beer. (Coriden to Gallagher, Director, Iowa Beer & Liquor Control Department, 6-19-74) #74-6-9

Mr. Rolland A. Gallagher, Director, Iowa Beer and Liquor Control Department: In your letter of April 19, 1974, you requested a ruling and clarification on the following questions:

"1. Must the owner of a sign advertising any brand of beer take down the complete sign including the pole or structure that holds or supports the sign?

"2. Can the owner of the sign take down only the portion of the sign, commonly known as the panel, that refers to the brand name (such as Millers, Schlitz, Hamms, etc.) and leave the portion that has the word beer, name of place, or other advertising, such as 'Good Food', etc.

"3. Can logos, copyrights, or symbols be left on beer brand signs that might convey an impression, association or suggestion to the public of brand name of beer?"

Section 123.51(3), 1973 Code of Iowa, provides that:

"No signs or other matter advertising any brand of beer shall be erected or placed upon the outside of any premises occupied by a licensee or permittee authorized to sell beer at retail."

However, neither this statute nor any other provision of the Iowa Beer and Liquor Control Act would appear to require the owner of such a sign to take down the complete sign, including the structural support. Thus, the owner of a

beer brand advertising sign could comply with the statute and at the same time, save time and money by removing only those portions of the sign which actually contain beer brand advertisements. It is beer brand advertising which is prohibited by this statute, not other advertising such as the name of the establishment or the words "Good Food" or "Beer."

What, then, is beer brand advertising? Is it just the brand name, or is it also any logos, copyrights, or symbols which might convey the impression, association, or suggestion of a particular brand of beer to the mind of the public. Section 123.51(3), 1973 Code of Iowa, prohibits ". . . signs or *other matter* advertising any brand of beer . . . ." (Emphasis added). The word "advertise" is defined in *Black's Law Dictionary* as "To give notice to, inform, or notify, give public notice of, announce publicly, notice or observe." In *Words and Phrases,* the noun "sign" is variously used as denoting a mark, symbol, token, emblem, or any statement, device, design, or pictorial representation. Following this line of thought, it would seem logical to assume that any "logos, copyrights, or symbols" which are immediately identifiable as representing a particular brand of beer would be prohibited under the statute.

In summary, in order to comply with §123.51(3), 1973 Code of Iowa, and to avoid the penalty of a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding thirty days outlined in §123.51(4) of the Code, the owner of a beer brand advertising sign erected or placed upon the outside of an establishment licensed to sell beer need remove only those portions of the sign which actually advertise a particular brand of beer, whether it be by use of the actual brand name or by a symbol which, in the public mind, represents a particular brand of beer.

However, it should be further noted that if a sign of the type contemplated herein is owned by a brewer or wholesaler, caution must be exercised in merely removing the brand name markings or identification. Should such a brewer or wholesaler leave a sign to a retailer by either gift or sale, a violation of §§123.45 and 123.126, The Code, might well occur.

June 21, 1974

MOTOR VEHICLES — implements of husbandry. §§321.1(16), 321.18(3), 321.310, 1973 Code of Iowa. A company engaged in developing farm hybrid products may operate four-wheel trailers behind motor vehicles without said trailer being registered and licensed. (Voorhees to Allbee, Franklin County Attorney, 6-21-74) #74-6-11

Mr. Richard A. Allbee, Franklin County Attorney: In your letter of March 5, 1974, you stated the following:

"In our community of Franklin County, we have a business . . . , which does a lot of transporting of various crops, especially corn, using four wheeled trailers. This obviously does not, at least to me, appear to be a farmer transporting produce, farm products or supplies to and from market. Thus, I would specifically like an Attorney General's Opinion from you. Whether or not a company engaged in developing farm hybrid products may operate four wheel trailers behind motor vehicles without said trailers being registered and licensed as these are definitely not trailers being used by a farmer in transporting goods to and from market."

Your opinion request refers to an exception to the registration provisions of §321.122, Code of Iowa, 1973, the exception appearing in §321.310 as follows:

"(T)he provisions of this section shall not be applicable to motor vehicles drawing wagon box trailers used by a farmer in transporting produce, farm products, or supplies hauled to and from market."

If the above exception were the only exception the Code granted to agricultural activities, the activities you described would probably not fit the above exception. There are, however, further exceptions granted within §321.310:

". . . (T)his section shall not apply to any motor truck, truck tractor or road tractor registered at a combined gross weight of ten tons or more nor to a farm tractor towing a four-wheeled trailer, or to any farm tractor or *motor vehicle towing implements of husbandry* or a wagon box trailer used by a farmer in transporting produce, farm products or supplies hauled to and from market." (Emphasis added).

A further exception is provided for implements of husbandry in §321.18(3). That section exempts implements of husbandry from the registration provisions of Chapter 321. "Implements of husbandry" are defined in §321.1(16) as "every vehicle which is designed for agricultural purposes and exclusively used, except as herein otherwise provided, by the owner thereof in the conduct of his agricultural operations."

It is our opinion that the operation of the vehicles you described in your letter clearly meets the definition of implements of husbandry as defined in §321.1(16), thereby exempting those vehicles from the registration requirements of Chapter 321, as well as the specific provisions of §321.310.

June 21, 1974

STATE OFFICERS AND DEPARTMENTS: State Department of Health; Board of Funeral Directors and Embalmer Examiners — §§8.2(2), 147.80(7), 147.82, 147.101, 444.21, 1973 Code of Iowa. Moneys of the fund created by §147.101 for the Board of Funeral Directors and Embalmer Examiners cannot be used to administer the licensing program of the board. The state general fund should not be reimbursed from the fund created by §147.101 for moneys appropriated to the board for expenses incurred in administering the board's licensing program. (Haskins to Pawlewski, Commissioner of Public Health, 6-21-74) #74-6-12

Mr. Norman L. Pawlewski, Commissioner of Public Health: You have requested an opinion as to the following matter:

"The Board of Funeral Directing and Embalming Examiners receives an appropriation from the general revenue fund for operating expenses in administering the licensing program. The Board also receives authorization to expend from the trust fund established under Section 147.101 of the Code. The Board has restricted expenditures from the trust fund established by Section 147.101 to educational activities and has not used proceeds from the fund for expenses in the licensing duties of the Board.

"A recommendation has been issued in the audit report of the State Board of Funeral Directors and Embalmer Examiners to reimburse the State general fund in the amount of $4,115 from the trust fund established by Section 147.101 for operating expenses of the Board incurred in licensing duties which have been paid by the appropriation from the general revenue fund.

"1. Will you render an opinion concerning whether the trust fund established by Section 147.101 can be used to pay expenses of the Board of

Funeral Directing and Embalming Examiners for administering the licensing program.

"2. Will you render an opinion concerning whether the Department should reimburse the State general revenue fund in the amount of $4,115 to be obtained from the fund established by Section 147.101 of the Code for past operating expenses of the Board of Funeral Directing and Embalming Examiners for administering the licensing program."

It is our opinion that moneys of the fund created by §147.101 for the Board of Funeral Directors and Embalmer Examiners ("the board") cannot be used to administer the licensing program of the board. Moreover, it is our opinion that the state general fund should not be reimbursed from the fund created by §147.101 for moneys appropriated to the board for expenses incurred in administering the board's licensing program.

§147.101, 1973 Code of Iowa, creates a fund from the additional renewal fees for licenses to practice embalming and funeral directing. That section states:

"The state department of health shall annually add three dollars to the renewal fee provided for in subsection 7 of section 147.80, for one licensed to practice embalming and shall annually add three dollars to the renewal fee provided for in subsection 7 of section 147.80 for one licensed to practice funeral directing, and such additional moneys shall be accepted as part of the regular renewal fee. The payment of the same shall be prerequisite to the renewal of such licenses. The funds derived by the state department of health from the additional renewal fees collected under this section in behalf of the profession of funeral directing and embalming shall be paid to the board of funeral directing and embalming examiners at such time as said board of funeral directing and embalming examiners or the Iowa Funeral directors association conducts a state-wide educational meeting for its members, in such amounts as are necessary for such said meeting only and such funds so collected by the state department of health shall be used for the advancement of the arts and sciences of the funeral directing and embalming profession."

As can be seen, the fund created by §147.101 is to be used for state-wide educational meetings and for the advancement of the arts and sciences of the funeral directing and embalming profession. Since the legislature in §147.101 set forth express purposes for which the fund could be used, it must be assumed that it did not intend the fund to be used for other unexpressed purposes such as administering the licensing program of the board. It is a well known maxim of statutory construction that the express mention of one thing implies the exclusion of other things not mentioned. *See North Iowa Steel Co. v. Staley*, 253 Iowa 355, 357, 112 N.W.2d 364 (1961). Accordingly, the fund created by §147.101 cannot be used to administer the board's licensing program.

Nor should the general fund of the state be reimbursed from the fund created by §147.101 for moneys appropriated to the board for expenses incurred in administering the licensing program of the board. §444.21, 1973 Code of Iowa, establishes the state general fund. That section states:

"The amount derived from taxes levied for state general revenue purposes, and all other sources which are available for appropriations for general state purposes, and all other money in the state treasury which is not by law otherwise segregated, shall be established as a general fund of this state."

Moneys in the fund created by §147.101 are not available for general state purposes and are segregated by law. Hence, such moneys are not part of the general fund. While it is true that §147.82, 1973 Code of Iowa, provides that all fees collected under Ch. 147 are to be paid into the "state treasury", neither that section nor any other section specifies the general fund as the "state treasury". The "state treasury" can be seen as encompassing special funds such as that created by §147.101 as well as the general fund. Cf. §8.2(2), 1973 Code of Iowa (definition of 'state funds" includes all funds collected by a state agency). But even if §147.82 is referring to the general fund, we believe that it must be construed together with §147.101 so as to apply only to the regular renewal fee (two dollars) provided for by §147.80(7), 1973 Code of Iowa, and not to the additional renewal fee (three dollars) provided for by §147.101. The latter fees, of course, are placed into the special fund created by §147.101. Hence, since moneys in the fund created by §147.101 could not be a part of the general fund initially, they could not be reimbursed to that latter fund.

In conclusion, the moneys of the fund created by the Board of Funeral Director and Embalmer Examiners cannot be used to administer the licensing program of the board and the state general fund should not be reimbursed from the fund created by §147.101 for moneys appropriated to the board for expenses incurred in administering the board's licensing program.

July 2, 1974

STATE OFFICERS AND DEPARTMENTS; RULES AND REGULATIONS: Iowa Commerce Commission—§§17A.3(3), 490A.2, 1973 Code of Iowa. Iowa Commerce Commission Order No. 74-01 establishing customer notification procedure and effective date for increased utility rates or charges must be promulgated as a rule under Ch. 17A, 1973 Code of Iowa. (Haskins to Millen, Chairman, Departmental Rules Review Committee, 7-2-74) #74-7-1

Floyd H. Millen, Chairman, Departmental Rules Review Committee: You ask whether Iowa Commerce Commission Order No. 74-01 establishing a customer notification procedure and effective date for increased utility rates or charges must be promulgated as a rule under Ch. 17A, 1973 Code of Iowa. It is our opinion that it must be so promulgated.

Commission Order No. 74-01 is clearly an order or standard of general application. It states:

"Pursuant to Section 490A.6, Code of Iowa, 1973, public utilities are required to notify their customers, not less than thirty days prior to the effective date, of any increase in rates or charges, in a manner and method prescribed by the Commission. Commission Rule 15.6(1) also sets forth that the Commission shall prescribe the notice to be given in Section 490A.6 rate increase proceedings. With the exception of municipally-owned water works or rural water districts incorporated and organized pursuant to chapters 357A and 504A, public utilities are, any person, partnership, business associations, corporation, or municipality offering to the public for compensation any of the following:

"1. Communications services,

"2. Electricity,

"3. Gas from a piped distribution system

"4. Water from a piped distribution system (except municipally-owned water works or rural water districts).

"It is apparent from the diversity of notices, and in some cases the failure to notify, that there is considerable confusion as to what constitutes a good and sufficient notice to a customer concerning a proposed increased rate or charge. Therefore, the Commission finds it is in the public interest to adopt guidelines establishing the procedure public utilities shall follow in customer notification, specifying the nature of the increased rate or charge and its effect on the customer, in order to insure that process is afforded the consumer.

"Additional confusion has resulted from the independent determination of the relationship between effective date for rates or charges and preparation of customer's service bills. In order that the effective date be meaningful, it must be interpreted as that time from which future service will be taken at the new rate or charge. All service taken prior to the effective date must be at the earlier established price. Therefore, customer notice shall be given not less than thirty days prior to the date upon which the increased rate or charge will apply to future usage. For those public utilities which utilize cyclic billing, the effective date will not necessarily coincide with the beginning of the billing interval. In such cases, prorating should be employed since it is a nondiscriminatory method for billing customers when the effective date falls within the service interval. For public utilities with all bills rendered on one day, the effective date can be made to coincide with the first day of a service period.

"*The Commission finds:*

"It is in the public interest and good cause has been shown to adopt the guidelines set out in the ordering section below.

"*The Commission orders:*

"1. *Filing Notification with Commission.* Any public utility, as defined in Section 490A.1, Code of Iowa, 1973, except municipally-owned water works or rural water districts, which proposes to increase rates or charges shall, not less than thirty days before providing notification to its customers, submit three copies of such notice to the Commission for its inspection. The Commission may for good cause shown permit a shorter period for inspection of proposed notices but during such period may require alterations in the proposed notice to customers to conform with Chapter 490A of the Code of Iowa and Commission Rules.

"2. *Notification of Customers.* Any public utility, as defined in Section 490A.1, Code of Iowa, 1973, except municipally-owned water works or rural water districts which proposes to increase rates or charges, shall, no less than thirty days prior to the proposed effective date, give written notice of such rate or charge increases to all customers in all rate classifications affected thereby. As used herein, the term 'rates' includes recurring period amounts billed for services rendered by the public utility as a commodity or service, while the term 'charges' includes nonrecurring amounts billed to customers for services and commodities rendered or offered by the public utility.

"Such notice shall clearly explain to each customer the following items, when applicable to the customer:

"a. The general nature of and the claimed need for proposed changes in rates and charges, together with a copy of the proposed rate schedule if practicable;

"b. How such proposed rate or charge increase will affect the average period billing in the particular customer's rate classification;

"c. The average percent of increase, and whether or not the percentage is uniformly applicable to all classes of customers;

"d. The total amount in dollars from all customers, that the increase will provide the utility each year;

"e. Municipals and cooperatives shall include the date on which the governing board approved the increase. All other public utilities shall include the date application was filed with the Commission.

"In addition, all public utilities shall include the date on which the increased rate or charge is proposed to become effective; provided, however, that if the public utility action is an acquisition which could result in rate or charge increases notification shall be given not less than thirty days prior to consummation of the acquisition; and;

"f. In the case of public utilities subject to rate regulation by the Commission, the notice shall state that the customer has a right to file a written objection with the Commission, and that the customer can request the Commission hold a public hearing to determine if such rate increase should be allowed. In the event that the notification to the customer exceeds one page in length, the notification of rights to file objection and request public hearing shall appear on the first page.

"The notice shall be of a type size, adequately headed, which is easily legible.

"Notice shall be sent by first class mail, deposited not less than thirty days in advance of the proposed effective date, for delivery to all affected customers. Notice of all increases, except nonrecurring service charge increases, shall be mailed in an envelope marked, 'Notice of rate increase enclosed.' Notice of nonrecurring service charge increases may be included with the regular period billing for service. Proof of mailing of such notice shall be filed with the Commission not more than fifteen days following the date by which all notices have been mailed. Failure of the postal service to deliver the notice to any customer shall not invalidate nor delay a proposed increase proceeding.

"After the date of determining affected customers, any person requesting service affected by the proposed increase in rates, shall be notified of such increases at the time service is requested.

"3. *Effective date.* The effective date is that point in time from which future service will be taken at the new rate or charge. All service taken prior to the effective date must be at the earlier established price. Prorating shall be used when computing customer's bills whenever the effective date falls within the billing interval.

"4. *Notification of Collections Under Bond.* A utility which has notified its customers of proposed rate or charge increases under Paragraph 2, and which implements such increases under bond as provided by Chapter 490A.6 of the Code of Iowa shall include with the first billing to each affected customer such notice as will call attention to the fact that the increases have been implemented under bond guaranteeing refund of any amounts determined to be excessive by the Commission.

"5. *Notification of Changes in Sliding Scale or Purchased Gas Adjustment Factor.* Whenever a sliding scale adjustment — Fuel Adjustment Clause or Purchased Gas Adjustment factor — is not printed on the customer's bill, the public utility shall notify the customer of the previous and present F.A.C. or P.G.A. factor and the change in the factor by bill insert at the time of a change. Such notice, together with customer's bill, shall contain sufficient information to enable the customer to determine the accuracy of the bill."

As can be seen, the order basically prescribes the form of the notice while public utilities are required to give their customers when a rate or charge increase is proposed.

Ch. 17A sets forth procedures by which rules of state administrative agencies are to be implemented. Among the procedures are submission of the proposed rules to the attorney general, review of the rules by the departmental rules review committee, filing of the rules with the secretary of state, and referral of them to appropriate committees of the general assembly. §17A.3(3), 1973 Code of Iowa, defines the word "rule" in Ch. 16A. That section states:

"*'Rule' means any* rule, regulation, *order or standard of general application* that supplements or interprets law or policy, or the amendment, supplement, repeal, recission, or revision of any rule, regulation, order, or standard of general application.

"'Rule' does not include any statement concerning only the internal management of an agency and not affecting the rights or procedures available to the public. 'Rule' does not include rules adopted relating to the management, discipline, or release of any person committed to any state institution, nor rules of any agency which may be necessary during emergencies such as floods, epidemics, invasion, or other disasters." [Emphasis added]

The fact that Iowa Commerce Commission Order No. 74-01 is an "order or standard of general application" and that it does not fall within one of the exceptions in the above section means that it is a "rule" under §17A.3(3). *Cf. Bunger v. Iowa High School Athletic Ass'n.*, 197 N.W.2d 555, 563 (Iowa 1972); 1969 O.A.G. 356. Hence, it can be implemented only by following the procedures of Ch. 17A.

In addition, §490A.2, 1973 Code of Iowa, empowering the Iowa Commerce Commission to promulgate rules, specifically provides that establishment of the rules shall be subject to Ch. 17A. §490A.2 states in relevant part:

"The commission shall have broad general powers to effect the purpose of this chapter notwithstanding the fact that certain specific powers are hereinafter set forth. *The commission* shall have authority to issue subpoenas and to pay the same fees and mileage as are payable to witnesses in the courts of record of general jurisdiction and *shall establish all needful, just and reasonable rules and regulations,* not inconsistent with law, to govern the exercise of its powers and duties, the practice and procedure before it, and to govern the form, contents and filing of reports, documents and other papers provided for in this chapter or in the commissions rules and regulations. *In the establishment,* amendment, alteration, or repeal *of any of such rules and regulations, the commission shall be subject to the provisions of chapter 17A.*" [Emphasis added]

In sum, it is our opinion that Iowa Commerce Commission Order No. 74-01 establishing customer notification procedure and effective date for increased utility rates or charges must be promulgated as a rule under Ch. 17A. We venture no opinion as to whether we would render a favorable advisory opinion on the order under §17A.6, 1973 Code of Iowa, were it placed in the form of a rule.

July 8, 1974

POLICEMEN AND FIREMEN: DISABILITY PAYMENTS, §411.15 Code of Iowa (1973) and Chap. 108, Acts of the 64th G.A. (1971). Policemen and firemen's disability payments under §411.15 are proportionately reduced by any amount received for such disability through workmen's compensation. (Kelly to Griffin, State Senator, 7-8-74) #74-7-2

The Honorable Jim Griffin, State Senator: This opinion is in response to your request dated June 4, 1974, regarding disability benefits under Chapter 411 of the Code of Iowa. In your request you state:

"If a policeman or fireman covered under Chapter 411 and who is injured while on duty, and also covered under workmen's compensation. Is that injured party entitled to receive both compensation benefits in the form of cash payments, lump sum settlements, or weekly indemnity payments through workman's compensation insurance as well as the city pension system (Chapter 411), or in other words, double collection for one disability?"

It is the opinion of this office that policemen and firemen are not entitled to a "double collection" for a disability under Chapter 411 and the Workmen's Compensation Act. We cite you specifically to Chap. 108 of the Acts of the 64th G.A. (1971) which repealed §85.62 of the Workmen's Compensation Act. Section 85.62 formerly provided for disability payments to *policemen* injured in the line of duty.

At this time §411.5 appears to be the exclusive source of disability funds to policemen, that section states:

"411.15 *Hospitalization and medical attention.* Cities and towns shall provide hospital, nursing, and medical attention for the members of the police and fire departments of such cities, when injured while in the performance of their duties as members of such department, and the cost of such hospital, nursing, and medical attention shall be paid out of the appropriation for the department to which such injured person belongs; *provided that any amounts received by such injured person under the workmen's compensation law of the state, or from any other source for such specific purposes, shall be deducted from the amount paid by such city or town under the provisions of this section.*" (Emphasis added)

It would appear from the above underlined language that if a policeman would somehow be entitled to workmen's compensation payments, his §411.15 disability payments would be proportionately reduced by such compensation funds and if a fireman became entitled to both workmen's compensation and §411.15 benefits, his §411.15 share would also be reduced by the amount received under Workmen's Compensation Act.

July 8, 1974

COURTS: Shorthand Reporters, Compensation. §§115.5, Code of Iowa, 1973, 605.8 and 605.9 as amended by Chapter 284, 65th G.A., First Session (1974). Shorthand reporters employed on an emergency basis under §605.8 should receive $40.00 per day. Additional shorthand reporters temporarily appointed under §605.9 should be paid the prevailing rate of compensation for shorthand reporters as determined by the judge making the appointment. (Haesemeyer to Herrick, Chairman, Certified Shorthand Reporters Board, 7-8-74) #74-7-3

Allan A. Herrick, Chairman, Certified Shorthand Reporters Board: You have requested an opinion of the Attorney General as to the compensation which must be paid to shorthand reporters temporarily employed by the district courts.

Section 115.5, Code of Iowa, 1973, provides:

"If the regularly appointed shorthand reporter should be disabled from performing his duty, the judge of such court may appoint a substitute whom he

deems competent to act during the disability of the regular reporter, or until his successor is appointed."

Section 605.8 as amended by §1, Ch. 284, 65th G.A., 1st Session (1973) provides in part:

"* * *

"The base starting salary of the full-time certified shorthand reporter shall be twelve thousand dollars. The base salary may be increased by an amount not to exceed five hundred dollars for each year of experience as a shorthand reporter. The maximum salary shall not exceed sixteen thousand dollars except as provided in this section. * * *

"Shorthand reporters of the district court who are employed on an emergency basis shall be paid a forty dollar per diem while employed by the court or while employed under the direction of the judge. . . ."

Section 605.9 as amended by §2, Ch. 284, 65th G.A., 1st Session (1973) provides in part:

"* * *

"In the event it is determined by any judge of the district court that it is necessary to employ an additional shorthand reporter because of an extraordinary volume of work, or because of the temporary illness or incapacity of a regular shorthand reporter, such judge may appoint a temporary shorthand reporter who shall serve as required by said judge, and shall be paid compensation on a per diem basis at the prevailing rates of compensation for such reporters as may be determined by the judge. * * *

It is evident from the foregoing that shorthand reporters who are employed on an *emergency basis* are to receive a $40 per diem under §605.8, whereas an additional shorthand reporter employed by a judge of the district court because of an extraordinary volume of work, or because of the temporary illness or incapacity of a regular shorthand reporter is to be paid compensation on a per diem basis at the prevailing rate of compensation for such reporters as may be determined by the judge under §605.9. While it is perhaps difficult to imagine an "emergency" requiring the employment of a shorthand reporter other than a circumstance of the type described in §605.9, i.e., extraordinary volume of work or temporary illness or incapacity of the regular shorthand reporter, it is our opinion that is a determination that is left to the discretion of the judge. In other words if the judge determines that an appointment made by him is of an emergency nature and the appointment is made under §605.8 the reporter should receive a $40 per diem but if a temporary appointment is made under §605.9 the appointing judge may determine what the prevailing rate of compensation for such reporters is and that is the amount which should be paid on a per diem basis to the reporter in question.

July 9, 1974

ELECTION: CONDUCT OF SCHOOL BOND ELECTION. §47.2, Code of Iowa, 1973, as amended by §93, Chapter 136, 65th G.A., First Session (1973). A school bond election for the Interstate 35 Community School District should be conducted by the Warren County Auditor since Warren County is the political subdivision included in the school district which has the largest tax base. (Haesemeyer to Oliver, County Attorney, 7-9-74) #74-7-4

Jr. Jerrold B. Oliver, Madison County Attorney: Reference is made to your letter of July 9, 1974, in which you request an opinion of the attorney general on the question of whether the Madison County Auditor or the Warren County Auditor should conduct a school bond election for the Interstate 35 Community School District. In your letter you state in part:

"Interstate 35 Community School District is in the process of holding an election to determine whether bonds should be issued to finance the construction of a new junior-senior high school. The election has been set for August 27, 1974. In the past the Madison County Auditor has taken care of the official school business of the school district. Mr. Robert Helmick, bond attorney for the district, has given his opinion that the County Commissioner of Elections in Warren County must conduct the election pursuant to the provisions of 47.2 as amended by Section 93 of Chapter 136 of the first session of the 65th General Assembly. * * *

"For your information the tax base for the three counties in which the school district is situated is as follows:

COUNTY	ACTUAL	ASSESSED
Warren	20,828,409	5,623,676
Clarke	3,427,004	925,291
Madison	16,939,035	4,573,544

This information was attested to by the county auditors on May 24, 1974."

Section 47.2, Code of Iowa, 1973, as amended by §93 of Chapter 136, 65th G.A., 1st Session (1974), provides in relevant part:

"When an election is to be held as required by law or is called by a political subdivision of the state and the political subdivision is located in more than one county, the county commissioner of election of the county having the greatest taxable base within the political subdivision shall conduct the election. The county commissioners of elections of the other counties in which the political subdivision is located shall co-operate with the county commissioner of elections who is conducting the election."

The foregoing statutory provision is clear, plain and free from ambiguity and it is therefore our opinion that since Warren County has the greatest taxable base of the counties comprising the Interstate 35 Community School District, that the Warren County Auditor should conduct the election in question.

July 10, 1974

COMMISSION ON JUDICIAL QUALIFICATIONS: Rules. §17A.1(1), Code of Iowa, 1973. Rules promulgated by the Commission on Judicial Qualifications need not be approved under Chapter 17A, Code, 1973. (Haesemeyer to Wild, Judge of the District Court of Iowa, 7-10-74) #74-7-5

The Honorable C. H. Wild, Judge, Second Judicial District of Iowa: Reference is made to your letter of June 24, 1974, in which you request an opinion of the Attorney General and state:

"The Commission on Judicial Qualifications came into being January 1st of this year pursuant to the provisions of Chapter 285 of the laws of the 65th General Assembly, 1973 Session. The Commission has now organized and is in the process of developing rules for its operation and procedure pursuant to

the authority contained in Section 7 of the act above referred to. In general, the rules will provide for officers of the Commission, times of meeting, the filing of complaints, preliminary investigations, formal hearings and notice to the parties involved.

"The question has arisen whether or not such rules must comply with and be adopted in accordance with the provisions of Chapter 17A of the Code in view of the exception contained in Section 17A.1, Subsection 1, for agencies in the judicial department."

Section 17A.1(1) provides:

"'Administrative agency' or 'agency' means any state board, commission, bureau, division, officer, or department which has state-wide jurisdiction, *except those in the legislative or judicial departments.*" (Emphasis added)

The Commission, as part of the judicial department is exempt from the requirements of Chapter 17A, Code of Iowa, 1973, and accordingly, the rules which you draft are not subject to legislative review or to the requirement of an Attorney General's advisory opinion.

July 10, 1974

COURTS; CLERKS OF THE IOWA DISTRICT COURT; CRIMINAL STATISTICS; REPORTING: §§247.29, 247.30, 247.5, 247.7, 602.1, 602.3, 602.34, 687.1. The words "all offenses in that court", as used in §247.29, mean "all felony offenses" and the enactment of Chapter 602 creating a unified trial court called the Iowa district court, and abolishing justices of the peace, municipal courts, etc., did not impliedly amend §§247.29 and 247.30 to require reporting of misdemeanors and traffic offenses not theretofore required to be reported by justices of the peace or municipal courts. (Turner to Olson, Parole Board Executive, Iowa Board of Parole, 7-10-74) #74-7-6

Mr. Donald L. Olson, Parole Board Executive, Iowa Board of Parole: You have requested an opinion of the attorney general with respect to the following question:

"Do Sections 247.29 and 247.30, Code of Iowa (1973) 'Criminal Statistics' apply to the number of convictions of all offenses handled by the new Magistrate Courts created July 1, 1973?"

§247.29, Code of Iowa, 1973, provides:

"Criminal Statistics. The clerk of the district court shall, on or before July 15 each year, report to the board of parole and the director of the division of corrections of the department of social services:

"1. The number of convictions of all offenses in that court, in his county, for the year ending June 30 preceding, the character of each offense, the sentence imposed, occupation of the offender, and whether such offender can read or write.

"2. Number of acquittals.

"3. Number of dismissals by the court without trial, and the nature of the charges so dismissed.

"4. The expenses of the county for criminal prosecutions during said year."

§247.30, Code of Iowa, 1973, provides:

"Itemization of statistics. The fourth item required by section 247.29 shall be itemized as follows:

1. Jury fees in criminal cases.
2. Means for jurors in criminal cases.
3. Bailiff's fees for service while attending criminal cases.
4. Expenses of taking prisoners to prison.
5. Attorney fees under appointment to defend.
6. Grand jury fees.
7. Witness fees paid in criminal cases.
8. Reporter's fees for reporting and transcripting testimony in criminal cases at expense of county.
9. Grand jury witness fees paid.
10. Compensation to clerk of grand jury.
11. Compensation to bailiff of grand jury.
12. Fees and expenses paid sheriff and other officers by the county in connection with the grand jury.
13. Expenses of jail, not including board of prisoners.
14. Board of prisoners.
15. Compensation and expense of county attorney and his assistants in criminal cases.
16. All juror fees, juror's meals, and witness fees paid by the county in all criminal cases before a judicial magistrate."

Chapter 602, Code of Iowa, 1973, (Ch. 1124, 64th GA, 2nd Session, 1972) effective July 1, 1973, established a unified trial court called the "Iowa District Court". Prior to the enactment of Chapter 602, the district courts operated apart from the various municipal and justice of the peace courts. Each district court had a clerk whose responsibilities were separate from those of the clerks of the municipal courts. Thus, before the unified trial court was established, the reporting requirements of §§247.29 and 247.30, imposing a duty on the "clerk of the district court" to report "criminal statistics" pertaining to matters in "that court", referred only to matters in the "district court". The "clerk of the district court" had no duty to report criminal statistics regarding matters in the municipal or justice of the peace courts.

With the enactment of Chapter 602, the offices of judicial magistrate and district associate judge were established, and all mayor's courts, justice of the peace courts, police courts, superior courts, and municipal courts were abolished. §§602.28, 602.36, and 602.42, Code of Iowa, 1973. Judicial magistrates, district associate judges, and district judges are the judicial officers of the Iowa district court, and a proceeding before any such officer is a proceeding before the Iowa district court. §§602.1 and 602.3

Under §602.34, those serving as elected municipal court clerks on June 30, 1973, were made deputies of the district court clerks. When this section is read with Chapter 602, which defines the duties of the clerk of the district court, it is clear there is now only one clerk for the Iowa district court in each county. Thus, superficially, it might appear that the clerk of the district court of each county is required to report "*all* offenses in that court" as provided in §§247.29 and 247.30, which sections were not amended when Chapter 602 was enacted.

"All offenses" would ordinarily include *all* public offenses; misdemeanors, including traffic violations, as well as felonies. §687.1, Code of Iowa, 1973. This would require reporting of hundreds of thousands of convictions, acquittals and dismissals not heretofore required to be reported. But in my opinion, "all offenses" *as used in §247.29* means only "all *felony* offenses". §§247.29 and

247.30 are part of the chapter on paroles and the power of the board of parole to deal with "inmates of the state penal institutions" who "qualify and thereafter shall be placed upon parole" (§247.5) or "after sentence for less than life imprisonment and *before commitment,* prisoners who have not been previously convicted of a felony" (§247.7). A felony is a public offense which may be punished by imprisonment in the penitentiary or men's reformatory (§687.2) and it is ordinarily only this kind of offense with which the board of parole is concerned. Chapter 247. Misdemeanors are not ordinarily punishable by sentences over which the board of parole has jurisdiction.

Prior to enactment of Chapter 602 in 1972, no provisions of any section of the code similar to §§247.29 and 247.30 required any comprehensive reporting of misdemeanor statistics to the board of parole or the director of the division of corrections by justices of the peace or municipal courts where the overwhelming majority of misdemeanor offenses were disposed of. Such courts had no jurisdiction to finally dispose of felony offenses and neither do the new magistrates. §602.60. Prior to Chapter 602, the Iowa district court ordinarily disposed of only those indictable misdemeanors not prosecuted in municipal courts and simple misdemeanors on appeal. Accordingly, it seems to me that the legislature has never deemed misdemeanor statistics from other courts of significance to the board of parole. Indeed, it is difficult to see what significance misdemeanor statistics would have to the board of parole or director of corrections, at least in absence of the *names* of specific defendants which §§247.29 and 247.30 have never required be reported.

Without a requirement preceding Chapter 602 that misdemeanor statistics be reported to the board and the director on a comprehensive basis, the mere failure of the legislature in enacting Chapter 602 to amend §§247.29 and 247.30 to make it clear that new and additional offenses are not required to be reported should not be construed, under all of these circumstances, to create a new and very great additional burden upon the clerks of our district court. If the legislature intended to require the reporting of all traffic and other misdemeanor cases, it should have specifically said so. Changes in statutory provision by implication are not favored. *Lineberger v. Bagley,* 1942, 231 Iowa 937, 2 NW2d 305. This is not to say that some of these records are not obtainable by other officers and agencies, such as the Supreme Court statistician or the department of public safety, under other sections.

Thus, clerks of the district court are required to report no more under §§247.29 and 247.30 than they were required to report thereunder prior to enactment of Chapter 602, the Unified Trial Court Act. Convictions, acquittals and dismissals by judicial magistrates, who, incidentally, are the keepers of their own dockets, (§602.63) need not be reported by clerks of the district court.

July 11, 1974

CONSTITUTIONAL LAW: Delegation of Legislative Power — Department of Transportation (DOT) §10(5) Senate File 1141, Acts of the 65th General Assembly. Section 10(5) of Senate File 1141, delegating authority to the Department of Transportation Commission to promulgate rules and regulations setting length limits on trucks outside the purview of Chap. 17A of the Code, must be presumed to be constitutional in the absence of any facts showing beyond a reasonable doubt that the section is unconstitutional (Blumberg to Fischer, State Representative, 7-11-74) #74-7-7

Honorable Harold O. Fischer, State Representative: We are in receipt of your opinion request of May 3, 1974, regarding the constitutionality of certain sections of Senate File 1141 of the Sixty-fifth General Assembly. Your first question concerns whether the portion in question violates Article I, section 6 of the Iowa Constitution because rules governing the length of trucks may be promulgated outside the purview of Chapter 17A, whereas all other rules are to be promulgated pursuant to Chapter 17A. The provision in question found in section 10(5) of the bill, reads as follows:

"The transportation commission shall also adopt rules and regulations, which rules and regulations shall be exempt from the provisions of chapter seventeen A (17A) of the Code, governing the length of vehicles and combinations of vehicles which are subject to the limitations imposed under section three hundred twenty-one point four hundred fifty-seven (321.457) of the Code. The commission may adopt such rules and regulations which permit vehicles and combinations of vehicles in excess of the length limitations imposed under section three hundred twenty-one point four hundred fifty-seven (321.457) of the Code, but not exceeding sixty-five feet in length, which may be moved on the highways of this state."

Your second question concerns whether the legislature exercised an illegal delegation of power to the administrative body by allowing rules to supercede statutes. It is based upon the following portion of section 10(5) of the bill:

"Any such proposed rules and regulations shall be submitted to the general assembly within five days following the convening of a regular session of the general assembly. The general assembly may approve or disapprove the rules and regulations submitted by the commission not later than sixty days from the date such rules and regulations are submitted and, if approved or no action is taken by the general assembly on the proposed rules and regulations, such rules and regulations shall become effective May first and thereafter all laws in conflict therewith shall be of no further force and effect."

As a preface to the following discussion, it must be remembered that legislative enactments are presumed to be valid and constitutional. The party attacking a statute must prove its unconstitutionality beyond a reasonable doubt. *Lewis Consolidated School Dist. v. Johnston,* 1964, 256 Iowa 236, 127 N.W.2d 118. If the constitutionality is merely doubtful or fairly debatable, courts will not interfere. *Burlington and Summit Apartments v. Manolato,* 1943, 233 Iowa 15, 7 N.W.2d 26. It must be shown that the statute clearly, palpably, and without doubt infringes the Constitution, and in so doing, every reasonable doubt must be resolved in favor of constitutionality. *Lee Enterprises, Inc. v. Iowa State Tax Comm'n.,* 162 N.W.2d 730 (Iowa 1968). We must adhere to these decisions in reaching our conclusion.

The equal protection concept of our laws does not mean that every individual must be treated exactly the same, nor that all laws apply alike to all citizens. *Steinberg-Baum & Co. v. Countryman,* 1956, 247 Iowa 923, 77 N.W.2d 15. A statute may comply with the uniformity or equal protection provisions of the Constitution even though it does not operate alike upon every citizen, as long as it operates alike upon every individual within a reasonable classification. *Sperry & Hutchinson Co. v. Hoegh,* 1954, 246 Iowa 9, 65 N.W.2d 410. In this vein, the legislature has a wide discretion in determining the classification to which its Acts shall apply. *Graham v. Worthington,* 1966, 259 Iowa 845, 146 N.W.2d 626. What is necessary is that the classification be reasonable and not necessary is that the classification be reasonable and not arbitrary. *Lee Enterprises, Inc. v. Iowa State Tax Comm'n.,* supra; *Sperry & Hutchinson Co. v. Hoegh,* supra; and, *Dickinson v. Porter,* 1949, 240 Iowa 393, 35 N.W.2d 66.

The legislature has, in the past, made classifications with reference to owners and operators of motor vehicles. It has made classifications based upon the difference between automobiles, trucks, and motorized trailers. It has even classified mobile homes with automobiles for a ban on Sunday sales. See, *Brown Enterprises, Inc. v. Fulton,* 192 N.W.2d 773 (Iowa 1972). If the legislature can set up a class of individuals subject to the provisions of §321.457 of the Code for these purposes, which it obviously has done, then it can surely use that same classification again for another purpose relative to §321.457. The fact that rules will be promulgated outside the purview of Chapter 17A operates equally upon all within the class of those vehicles subject to §321.457. We can find nothing that indicates the classification in question is unreasonable or arbitrary. Until it can be shown beyond a reasonable doubt that such is the case, it must be presumed that the statute is constitutional. Chapter 17A is a mere statute and may be changed, or its application limited, by another statute, such as S.F. 1141.

Your second question is in two parts. The first concerns an illegal delegation of power in violation of Article III, §§16 and 17 of the Iowa Constitution, which deals with the manner in which bills are passed and become law. We do not believe that these sections have any bearing on the question of delegation of power since rules normally do not go through the same process as legislative bills, and never are signed or vetoed by the governor. The second part of your question is the one of major import. It deals with the authority of the legislature to delegate the power to an administrative agency to repeal existing legislation.

The legislature may create a new administrative agency having powers to enact rules and regulations which would *repeal* statutes in conflict therewith without violating the Federal or state constitutions concerning the distribution of powers. 1 Am.Jur.2d. Administrative Law §98. See, *Sylvester v. Tindell,* 1944, 154 Fla. 663, 18 So.2d 892. The court there, recognizing that the legislature may not delegate power to enact a law, stated that the legislature may enact a law complete in itself designed to accomplish a general public purpose and may authorize designated officials to act within *definite limits* to provide rules and regulations to carry out the express purpose of the law and to provide rules and regulations that will repeal other statutes in conflict with the law. The wording in the section in question strongly suggests the language was to have a repealing effect: "all laws in conflict therewith shall be of no further force and effect." Where the legislature intends by the statute in which the administrative agency is given its power that the administrative regulations enacted pursuant thereto should supercede prior inconsistent statutes, the administrative regulations should be given a repealing effect. 1A Southerland, *Statutory Construction* §23.19.

Generally, the constitutional prohibition against delegating legislative powers to administrative boards is given a liberal interpretation in favor of constitutionality of legislation. When the legislature has declared a policy which is definite in the subject it covers and definite in the character of the regulation to be imposed, it may delegate to a nonlegislative board the power to make rules and regulations for effectuating such policy. *Miller v. Schuster,* 1940, 227 Iowa 1005, 289 N.W. 702; *State v. Van Trump,* 1937, 224 Iowa 504, 275 N.W. 569. The court in *Miller* also stated that there was no invalid delegation of power where the standards set by the legislature were sufficiently defined and definite. In *Elk Run Telephone Co. v. General Telephone Co.,* 160

N.W.2d 311 (Iowa 1968), it was held that power could be delegated to an administrative body to fill in the details of a statute if there were sufficient standards and guidelines. Therefore it is the general rule in delegating powers to an administrative agency that the legislature must set out a policy and guidelines within which the policy will be effectuated, and the agency must not be vested with uncontrolled discretion. See, *Burlington Trans. Co. v. Iowa State Commerce Commission,* 1947, 230 Iowa 570, 298 N.W. 631; *Lewis Consol. School District v. Johnston,* 1964, 256 Iowa 236, 127 N.W.2d 118; *State v. Rivera,* 1967, 260 Iowa 320, 149 N.W.2d 127.

In *Contract Cartage Co. v. Morris,* 59 F.2d 437 (E.D. Ill. 1932), the court held that the word "emergency" was a sufficient guideline for the highway officials to follow in deciding when to grant special permits to vehicles of certain lengths to move on Illinois highways. In so holding the court went on to state (59 F.2d at 446):

"No law can cover all possible situations. A large measure of discretion and judgment must be left to those charged with executive and administrative duties. The statute indicates the general policy of the government and has left to the administrative officers, within narrow limits, to administer the details so as to make the law practically effective. Sproles v. Binford, 62 S.Ct. 581."

The Iowa court has discussed the use of guidelines for administrative agencies, as shown above. In *Danner v. Haas,* 1965, 257 Iowa 654, 134 N.W.2d 534, one of the issues was whether there was an illegal delegation of legislative power to an administrative body to decide what would constitute a serious violation for purposes of motor vehicle license revocation. The question was whether the words "serious violation" was a sufficient guide or standard. The court held that those words were a sufficient guideline, and the statute was not unconstitutional on those grounds. The section in question here provides that the commission shall adopt rules governing the length of vehicles in section 321.457, and may exceed the limits set in that section, "but not exceeding sixty-five feet in length . . . ." If the words "emergency" and "serious violation" are sufficient guidelines, then the above-quoted section must also be sufficient.

The questions you have asked are not easily answered. There is some doubt as to the constitutionality of the section in question. However, a mere doubt is not sufficient to declare a statute unconstitutional. Without any stronger evidence showing the unconstitutionality of the statute, we can only uphold its constitutionality.

July 16, 1974

WEAPONS: Manner of Conveyance. §110.24, Code of Iowa, 1973. A gun carried in a vehicle upon a public highway must be unloaded and either contained in a case or broken down into its principal component parts of lock, stock and barrel. (Moore to Kelly, Jefferson County Attorney, 7-16-74) #74-7-8

Edwin F. Kelly, Jr., Jefferson County Attorney: This is to acknowledge receipt of your letter in which you requested the following opinion from this office:

"I am requesting an Attorney General's Opinion construing Section 110.24 of the 1973 Code of Iowa. I have reviewed Opinions of December 6, 1948, and November 30, 1956. The particular question which generates this request for an Attorney General's Opinion is whether a gun is taken down sufficiently to

carry in any vehicle upon a public highway when it is unloaded, its bolt completely removed and separate from the rifle, and it would not be possible to further take down such weapon without the use of tools."

Section 110.24, 1973 Code of Iowa, provides:

"No person, except as permitted by law, shall have or carry any gun in or on any vehicle on any public highway, unless such gun be taken down or contained in a case, and the barrels and magazines thereof be unloaded."

A question similar to the one you are now asking was considered in an October 11, 1956, letter opinion which states:

"Your first question is whether a bolt-action rifle or shot gun from which the bolt has been removed has been 'taken down' within the meaning of Section 100.23, Code, 1954. A similar question was considered in an opinion appearing at page 265 of the 1948 Report of the Attorney General which opinion states in pertinent part as follows:

'By letter opinion of this office dated March 1, 1946, directed to the Iowa Conservation Commission, it was held that the intent of the foregoing section was the prevention of the possession of a gun available for instantaneous firing. The opinion noted that the legislature obviously had in mind that preparatory action would be required before a gun would be available and in a condition to be used as a fire arm. It was therefore required that the gun be taken down or contained in a case either of which situations would necessitate acts preparatory to availability for use. An additional requirement was that in all instances the gun be unloaded. * * *'

"'Take down' is defined by Webster as '. . . To pull down or to pieces, as a building or a scaffold . . . To take apart or to pieces as a motor . . .' 'Taken' is, of course, the past participle of 'take'. Thus, a literal interpretation of the section would seem to indicate reduction of the gun to its principle component parts. Traditionally and historically the principle and component parts of a gun are lock, stock and barrel. The firing mechanics or 'lock' in its modern counterpart has been refined in structure and operation so that it may appear as a part of the barrel assembly, or in the case of the bolt-action guns referred to in your letter, retain its separate identity.

"As is stated in the quoted opinion, the test must be one of practicability. The intent of the section is to delay availability of the gun for firing but not to the extent that every hunter would be required to be a gunsmith. It seems reasonable that what the legislature intended by the language 'take down' was that the gun should be dismantled to whatever degree is necessary to reduce it to its principal components which, in the case of most guns would simply amount to separation of the barrel from the stock, but in the case of bolt-action arms would include the additional operation of removing the bolt."

July 16, 1974

COUNTIES: Deputy Sheriffs. §§340.11, 321.1(48), 321.1(49), 321.220, 321.261, 321.274, 321.280 and 321.283, Code of Iowa, 1973. A deputy sheriff's salary may not be paid by private company. A law enforcement officer patrolling a private road has only limited authority to enforce traffic laws. (Voorhees to Hutchins, State Representative, 7-16-74) #74-7-9

Mr. C. W. Bill Hutchins, State Representative: You have requested an attorney general's opinion on the following question:

"Does a county sheriff have authority to deputize an individual, whose sole duty as a deputy is to police and patrol a private land development, for which

services the land development company will pay said deputy's salary? Does said deputy have authority to issue traffic violation summonses on the private roads within this land development?"

The first of the two issues you presented was discussed in a previous opinion. See 1962 O.A.G. 99. The facts presented therein were that the owner of an automobile race track offered to pay the salaries of sheriff's deputies used to protect the owner's property during a race. Our opinion held that such an arrangement would be in violation of Chapter 340 of the 1973 Code of Iowa, which sets salaries for county officers. We relied on the following language contained in §340.11:

"The salaries fixed by the foregoing sections of this chapter shall be paid out of the general fund of the county."

Although this particular section has never been judicially interpreted, the following language from *Lemper v. City of Dubuque,* 237 Iowa 1109, 1116, 24 N.W.2d 470, 473 is helpful:

"The Court has repeatedly recognized that the amount of compensation and the time or times for payment thereof for a public officer are not determined from the contract of employment but solely from the legislative provisions applicable to the payment of such compensation. * * * (Citing decisions). 'We have held that a contract, which contemplates the payment of more salary than that specified by law, is against public policy. * * * (Citations). We have also held that a contract which contemplates the payment of less salary than the law specifies, is likewise contrary to public policy. * * * (Citations). In the case of Johnson County Sav. Bank v. Creston, 212 Iowa 929, 933, 231 N.W. 705, 707, 84 A.L.R. 926, we state: 'It is a general principle that a municipal contract entered into in violation of a mandatory statute, or a contract in opposition to public policy is not merely voidable but void. (Coggshell v. Des Moines, 78 Iowa 235). * * *'"

In light of the foregoing, it is our opinion that the salary of a deputy sheriff may not be paid for by a private land development company.

In any event, any law enforcement officer would be limited as to which traffic laws he could enforce on private roads.

§321.1(48) defines "street" or "highway" as: ". . . the entire width between property lines of every way or place of whatever nature when any part thereof is open to use of the public, as a matter of right, for purposes of vehicular traffic."

§321.1(49) defines "private road" or "driveway" as: ". . . every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons."

§321.220 provides that the sections of Chapter 321 relating to the operation of vehicles refers exclusively to the operation of vehicles upon highways, except in §§321.261 to 321.274, inclusive, and §§321.280 to 321.283, inclusive, or where otherwise provided. These specified sections relate to accidents (filing reports, stopping at the scene, etc), reckless driving, and OMVUI.

Thus, any law enforcement officer patrolling a private road would have only limited authority to enforce traffic laws thereon.

July 17, 1974

SCHOOLS: Nonpublic school bussing — House File 1476, 65th General Assembly, 1974 Session. (1) A nonpublic school may qualify as a "private

party" for the purposes of Par. 4(b) of H.F. 1476; (2) Private parties may transport nonpublic school children from one district to another under the contract option of §3 of the Act, but public school buses are limited to transporting such children within the district; (3) School districts are not permitted to contract for only a portion of the transportation cost of nonpublic school students but must contract fully for the service if that is the option chosen; (4) Under §4 of the Act, both public and nonpublic high school reimbursement is limited to $80 per family — reimbursement to parents of nonpublic elementary students is limited to $40 per pupil although such limitation does not apply to public school pupils; (5) The $40 per pupil limitation applies to the parental reimbursement option not the actual cost of transporting pupils under the other two options; (6) H.F. 1476 does not change the meaning of "shared time" or the interpretation of §257.26, Code of Iowa, expressed in opinions of this office; (7) A school district may provide bus service to nonpublic school children for activity trips. (Nolan to Dr. Benton, Superintendent, State Department of Public Instruction, 7-17-74) #74-7-10

Dr. Robert D. Benton, State Superintendent, Department of Public Instruction: We have received several letters from your department requesting interpretations of House File 1476, enacted by the 65th General Assembly of Iowa, 1974 Session. This legislation is to provide auxiliary service, including transportation, for children attending nonpublic schools. The following questions were submitted and each is treated under the appropriately numbered division.

I. Section 3 of the Act amends Code §285.1, Code of Iowa, 1973, does a nonpublic school qualify as a "private party" for the purposes of this amendment?

II. Under the provisions of Section 3, is it permissible for a private party contracted by a public school district to cross district boundary lines or is the private party limited to the provisions of subsection 3 which states, ". . . the pupil may be transported by the district of residence to a public school or other location within the district of the pupil's residence?

III. Can a contract with a private party include a provision that any difference between the average transportation cost of the public school district per pupils transported and the amount per pupil provided from state funds under the provisions of H.F. 1476 be included in the contract with the responsibility for the collection of the difference being that of the private party, or must the public school district entering into a contract with a private party collect the difference, if any?

IV. Does the eighty dollar limitation imposed by §4 apply to families of children attending nonpublic schools as well as those attending public schools?

V. Does the sentence, "However no reimbursement shall exceed forty dollars per nonpublic school pupil per year", which appears in §4 of H.F. 1476, supra, limit the amount payable to the parent of an elementary child to forty dollars per year?

VI. Does H.F. 1476 negate the opinion dated July 14, 1965, in which the Attorney General stated that shared-time pupils were entitled to ride on public school buses?

VII. Does H.F. 1476 limit the transportation of nonpublic school children between the home and the nonpublic school or may a public school district provide bus service to a nonpublic school for the purpose of educational field trips or activity trips?

I

The term "private party" or "private parties" which appears in H.F. 1476 as an amendment to §285.1, Code of Iowa, is not a new term in the chapter, having appeared in Section 285.5 for many years. In contrast to bus transportation referred to and authorized under other provisions of §285.1, which relates to transportation in buses operated by a public school district, the term "private parties" distinguishes between governmental and non-governmental parties.

In the Funk and Wagnall's "New Standard Distionary of the English Language", the term "private" is defined as ". . . unconnected with public position, aid or employment; personal as opposed to public; also having no official character. . . ".

The distinction would seem clear and a nonpublic school most assuredly is a "private party" within the meaning of the new subsection to §285.1, Code of Iowa, 1973.

II

The Act provides for the transportation of nonpublic school pupils who live in one public school district and attend a nonpublic school in another district. (Section 3, new subsection 3). But this provision does not authorize public school buses to cross district lines. The limitations in this provision only refer to the operation of public school buses and do not refer to the other options. Section 3, new subsection 4(b), which refers to the contract option only, limits the contracts for payment to the average per pupil transportation costs of the school district. Therefore, my answer to your question is that private parties may cross school district lines and the language you quote from Secton 3, new subsection 3, does not apply to the contract option.

III

House File 1476 provides that transportation benefits are to be provided to resident nonpublic school pupils through several options. Contracts with third parties are authorized as one of the options. Contracts for just a portion of the transportation cost are not. The public school district must fully contract for the service and if the state reimbursement is prorated, then the public school district must collect the unpaid portion. Therefore, our answer to the first part of your second question is that such a provision would not have legal effect, and the answer to the second part is in the affirmative.

Language in Section 7 of House File 1476 supports this view as follows:

"Boards of directors of school districts shall be required to provide transportation services to nonpublic school pupils as provided in section two hundred eighty-five point one (285.1) of the Code only during school years when the general assembly has appropriated funds to the department of public instruction for the payment of claims for transportation costs submitted by the school district.

"If the funds appropriated by the general assembly are not sufficient to pay the claims submitted by the school districts, the amount paid to each school district by the department shall be prorated on the basis of funds so appropriated. The difference between the amount of payment received from the department of public instruction shall be paid by the parent or guardian of the nonpublic school pupil transported."

IV

Section 4, H.F. 1476 on §285.1(3), Code of Iowa, 1973, provides:

"Sec. 4. Section two hundred eighty-five point one (285.1), subsection three (3), Code, 1973, is amended to read as follows:

"3. In any district where transportation by school bus is impracticable or where school bus service is not available, the board may require the parents or guardian to transport their children to the school designated for attendance. The parent or guardian shall be reimbursed for such transportation service for elementary pupils by the board of resident district for the distance one way from the pupil's residence to the school designated for attendance at the rate of twenty-eight cents per mile per day irrespective of number of children transported. For high school pupils, the parent or guardian shall be reimbursed forty dollars per pupil per year for such service, provided however no family shall receive more than eighty dollars per year for transporting the members of the family who attend high school. *The provision of this section shall apply to eligible nonpublic school pupils as well as to eligible public school pupils. However, reimbursement for nonpublic school pupils shall not exceed forty dollars per pupil per year.*"

The effect of this language is two-fold in regard to reimbursing parents or guardians for transporting their children:

1. It makes it clear that the eighty dollar limitation applies equally to public and nonpublic high school student reimbursements;

2. It establishes a limited reimbursement with regard to nonpublic elementary student transportation of forty dollars per pupil, which is a greater limitation on reimbursement as to nonpublic elementary students than exists as to public elementary students. However, this serves the purpose of giving the legislature a more exact method of determining the appropriation necessary to fund transportation reimbursement.

V

As indicated above, the effect of the $40 per nonpublic school pupil limitation in Section 4 is to limit the parental reimbursement to forty dollars per nonpublic school pupil. Section 3, new subsection 4, is merely a parallel provision affirming the forty dollar per nonpublic school pupil limitation as to the parental reimbursement option. The language in these two places of House File 1476 places a definite limit on the parental reimbursement option. Therefore, the language in Section 3, 4th new subsection and Section 4 of House File 1476 does limit the amount payable as parental reimbursement to a maximum of forty dollars per child for elementary school children as well as for secondary school children.

VI

The 1965 Official Opinion of this office cited as 65 O.A.G. 278, correctly interprets §257.26 that the "shared time" law contemplates a dual enrollment situation where a student is enrolled in the public school as well as the nonpublic school. What follows from this law is that such students are students in both systems. Necessarily, a public school district has the option under House File 1476 to transport a dually enrolled student either as a public school student or as a nonpublic school student. House File 1476 does not change the meaning of §257.26 in this regard or this office's opinion interpreting that section.

VII

According to the language of Section 3 of House File 1476, nonpublic school pupils ". . . shall be entitled to transportation on the same basis as provided for resident public school pupils. . . . The public school district providing transportation to a nonpublic school pupil shall determine the days on which bus service is provided. . .".

Chapter 197, Acts of the 65th General Assembly, amended §285.11(7), Code of Iowa, to be read as follows: "7. The use of school buses shall be restricted to transporting pupils to and from school and to and from extra-curricular activities sponsored by the school when such extra-curricular activity is under the direction of a qualified member of the faculty and a part of the regular school program and to transporting other persons to the extent permitted by §§1 and 3 of this Act. School employees of districts operating buses may be transported to and from school and approved activities which they are required to attend as a result of their responsibilities. Provided, however, nothing in this subsection shall prohibit the use of school buses in transporting a school teacher going to and from her school when such school is on an established school bus route and such teacher makes arrangements with the district operating such school bus."

Section 1 of Chapter 197 was amended by H.F. 1476 to read in part as follows: "Boards in their discretion may provide transportation for some or all resident pupils attending public school *or pupils who attend nonpublic schools* who are not entitled to transportation. Boards in their discretion may collect from the parent or guardian of the pupil not more than the pro rata cost for such optional transportation, determined as provided in subsection 12 of this section." (italics indicating addition made by H.F. 1476).

Section 3 of Chapter 197 reads as follows: "Section 3. Section 285.10, Code 1973, is amended by adding the following new subsection: NEW SUBSECTION. In the discretion of the board, furnish a school bus and services of a qualified driver to an organization of, or sponsoring activites for, senior citizens, children, or handicapped persons in this state. The board shall charge and collect an amount sufficient to reimburse all costs of furnishing the bus and driver. A school bus shall be used as provided in this subsection only at times when it is not needed for transportation of pupils."

It is my opinion that House File 1476 does not limit the transportation of nonpublic school children to between home and nonpublic school and a public school district may provide bus service to nonpublic school children for other than to and from school and home.

July 17, 1974

TAXATION: Property Tax — Homestead Tax Credit and Military Service Exemption; §§425.2, 427.6 Code of Iowa, 1973; Ch. 1020, Acts 64th G.A., §3. Failure to make claim for homestead credit and military exemption by July 1, 1973, disqualifies homeowners to receive those benefits as to all three installments of his 1973 real property taxes payable in 1974 and the first half of 1975. (Capotosto to Mendenhall, State Representative, Seventeenth District, 7-17-74) #74-7-11

Hon. John C. Mendenhall, State Representative: You have requested an opinion of the Attorney General regarding the homestead tax credit and military

service exemption as applied to the extended fiscal year which was created by Chapter 1020, §3, Acts 64th G.A.

You have presented the following fact situation: A homeowner in 1973 did not file claims in the local assessor's office for the homestead credit and military service exemption for 1973 property taxes by July 1, 1973, as is required by law. Section 425.2, Code of Iowa, 1973; §427.6, Code of Iowa, 1973. The homeowner did file for the credit and exemption for his 1974 property taxes. You go on to state:

"You will note that due to complications they were unable to file for homestead and soldiers exemption before July 1, 1973, which means they will lose these exemptions on the 1973 taxes paid in 1974.

"However, they did file early this year for exemption on 1974 taxes payable in 1975. Due to the new fiscal year bill, our taxes are divided into three equal payments, 5-31-74 and 9-30-74 which are in payment of 1973 taxes. The third payment is due 3-30-75 which in reality is the first payment on 1974 taxes and they should be entitled to these exemptions on this payment but apparently the State Revenue Department, Property Tax Division, does not see it that way. I think they are wrong and if the [homeowners] do not receive benefit of these exemptions on their payment of 3-30-75, they are being unconstitutionally deprived."

Essentially your question is whether the homestead tax credit and military service exemption can be applied against the third installment of property taxes under the extended fiscal year law which is payable before April 1, 1975. A little background is in order at this point. Chapter 1020, Acts 64th G.A., implements the transition of the budget year of Iowa's cities, counties and other political subdivisions from a calendar year to a fiscal year. In order to facilitate the continuity of local property tax collection during the change-over from calendar to fiscal year the legislature created an extended fiscal year. Ch. 1020, Acts 64th G.A., §3. As you are undoubtedly aware, property taxes are customarily paid in two equal installments, the first by April 1, and the second by October 1. As you are also aware, property tax collection always runs a year behind. That is, your 1971 taxes were actually paid by April 1 and October 1 of 1972; your 1972 taxes were paid by April 1 and October 1 of 1973. Chapter 1020 created a change in this collection process with respect to property taxes for 1973. That statute increased all millage rates by fifty percent and made the 1973 taxes payable over a period of eighteen months in three installments. Ch. 1020, §3. Hence, property taxes for 1973 are payable by April 1, 1974, October 1, 1974, and April 1, 1975. All three installments constitute payment of the 1973 taxes. They are based on the assessed value of the property as of January 1, 1973. Section 428.4, Code of Iowa, 1973. Collection of property taxes for subsequent years will then be on a fiscal year basis. That is, 1974 taxes will be collectible by October 1, 1975, and April 1, 1976, and so on for all later years.

Within this framework of property tax assessment and collection we have the homestead tax credit and the military service exemption. Requirements for claiming the homestead credit are set out at §425.2, Code of Iowa, 1973:

"Any person who desires to avail himself of the benefits provided hereunder shall each year on or before July 1 deliver to the assessor, on blank forms to be furnished by the assessor, a verified statement and designation of homestead as claimed by him . . ."

Section 427.6, Code of Iowa, 1973, governs claims for the military service exemption:

"Said claim for exemption, if filed on or before July 1 of any year and allowed by the board of supervisors, shall be effective to secure an exemption only for the year in which such exemption is filed."

The time limitations for filing claims for the homestead tax credit and military service exemption were not changed by Ch. 1020, Acts 64th G.A. Moreover, the filing statutes permit a credit or exemption only against taxes for the year in which the claim was filed. Thus, if your taxpayer has filed claims in 1974 prior to July 1, 1974, and if he qualifies for the credit and exemption in all other respects, he is entitled to the benefits of the statutes with respect to his 1974 taxes payable by October 1, 1975 and April 1, 1976. His filing of claims in 1974 does not affect or change in any way the 1973 taxes which are payable in 1974 and the first half of 1975. See, O.A.G. #74-5-2.

Pulling all of these concepts together in the context of your specific inquiry, it is the opinion of the Attorney General that where a homeowner has failed to claim the homestead tax credit and military service exemption from his 1973 taxes by July 1, 1973, those benefits are lost. The exemption and credit furthermore are lost as to all three installments of the 1973 taxes. As has been pointed out, all three installments payable for purposes of the extended fiscal year are for *1973* taxes. It should be emphasized that the third installment due by April 1, 1975, is not in reality the first payment on 1974 taxes. It is very simply the last payment of 1973 taxes. Thus if a taxpayer has failed to qualify for the exemption and credit as to the first two payments, it follows that he is also disqualified as to the third.

July 17, 1974

PRIMARY ELECTION: Death of Nominee. §43.77, 43.78, 43.86; 133 A.L.R. 321 (1941). Where a candidate for party nomination dies immediately prior to or subsequent to the primary election, such death makes the election nugatory but all votes cast must be canvassed as though the candidate were alive and eligible. (Haesemeyer to Wellman, Secretary, Executive Council of Iowa, 7-17-74) #74-7-12

W. C. Wellman, Secretary, Executive Council of Iowa: In your letter dated July 16, 1974, you refer to the June 4, 1974, primary election for 47th State District Representative and call to our attention the fact that though candidate R. G. Miller died four days prior to the election his name nevertheless appeared on the primary ballot and he received the greatest number of votes. You specifically ask whether the Executive Council may certify the candidate with the next highest number of votes as the party's nominee for State District Representative.

The general rule is set out at 133 A.L.R. 321 (1941):

"The general rule — that votes cast for a deceased, disqualified, or ineligible person are not to be treated as void or thrown away, but are to be counted in determining the result of the election as regards the other candidates — has been most frequently applied in cases where the highest number of votes were cast for the deceased or disqualified person. The result of its application in such cases is to render the election nugatory, and to prevent the election of the person receiving the next highest number of votes."

In *Patton v. Haselton,* 164 Iowa 645, 146 N.W. 477 (1914), the Iowa Supreme Court said,

"It has not infrequently happened that ineligible candidates have been voted for by a majority of the voters. Though the candidate thus voted for by a majority cannot be declared elected because of his ineligibility, and the majority vote is thereby rendered ineffective for such purpose, yet it is quite uniformly held that such majority vote is effective to forbid the election of the candidate having the next highest number of votes. The effect of such majority vote is to render the purported election nugatory, and to leave a vacancy in the office thus attempted to be filled." (citing cases)

Concise and cogent support for this rule is set out in *Davis v. Wilson,* 229 Iowa 100, 294 N.W. 288 (1940) in which the court said:

"The purpose of a primary election is to permit the electors affiliated with the respective political parties to say by their votes who shall be the candidates of their parties for the various offices. In other words, the electors do the nominating. This is clearly manifest from the statutory provisions . . . It is true that the canvass by the State Board of Canvassers of the abstracts of the election returns filed by the County Auditors is one of the statutory steps in an election for public offices, but it cannot ordinarily alter the record made by the voters. Its duty is the ministerial or administrative one of ascertaining and verifying that record and declaring the result as it was shown upon the face of the abstracted returns.

"In 20 C.J.S. page 200, section 255, it is stated: 'Where there is no question as to the genuineness of the returns or that all of the returns are before them, the powers and duties of the canvassers are limited to the mechanical or mathematical function of ascertaining and declaring the apparent result of the election by adding or compiling the votes cast for each candidate as shown on the face of the returns before them, and then declaring or certifying the result so ascertained."

Accordingly, it is our opinion that the Executive Council may not certify the candidate with the next highest number of votes, and since the candidate with the highest number of votes is deceased, a vacancy exists as to the Democratic nominee for 47th State District Representative.

Under §43.76, Code of Iowa, 1973, this vacancy if it occurred before the holding of the legislative district convention, should be filled by such convention making a nomination for the office. Or if the convention fails to fill the vacancy then by the district party central committee under §43.77. If the convention has already been held, the vacancy may, under §43.78, be filled by the district party central committee or the central committee may, if it wishes to do so, call a convention in lieu of filling the vacancy itself. §43.86.

July 22, 1974

CONSTITUTIONAL LAW: Equal protection of Senate File 1141. §30, Senate File 1141, Acts of the 65th G.A. In the absence of facts showing otherwise, §30 of Senate File 1141 is presumed to be constitutional. Said section is not unconstitutional merely because it distinguishes between geographical locations. (Blumberg to Woods and Caffrey, State Representatives, 7-22-74) #74-7-13

Honorable Jack Woods, State Representative; Honorable James Caffrey, State Representative: We are in receipt of your opinion request of April 29, 1974, regarding the Constitutionality of Senate File 1141 of the Sixty-fifth

General Assembly. Your question is with reference to section 30 of the Act, which amends section 321.457 of the Code as follows:

"A motor vehicle or combination of vehicles may be operated upon the highways of this state, irrespective of the length and weight limitations imposed by the laws of this state, if the motor vehicle or combination of vehicles is operated within the corporate limits of a city abutting a border of this state and such operations have been approved by ordinance of the city council and if the length and weight of the motor vehicle or combination of vehicles is in conformity with the laws relating to length and weight of the abutting state on the effective date of this Act. If a city council has authorized such operation upon highways within the corporate limits, then the limit of travel for such motor vehicles or combination of vehicles within the state is extended to the commercial zones as described by federal regulations concerning interstate commerce, forty-nine (49), code of federal regulations, paragraphs one thousand forty-eight point ten (1048.10), one thousand forty-eight point one hundred one (1048.101) as they exist on the effective date of this Act."

You question the constitutionality of this section because it is limited to certain geographical areas (border cities) and because it may not afford uniformity and equal protection to all similarly situated individuals.

Legislative enactments are presumed to be constitutional. Unconstitutionality of a statute must be proved beyond a reasonable doubt. *Lewis Consolidated School Dist. v. Johnston,* 1964, 256 Iowa 236, 127 N.W. 2d 118. If the constitutionality is merely doubtful or fairly debatable, courts will not interfere. *Burlington and Summit Apartments v. Manolato,* 1943, 233 Iowa 15, 7 N.W.2d 26. It must be shown that the statute clearly, palpably, and without doubt infringes the constitution, and in so doing, every reasonable doubt must be resolved in favor of constitutionality. *Lee Enterprises, Inc. v. Iowa State Tax Comm'n,* 162 N.W.2d 730 (Iowa 1968).

It is well settled that the Constitution of the United States in securing equal protection of the laws does not prohibit legislation which is limited as to the territory within which it operates. 16 Am.Jur.2d, *Constitutional Law* §510 See *McGowan v. Maryland,* 1961, 336 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101, in which the court stated a state Sunday closing law does not violate the equal protection clause of the Fourteenth Amendment merely because it exempts from its scope retailers in only on county. A classification is not illegal because certain cities are included while others are omitted from the operation of a statute. 16 Am.Jur.2d, *Constitutional Law* §510. See also, *North Western Laundry v. Des Moines,* 1915, 239 U.S. 486, 60 L.Ed. 396, 36 S.Ct. 206. There may be valid reasons, economic or otherwise, why border cities should be treated differently than other areas of the state. The mere fact that there is a distinction in the statutes based upon geographical location is not sufficient, in and of itself, to render such a statute unconstitutional. Adhering to the constitutional law cited above, we must presume the statute in question to be constitutional in the absence of any facts showing otherwise.

In response to your second question, a classification will be valid if it is reasonable and operates equally upon all within a class. *Brown Enterprises, Inc. v. Fulton,* 192 N.W.2d 773 (Iowa 1972). There appears to be a question whether Iowa residents are treated differently than those from other states in access to the border cities in longer trucks. There may at times be some type of discrimination against the Iowa residents, however it is not such an invidious discrimination that violates the Constitution. The evil sought to be prohibited

(driving longer trucks on the highways of this State) is still being prohibited, and such prohibition is applied equally to both in-state and out-of-state residents. The only manner in which longer trucks may be allowed anywhere in this state is in border cities, and only if the vehicle enters from the neighboring state. This applies equally to both residents and non-residents.

Accordingly, we are of the opinion that section 30 of the Senate File 1141 is constitutional, not only in its equal application, but also based upon the presumption of constitutionality until facts show otherwise beyond a reasonable doubt.

July 22, 1974

CRIMINAL LAW: Intoxication. Senate File 1354, §17(1), Acts, 65th G.A., Second Session (1974), §§123.46 and 4.1(37), 1973 Code of Iowa. A peace officer who apprehends a person who appears to be intoxicated by alcohol in a public place "may" either take that individual to an alcohol treatment facility or he "may" file a charge of public intoxication in volation of §123.46. "May" confers a power or discretion. (Turner to Ramsey, State Senator, 7-22-74) #74-7-14

The Honorable Richard R. Ramsey, State Senator: This is to acknowledge receipt of your letter of April 24, 1974, in which you requested an opinion of this office as to whether, under Senate File 1354, §17(1), of the 65th General Assembly, Second Session (1974), and §123.46, 1973 Code of Iowa, a law enforcement officer has "discretion to file a charge of intoxication against someone who appears to be intoxicated before offering to take that person to a facility."

Senate File 1354, §17(1) was the final version of the bill enacted and signed by Governor Robert Ray on May 29, 1974. It is now identified as Chapter 1131, §17(1), Acts of the 65th G.A., Second Session (1974), which provides as follows:

"1. An intoxicated person may come to a facility for emergency treatment. A person who appears to be intoxicated or incapacitated by alcohol in a public place and in need of help *may* be taken to a facility by a peace officer or the alcoholism service unit. If the person refuses the proferred help, he *may* be arrested and charged with intoxication." (Emphasis added)

Section 123.46, 1973 Code of Iowa, provides in pertinent part as follows:

". . . no person shall be intoxicated in a public place. . . ."

Your question is answered by comparing the language of S.F. 1354, §17(1) to the language of the original proposed draft of this legislation, H.F. 1110, §16(1). The language of the two bills differs in only one major respect. House File 1110, §16(1) provides that any person found intoxicated in a public place *shall* be taken to a treatment facility, and if any such person refuses the proferred help he *shall* be arrested and charged with intoxication. Had the Senate passed the bill in this form, peace officers would have had no discretion to file a charge of public intoxication under §123.46, since, as stated in *Consolidated Freightways Corp. of Del. v. Nicholas*, 258 Iowa 115, 121, 137 N.W.2d 900, 904 (1965):

"When a statute uses the word 'shall' in directing a public body to do certain acts, the word is to be construed mandatory, not permissive, and excludes the idea of discretion." (Citation omitted)

However, the Senate rejected the mandatory language of H.F. 1110, §16(1). The verb "shall" was stricken from the two sentences in which it appears in H.F. 1110, §16(1), and the verb "may" was inserted in place thereof. This change was crucial. The use of the verb "may" generally indicates a permissive intent. *John Deere Waterloo Tractor Works v. Derifield,* 252 Iowa 1389, 1392, 110 N.W.2d 560, 562 (1961). In *Derifield,* the Court stated:

"The verb "may" usually is employed as implying permissive or discretionary rather than mandatory action or conduct. It imports a grant of opportunity or power and is never properly used in a denial, or a restriction or limitation, except in connection with the word 'not.' 57 C.J.S. May pages 457-458, A mandatory construction will not be given it unless it plainly appears the legislative intent was to impose a duty and not merely a privilege or discretionary power and where third persons have a claim de jure to have the power exercised." (Citations omitted)

§4.1(37) Code of Iowa, 1973, provides:

"Unless otherwise specifically provided by the general assembly, whenever the following words are used in a statute enacted after July 1, 1971, their meaning and application shall be:

a. The word 'shall' imposes a duty.

b. The word 'must' states a requirement.

c. The word 'may' confers a power."

It is our opinion that under Chapter 1131, §17(1), Acts of the 65th G.A., Second Session (1974), a peace officer who apprehends a person who appears to be intoxicated by alcohol in a public place *may, in his discretion,* take that individual to an alcohol treatment facility. However, the peace officer is not obligated under this statute to do so. He may instead choose to file a charge of public intoxication in violation of §123.46.

July 23, 1974

UNEMPLOYMENT COMPENSATION — Legislative Employees. Iowa Constitution, Art. III, §9; §2.11, Code of Iowa, 1973, §96.7(8), Code of Iowa, 1973, as amended by Chapter 147, Acts, 65th G.A. §1, 1973; Chapter 97B, Code of Iowa, 1973. Legislative employees are precluded from receiving unemployment benefits unless and until such time as the legislature deems it propitious to bestow such benefits upon them as part of their compensation. (Haesemeyer to Rabedeaux, State Senator, 7-23-74) #74-7-15

The Honorable W. R. Rabedeaux, State Senator: This opinion is in reference to your request of February 15, 1974, in which you ask,

"Are legislative employees, being employees of a distinct and separate branch of government and under the direct control of the General Assembly . . . subject to the provisions of Chapter ninety-six (96) of the Code of Iowa relating to Employment Security in the following instances:

"1. When an employee of the General Assembly files for unemployment compensation upon leaving work at the end of a legislative session; and/or

"2. When a legislative employee files for unemployment upon being laid off or terminated by a subsequent or concurrent employer other than the General Assembly (with the General Assembly being charged for a portion of the benefits)."

Iowa Constitution, Article III, §9,

"Each house shall . . . have all other powers necessary for a branch of the general assembly of a free and independent state."

Section 2.11, Code of Iowa, 1973,

"Each house of the general assembly may employ such officers and employees as it shall deem necessary for the conduct of its business. The compensation of the chaplain, officers, and employees of the general assembly shall be fixed by joint action of the house and senate by resolution at the opening of each session, or as soon thereafter as conveniently can be done."

It is to be observed that the compensation of legislative employees is not fixed by statute but by joint resolution and that this is done for each session at the beginning of such session.

Under §97B.41(3)(b), Code of Iowa, 1973, which creates the Iowa Public Employees Retirement System, employee means,

"[a]ny individual who is in employment defined in this chapter, except . . .

"(2) Temporary employees of the general assembly of Iowa unless such employees shall make an application to the commission to be covered under the provisions of this chapter."

While no corresponding exception is found in Chapter 96, the language of §96.19(5) defining "employing unit" is at best ambiguous:

" 'Employing unit' means any individual or type or organization, including any partnership, association, trust, estate, joint stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1936, had in its employ one or more individuals performing services for it within this state. . . ." * * *

It is questionable whether the Iowa general assembly could be said to be a "type of organization". In any event, in our opinion the legislative employees are considered to have a status different from all other employees and the legislature is given exclusive power to determine their compensation. The legislature has deemed it appropriate to provide for a salary but has specifically withheld other benefits such as sick leave, vacation pay, and many other forms of compensation which other employees take for granted. However, the peculiar nature of this particular employment relationship is such that means of compensation other than salary are not in fact mandated. Legislative employees accept their employment with complete awareness of the fact that it is to be for a limited duration and for specified compensation, and turnover among such employees is the rule not the exception, with most employees intending to remain in service for only one session.

To reiterate, by the unambiguous terms of §2.11, Code of Iowa, 1973, legislative employees receive only such compensation as is provided for by the legislature by joint resolution. Unemployment compensation is, therefore, not deemed to accrue as part of the compensation of said employees in the absence of specific legislative language to that effect.

July 25, 1974

COUNTIES AND COUNTY OFFICERS: Sanitary Sewer Districts — §§28E.2, 28E.3, 28E.4, 28E.12, 358.11, 358.13 and 358.18, Code of Iowa,

1973. Contracts between sanitary sewer districts are permissible under Chapter 28E of the Code. (Blumberg to Readinger, State Representative, 7-25-74) #74-7-16

The Honorable David M. Readinger, State Representative: We are in receipt of your opinion request of June 25, 1974, regarding sanitary sewer districts. The trustees of the Urbandale and the Urbandale-Windsor Heights Sanitary Sewer Districts wish to contract with one another to provide emergency relief to residents of the districts by connecting a temporary relief sewer line between the two systems. You question whether this can be accomplished.

Chapter 28E of the Code provides for joint agreements between public agencies. Section 28E.2 defines "public agency" as "any political subdivision of this state". Sections 28E.3 and 28E.4 provide that any powers, privileges or authorities exercised by public agencies of this state may be exercised jointly with any other public agency. Section 28E.12 allows contracts between public agencies. The only question remaining is whether a sanitary district is a political subdivision, and therefore a public agency within Chapter 28E.

Section 358.11 provides that each sanitary district shall be a body corporate and politic. The board of trustees of such a district shall pass ordinances and resolutions (§358.13), and have taxing power (§358.18). These sections are evidence in and of themselves that these districts are political subdivisions. See also *State ex rel Iowa Employment Security Commission v. Des Moines County,* 1967, 260 Iowa 341, 149 N.W.2d 288, where a drainage district under Chapter 455 was held to be a political subdivision. Thus, sanitary districts fall within the definition of "public agencies" within Chapter 28E.

There has been some question as to the requirements of Section 358.16, which provides that the districts shall provide for the disposal of sewage within the boundaries of such district. We do not believe that such a limitation, if it is a limitation, prohibits the proposed action under "joint cooperation" in Chapter 28E. To hold otherwise would in effect, nullify the words "joint cooperation".

Accordingly, we are of the opinion that the two sanitary districts may contract with one another to construct an emergency sewer line under Chapter 28E of the Code.

July 29, 1974

COURTS: COURT COSTS: FILING FEES: SMALL CLAIMS: HF 1470, §24, 65th G.A., 2nd, 1974; §§631.6 and 606.15, Code of Iowa, 1973, as amended. The initial filing fee required to be paid in advance as court costs with the filing of a small claim action in the district court of Iowa is $5.00 except in those counties (Polk, Black Hawk, Linn, Scott and Woodbury) with more than 100,000 population, in which such initial filing fee is $6.00. In addition, any clerk may weigh the original notices he is required to mail and ascertain the postage which he may also require be paid in advance with the initial filing fee. (Turner to Erhardt, Wapello County Attorney, 7-29-74) #74-7-17

Mr. Samuel O. Erhardt, Wapello County Attorney: This will acknowledge your request of July 19, 1974, for an attorney general's opinion as to the amount of advanced costs which must be paid to the clerk at the time of filing a small claim, and which request I understand was initiated by Mr. C. K. Wise, President of the Association of Clerks of the District Court. Your request incorporates your learned opinion, with which we agree, as follows:

"Mr. C. K. Wise, Clerk of District Court of Wapello County has asked me to request an opinion from you concerning the advanced payment of costs in small claims, since the article appeared in the Register this day. There seems to be a lot of confusion as to the amount that must be paid to institute an action in the small claims division of District Court.

"House File 1470, Section 24, [Acts 65th G.A., 2nd Session, 1974] amends Section 631.6 of the 1973 Code and states that all fees and costs required to be paid in small claims actions shall be paid in advance, and shall be assessed as costs in the action. Subsection 1 of this Section states docket fees and other fees imposed for small claims shall be the same as those required in regular actions in District Court.

"Now it is understood that the costs will be taxed pursuant to Section 606.15 of the 1973 Code, stating that the filing fee under 606.15 subsection 1 shall be $4.00 'except in certain counties', of which $1.00 shall be sent to the State Treasurer. Subsection 10 under Section 606.15 states for taxing costs $1.00. The small claims action also required that if the Notice is to be mailed, the Clerk shall collect in the costs of mailing certified mail return receipt requested or if it is filed under a long-arm statute being Section 22 of House file 1470, subsection, paragraph C which is the long-arm statute, we would collect an additional $5.00 in advance to send to the Secretary of State and in my opinion this would be all the costs that would be required to be collected in advance since the Sheriff's fee could be collected by the Sheriff since Section 337.11 states what his fees will be for service and the amount he will get per mile, however, the Clerk is unable to determine how many trips the Sheriff must make to obtain service on this Original Notice so their fees could vary quite a little on personal service.

"According to the newspaper, the Des Moines Register, some of the counties are charging $20.00 to file a small claims action and in visiting with some of them I find that the Sheriff asked them to estimate their service fees at $10.00. They would be charging $4.00 for the filing of the case, $1.00 for taxing and costs, $1.50 for a judgment entry, $2.50 for the trial of the case and $1.00 for the satisfaction and judgment, which would make a total of $20.00.

"It is my opinion that the intent of the legislature in stating that the fees should be collected in advance would mean just those fees that were readily ascertainable by the Clerk as the Clerk would have no way of knowing if a case was going to be tried, dismissed, or be a default judgment and in each instance the costs would be different.

"If this $20.00 fee continues, it will simply chase the poor man out of the small claims court as he will feel that $20.00 is too much money to invest in a $50.00 or $75.00 law suit, since he really has no assurance that he will be able to collect this money back even though he is successful in obtaining his judgment. Therefore, I feel this is depriving the person of his right to a day in court. It would be my opinion that a charge of $4.00 for filing, $1.00 for taxing and costs and any mailing service fee that we required should be collected in advance. The Sheriff has the right to withhold his return of service until the Plaintiff reimburses him for expenses, so he is assured of his fee."

§631.6, as amended by H.F. 1470, provides that "all fees and costs required to be paid in small claims actions shall be paid in advance, and shall be assessed as costs in the action." We agree that this necessarily means only those costs "readily ascertainable" at the time of filing and that if the exact amount is not so readily ascertainable then no such costs should be collected at the time of filing. The only costs we can see which are readily ascertainable is the $4.00 charge for filing (§§631.6(1) and 606.15(1)) plus $1.00 for taxing costs (§606.15(10)), or a total of $5.00 ($6.00 in those counties with more than

100,000 population: Polk, Black Hawk, Linn, Scott and Woodbury). In addition, any clerk may weigh the original notices he is required to mail and ascertain the postage which he may also assess as part of this initial filing fee. (§631.6(2).

While some may argue that the clerk is entitled to require $2.50 "for every cause tried by the court," (§606.15(4)) not every cause is tried by the court. Some cases go to default and are not "tried", as the term is used. Similarly, determination of sheriff's fees, continuances, entries of either "final judgment" (§606.15(9)) or "order" of dismissal (§606.15(15)) cannot be definitely determined until a time subsequent to filing.

July 30, 1974

ENVIRONMENTAL PROTECTION: County Conservation Boards, cooperative agreement or contracts with local units of government — Chapter 28E and §§111A.1, 111A.4, 111A.6, 111A.7, Code of Iowa, 1973. County conservation boards may participate with a town or other local unit of government in the establishment of a recreational area upon land in which either has sufficient interest to establish such a project. (Peterson to Priewert, Director, State Conservation Commission, 7-30-74) #74-7-18

Mr. Fred A. Priewert, Director, State Conservation Commission: Receipt is hereby acknowledged of your letter of July 15, 1974, wherein you request the opinion of the Attorney General as follows:

"Chapter 111A.7 of the 1973 Code of Iowa on joint operations permits a county conservation board to join with other county conservation boards and state and federal agencies in cooperative programs. It also permits cities, towns, villages, or school districts to aid and cooperate with a county conservation board in equipping, operating, and maintaining public recreation areas. An Attorney General's opinion to Mr. G.A. Cady, Franklin County attorney, Hampton, Iowa, dated April 22, 1959, established that a board could not financially aid a town in the establishment of a recreational area upon property which the board has no interest. This appears to be in conflict with Chapter 28E on the joint exercise of governmental powers.

"It appears as though Chapter 28E has superseded Chapter 111A.7. We would appreciate an interpretation and clarification of these laws."

Portions of Chapter 111A, Code of Iowa, 1973 (enacted 1955) pertinent to your inquiry are:

"111A.1 Purposes. The purposes of this chapter are to create a county conservation board to authorize counties to acquire, develop, maintain, and make available to the inhabitants of the county, public museums, parks, preserves, parkways, playgrounds, recreational centers, county forests, wildlife and other conservation areas, and to promote and preserve the health and general welfare of the people, to encourage the orderly development and conservation of natural resources, and to cultivate good citizenship by providing adequate programs of public recreation.

"111A.4 Powers and duties. The county conservation board shall have the custody, control and management of all real and personal property heretofore or hereafter acquired by county for public museums, parks, preserves, parkways, playgrounds, recreation centers, county forests, county wildlife areas, and other county conservation and recreation purposes and is authorized and empowered: * * *

"2. To acquire in the name of the county by gift, purchase, lease, agreement or otherwise, in fee or with conditons, suitable real estate within or without the territorial limits of the county areas of land and water for public museums, parks, preserves, parkways, playgrounds, recreation centers, forests, wildlife and other conservation purposes . . .

* * *

"5. To accept in the name of the county gifts, bequests, contributions and appropriations of money and other personal property for conservation purposes.

"111A.6 Funds — tax levy — gifts — anticipatory bonds . . . . Gifts, contributions and bequests of money and all rent, licenses, fees and charges and other revenue or money received or collected by the board shall be deposited in the county conservation fund to be used for the purchase of land, property and equipment and the payment of expenses incurred in carrying out the activities of the board, except that moneys given, bequeathed, or contributed upon specified trusts shall be held and applied in accordance with the trust specified.

"111A.7 Joint operations. Any county conservation board may cooperate with the federal government or state government of any department or agency thereof to carry out the purposes and provisions of this chapter. Any county conservation board may join with any other county board or county boards to carry out the provisions of this chapter, and to that end may enter into agreement with each other and may do any and all things necessary or convenient to aid and to co-operate in carrying out the provisions of the chapter. Any city, town, village or school district may aid and co-operate with any county conservation board or any combination thereof in equipping, operating and maintaining any museums, parks, preserves, parkways, playgrounds, recreation centers, and conservation areas and for providing, conducting and supervising programs of activities, and may appropriate money for such purposes. . . ."

The Opinion of the Attorney General referred to in your letter (1960 O.A.G.70, Gritton to Cady, Franklin County Attorney, 4/22/59, #59-5-2) construed these sections holding, inter alia, that county conservation boards are not thereby authorized to financially aid a town in the establishment of a recreational area upon property in which the board has no interest.

Subsequent to the enactment of Chapter 111A and the issuance of the Opinion of the Attorney General thereon cited above, what is now Chapter 28E of the Code was enacted by the Sixty-first General Assembly (1965) to authorize joint exercise of governmental powers by public agencies. Pertinent portions thereof are:

"28E.1 Purpose. The purpose of this chapter is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to co-operate in other ways of mutual advantage. This chapter shall be liberally construed to that end.

"28E.2 Definitions. For the purposes of this chapter, the term 'public agency' shall mean any political subdivision of this state; any agency of the state government or of the United States; and any political subdivision of another state. The term 'state' shall mean a state of the United States and the District of Columbia. The term 'private agency' shall mean an individual and any form of business organization authorized under the laws of this or any other state.

"28E.3 Joint exercise of powers. Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privileges or authority, and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency.

"28E.4 Agreement with other agencies. Any public agency of this state may enter into an agreement with one or more public or private agencies for joint or co-operative action pursuant to the provisions of this chapter, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force.

"28E.11 Agency to furnish aid. Any public agency entering into an agreement pursuant to this chapter may appropriate funds and may sell, lease, give, or otherwise supply the administrative joint board or other legal or administrative entity created to operate the joint or co-operative undertaking by providing such personnel or services therefor as may be within its legal power to furnish.

"28E.12 Contract with other agencies. Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity, or undertaking which any of the public agencies entering into the contract is authorized by law to perform, provided that such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives, and responsibilities of the contracting parties.

"28E.13 Powers are additional to others. The powers granted by this chapter shall be in addition to any specific grant for intergovernmental agreements and contracts."

The explanation of the proposed bill (Ch. 28E) states:

"This bill would permit any local unit of government (city, town, school, county, township, or special district) to make agreements or contracts with each other or state or federal agencies. This should stimulate increased cooperation and efficiency among government units.

"Currently, local units of government must get specific authority from the legislature for any kind of agreement or contract with each other. This bill would eliminate the necessity for authorization for each kind of agreement. Indeed, if the government units have the power by law to do something individually, they automatically will (have) the power to perform the service or function jointly if they make an agreement or contract and if they follow certain steps in doing this."

In an opinion issued by this office on April 4, 1969 (Turner to Coupal, Director of Highways) we stated:

"28E.12 authorizes not only the joint exercise of mutually possessed powers, but also the exercise by one agency of the power of the other in accordance with the contract."

Accordingly, we are of the opinion that Code Chapter 28E was enacted for the very purpose of authorizing the joint exercise of governmental power

noted in your letter and which was not previously authorized by Chapter 111A. Thus, in accord with the provisions and requirements of Chapter 28E, a county conservation board may participate with a town (or other local unit of government) in the exercise of any power possessed by either, including the establishment of a recreational area upon land in which either has sufficient interest to establish such a project.

July 30, 1974

SCHOOLS: Schoolhouse construction. When a school district utilizes the services of a construction manager for the building of a high school,compliance with the statutory requirements of public hearing on the project and form of contract, approval of plans and bonding is also required. (Nolan to Pillers, Clinton County Attorney, 7-30-74) #74-7-19

Mr. G. Wylie Pillers, Clinton County Attorney: We have received your letter of June 21, 1974, pertaining to the construction of a new high school in Camanche, Iowa. We quote from that part of your letter pertinent to your request for an opinion from the Attorney General on the questions you submitted;

"(1) Is a public hearing, as is set forth on page six of your opinion letter of May 17, 1974, required prior to the undertaking of any contract or contracts for construction of the school at which time the public is entitled to know the scope of the entire contemplated school project, or is it possible to construct the project piecemeal and hold a public hearing prior to the letting of contracts for each piece at which time the scope of that particular phase only would be known to the public?

"(2) Is it possible for the Construction Manager who appears to be an agent of the school district to have an identity of interest with the architect or some contractor in connection with the project, or are all architectural firms and other contractual firms in which the Construction Manager may have an interest barred from participation in work in connection with the project because of common law and statutory conflict of interest principles. For instance, if the architect's contract calls for the architect to make inspections and provide assurance that the plans and specifications are being followed, and if the Construction Manager is responsible for the amendment of the construction contracts and the Construction Manager has an identity of interest with the architect, does this not constitute a conflict of interest?

"(3) How can the board of directors of the school district comply with Section 297.7 *Iowa Code* which requires consultation by the school board with the Building Consultant of the Department of Public Instruction as to the 'most appropriate plan' for such a building when the plans and specifications of the total project contemplated are unknown during the various phases of the building construction?

"(4) May the drawings and specifications be submitted to the State Fire Marshal for approval, pursuant to §46.1(5) of *Regulations of the Public Safety Department of the State of Iowa,* I.D.R., page 829, piecemeal or in phases in connection with a school building where phase construction, using a Construction Manager, is contemplated or must the drawings and specifications be submitted to the State Fire Marshal in toto for his approval? In other words, can the Fire Marshal effectively perform his function if he is given the plans only in piecemeal? What corrective action is permitted the Fire Marshal if he determines, for example, that certain features of the building are not in compliance with applicable codes, if related structural work (such as foundations) have already been constructed?

"(5) Have not the electors approved the construction of the total building or buildings and therefore is it not the responsibility of the school board from the beginning to insure that the total building authorized by the electors: (1) be submitted to the public under the hearing provisions of 23.2 and 23.3 Iowa Code and (2) that the entire building under all of the construction contracts be covered by a construction bond required by §573.2. It is to be noted that the construction bonds usually have limited time coverage so that unless all of the bonds are tied to completion of the building as a whole that the time coverage for the foundation, for instance, may well expire before the building which will test the quality of the foundation has been completed."

The clear statutory language of §297.7 and 23.2 Code of Iowa 1973 dictates, as was stated in the opinion issued on May 17, 1974, that, "the school district is required under Sec. 23.2 of the Code to hold a public hearing on the proposed plans and specifications and *proposed form of contract* for the construction of the school. At such time, the public is entitled to know the scope of the contemplated project."

The public's right to know the scope of the project as well as the form of the contract, is not satisfied by merely holding a public hearing prior to the letting of contracts for each phase of construction. As the "contemplated project" is the erection of a high school, the public has a statutory right to know the plans and specifications of the contemplated project to the extent that such are available. Additionally, the public has a statutory right to know that the form of contract involves the employment of a construction manager. All such information must be brought out at a public hearing prior to the undertaking of any contract or contracts.

2.

While it is always possible for a conflict of interest to exist, it is our view that any contract between the School Board and the Construction Manager/Architect/Builder can be drawn with sufficient specificity so as to minimize such problems. To do so, it would seem necessary to recognize the construction manager as the agent of the owner and the architect as agent of the building contractor unless all are employees of the same company in which case all should be dealt with jointly — at arm's length. In any event the parameters of responsibility should be clearly spelled out in the contract or contracts.

3.

Section 297.7, 1973 Code of Iowa, requires that:

"Before erecting any school building at a cost of more than five thousand dollars, the board of directors shall consult with the building consultant in the department of public instruction as to the most approved plan for such building."

In an Attorney General's opinion issued April 12, 1962, 1962 OAG 326, it was stated that the term "plan" as used in this context refers to the architect's plan. Thus, in order to comply with the provisions of 297.7 it is necessary that there in fact be a plan for the board of directors to consult with the building consultant in the department of public instruction. Obviously, necessity as well as statute dictates that such plans be drawn up before any construction begins.

4.

Section 46.1(5) of the Regulations of the Public Safety Department of the State of Iowa, I.D.R., page 829 requires that:

"All changes of alterations to be made in any school or college building, whether new or existing, shall conform with the applicable provisions of these rules *and before any construction of new or additional installation is undertaken, drawings and specifications thereof made to scale shall be submitted to the state fire marshal, in duplicate, for his approval.*"

The language of this section is quite explicit: Before any construction is undertaken the drawings and specifications must be submitted to the state fire marshal. Such drawings and specifications would seem to include the architects plan, material alterations thereto and any other pertinent materials. Finally, such drawings and specifications must be submitted in toto for his approval, as must all subsequent changes or alterations.

We concur with your statement that the school board bears the responsibility of compliance with §23.2 and 23.3 of the Code and also has an obligation under 573.2 to see that the *entire* building under all of the construction contracts be covered by a construction bond.

In *City of Osceola v. Gjellefald Const. Co.*, 1938, 279 N.W. 590, the Supreme Court of Iowa concluded that, while a dam built for the city met all other specifications, the fact that it was not water-tight, which was the original intent of the contracting parties, allowed the city to collect damages from surety on the contractor's bond.

As it is now the intent of both the school board and the electors that the contract result in a *completed* high school, the performance bonds should be so drawn so as to cover construction of the entire building. Thus the amount and time coverage of such bonds should substantially comply with the provisions of Chapter 573 and if each contractor is considered a prime contractor then additional surety should also be required of the construction manager.

July 30, 1974

ENVIRONMENTAL PROTECTION: Energy Policy Council, appropriation to upgrade branch line railroad trackage, public or private purpose — Article III, §31, Constitution of Iowa; SF 1222, 65th G.A., 1974 Session. An appropriation to the energy policy council to provide financial assistance to railroad companies to upgrade branch line railroad roadbeds to improve the service of the railroad is for a public purpose and a two-thirds vote in each house of the General Assembly is not required. (Peterson to Patchett, State Representative, 7-30-74) #74-7-20

The Honorable John E. Patchett, State Representative, 25th District: Receipt is hereby acknowledged of your letter of July 15, 1974, requesting the opinion of the Attorney General as to whether the Energy Policy Council created by Senate File 1222, Sixty-fifth General Assembly, 1974 Session, can legally disburse any of the three million dollars appropriated therein to private railroad companies for the purpose of improving branch rail lines in need of repair. You state that SF 1222 was passed by the House of Representatives by a majority vote but less than the two-thirds vote required by the Constitution of Iowa for appropriations for local or private purposes.

Article III, Section 31 of the Constitution of Iowa states:

"No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor, shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, *and 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.*" (Emphasis added)

The issue here is whether the appropriation is "for local or private purposes" for which a favorable two-thirds vote in each house is required.

The distinctions between private and public purpose is fully discussed by the Supreme Court of Iowa in *Dickinson v. Porter,* 1949, 240 Iowa 393, 35 N.W.2d 66, the leading Iowa case on the subject at hand.

Therein, inter alia, it was argued that an appropriation under the Agricultural Land Tax Act was made for a private purpose and in violation of Article III, Section 31 of the Constitution of Iowa. In holding that appropriations for that purpose are not constitutionally proscribed, the court made the following observations:

"Our state constitution makes no attempt to define what is a public purpose nor have the courts adopted any inflexible definition.

"A law may serve the public interest although it benefits certain individuals or classes more than others . . .

"An act cannot be said to be for a private purpose where some principle of public policy underlies its passage . . .

"Whether the present expenditure serves a public purpose is a practical question addressed to the lawmaking department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court."

In an opinion issued by this office on October 18, 1971, (Turner to Harbor, Speaker of the House of Representatives, 10/18/71, #71-10-9), discussing a bill for an appropriation to the Executive Council to be paid to a private medical college for constructing and equipping a new medical school on lands owned by the college, we stated:

"This bill is clearly for a public purpose and the limitations imposed by Article III, §31, are not applicable . . . It is a matter of common knowledge that there is a serious shortage of doctors in Iowa and that the college of medicine at The University of Iowa is unable to train enough medical doctors who will stay in the state to improve the situation. Thus, it is clear that this bill is obviously calculated for the benefit of the general public rather than for the benefit of the [private college]."

It is equally well known that this state and nation is experiencing an energy shortage that could be eased to some degree, at least, by greater availability and use of railroads. That principle is recognized by the General Assembly in §9 of SF 1222 which, in pertinent part, states:

"The energy policy council shall identify those segments of branch line railroad trackage which, if improved, may provide increased transportation services for the citizens of this state. The council shall develop and implement programs to encourage the improvement of rail-freight services on such

railroad trackage. If the council determines that public assistance is in the best interest of the citizens of this state, the council may, in emergencies, provide financial assistance on behalf of the citizens of this state to railroad companies, which assistance shall be used exclusively to upgrade branch line railroad roadbeds in order to improve the freight-carrying capacity of the railroad and to increase the speed limitations of the railroad trackage . . ."

We are, therefore, of the opinion that the appropriation made in SF 1222 is for a public purpose and was legally enacted upon a simple majority vote of each house of the General Assembly.

July 30, 1974

DEPARTMENT OF SOCIAL SERVICES: Mental Health Institutes. Sections 230.1, 230.15, Code of Iowa, 1973. Payments received by the Mental Health Institutes from insurance companies are voluntary payments and should be used to reduce the cost to the counties of the care and treatment of patients at these facilities (Boecker to Kelso, Supervisor of County Audits, 7-30-74) #74-7-21

Mr. William E. Kelso, Supervisor of County Audits: This is written in response to your request for an Attorney General's Opinion with respect to the following questions concerning patient liability for the cost of care under Section 230.15 of the Code of Iowa, 1973, when such care is paid for by an insurance company with whom the patient carries hospital insurance.

(1) Since the patient cannot act on his own behalf, is it all right to accept payments of the cost, even though the patient's liability is less?

(2) If it is all right to accept this payment from the insurance company, who does the excess belong to over the patient liability

a) the county as they paid the full cost, or
b) the individual?

Section 230.15, Code of Iowa, 1973, as amended by Section 1, Chapter 183, 1st Session of the 65th G.A., reads:

"SECTION 1. Section two hundred thirty point fifteen (230.15), unnumbered paragraph one (1), Code 1973, is amended to read as follows:

"Mentally ill persons and persons legally liable for their support shall remain liable for the support of such mentally ill. Persons legally liable for the support of a mentally ill person shall include the spouse of the mentally ill person, any person, firm, or corporation bound by contract for support of the mentally ill person, and, with respect to mentally ill persons under twenty-one years of age only, the father and mother of the mentally ill person. The county auditor, subject to the direction of the board of supervisors, shall enforce the obligation herein created as to all sums advanced by the county. The liability to the county incurred under this section on account of any mentally ill person shall be limited to one hundred percent of the cost of care and treatment of the mentally ill person at a state mental health institute for *the first* one hundred twenty days of hospitalization, *whether occurring subsequent to a single admission or accumulated as a consequence of two or more separate admissions,* and thereafter to an amount not in excess of the average minimum cost of the maintenance of a physically and mentally healthy individual residing in his own home, which standard shall be established and may from time to time be revised by the department of social services. No lien imposed by section 230.25 shall exceed the amount of the liability which may be incurred under this section on account of any mentally ill person."

This section defines who is liable for the cost of the care and treatment of a mentally ill person. Either the person himself or someone legally liable is responsible for the costs of said care and treatment. It is clear that an insurance company meets the statutory definition of a person legally liable for the support of the mentally ill person. Section 230.15, Code of Iowa, 1973, reads in part:

"Persons legally liable for the support of a mentally ill person shall include . . . any person, firm, or corporation bound by contract for the support of the mentally ill person . . ."

The person now mentally ill, and the insurance company entered into a contractual agreement to cover these costs and even though that person is presently unable to act for himself, the contract comes into effect whereby the insurance company agreed to pay the costs of the person's hospitalization.

Under Section 230.15, the cost of the care and treatment of the individual is not reduced. The reduction comes in that amount for which the county can hold the mentally ill person liable. The county is still liable for the full amount to the State Mental Health Institution.

"230.1 Liability of county and state. The necessary and legal costs and expenses attending the taking into custody, care, investigation, admission, commitment, and support of a mentally ill person admitted or committed to a state hospital shall be paid:

1. By the county in which such person has a legal settlement, or

2. By the state when such person has no legal settlement in this state, or when such settlement is unknown.

"The legal settlement of any person found mentally ill who is a patient of any state institution shall be that existing at the time of admission thereto."

There is also that Section of 230.15 which provides the exception that one may voluntarily pay the full cost of an individual care and treatment:

"Nothing in this section shall be construed to prevent a relative or other person from voluntarily paying the full actual cost of the care and treatment of any mentally ill person as established by the department of social services."

Therefore, because of the contract between the now mentally ill person and the insurance company, which was an agreement to pay the cost of his hospitalization if and when he was hospitalized, this can be considered as a voluntary payment of the full cost of care and treatment.

Any money paid by an insurance company and wrongfully credited to the patients' accounts should be recredited to the counties' accounts. These were voluntary payments of the patients' accounts and monies received should be used to reduce the financial burden placed upon the counties by Section 230.1.

July 30, 1974

FISCAL YEAR: §1, Chapter 1020, Acts of the 64th G.A. (1972) and Chapter 347A, Code of Iowa (1973), County hospitals organized under Chapter 347A are required to operate under the provisions of the Fiscal Year Act. (Kelly to Newell, Muscatine County Attorney, 7-30-74) #74-7-22

Mr. David W. Newell, Muscatine County Attorney: This opinion is in response to your request regarding the Fiscal Year Act. Your request stated:

"In your opinion, does the mandatory change of fiscal year apply to county hospitals organized under Chapter 347A of the 1973 Code?"

The original Fiscal Year Act was passed by the 64th General Assembly in 1972, see Chapter 1020 of those session laws. Section 1 of Chapter 1020 states in part:

"*Purpose and effective date.* The purpose of this Act is to change the budget year of cities, counties, and all other political subdivisions of the state from a calendar year beginning January first and ending December thirty-first to a fiscal year beginning July first and ending the following June thirtieth."

It is the opinion of this office that county hospitals organized under Chapter 347A are required to utilize a fiscal year as opposed to a calendar year. Section 1 of Chapter 1020, Laws of the 64th G.A. (1972) clearly evidences the intent of the Legislature to have a uniform accounting year for cities, counties and all other political subdivisions of the state. A county hospital does not fall within the classification of a city and there is some question as to whether it could be designated as a "political subdivision of the state", see *State ex rel v. Des Moines County*, 260 Iowa 342 (1967) and 40 AmJur2d §21, *Hospitals and Asylums*. However, there is no question that it falls under the "county" classification. §347A.1 provides that any county is hereby authorized and empowered to ". . . acquire, construct, equip, operate and maintain a county hospital . . ." A county hospital is an agency of the county which operates it, therefore, a county hospital is required to follow the accounting year mandatorily imposed upon the county itself.

Without the uniform application of the fiscal year upon the agencies of the counties, the purpose of the Fiscal Year Act would be lost in myriad of accounting procedures and practices.

July 30, 1974

STATE OFFICERS AND DEPARTMENTS: Health Care Facilities — §1, H.F. 1104, Acts of the 65th G.A., Second Session. Findings made by the Department of Health prior to July 1, 1974, may not be made public under H.F. 1104, unless the requisites of former section 135C.19, 1973 Code of Iowa, are followed. Such findings made after July 1, 1974, may not be made public prior to the expiration of the forty-five day waiting period. (Blumberg to Pawlewski, Commissioner of Health, 7-30-74) #74-7-23

Mr. Norman L. Pawlewski, Commission of Public Health: We are in receipt of your opinion request of July 23, 1974, regarding section 135C.19 of the Code as amended by the last session of the Legislature. You specifically asked:

"1. Can inspection reports prepared before July 1, 1974, under the repealed section 135C.19 be made public?

"2. Can inspection reports be made public before the expiration of the forty-five day time period?"

Section 1 of House File 1104, Acts of the 65th G.A., Second Session, which became effective on July 1, 1974, struck the old section 135C.19, and placed in lieu thereof the following:

"Following inspection of a health care facility by the department, the findings of the inspection with respect to compliance by the facility with requirements for licensing under this chapter shall be made public in a readily available form and place forty-five days after the findings are made available to the applicant or licensee. However, if the applicant or licensee requests a

hearing pursuant to section one hundred thirty-five C point eleven (135C.11) of the Code, the findings of the inspection shall not be made public until the hearing has been completed. Other information relating to any health care facility, obtained by the department through reports, investigations, complaints, or as otherwise authorized by this chapter, which is not a part of the department's findings from an inspection of the facility, shall not be disclosed publicly except in proceedings involving the denial, suspension or revocation of a license under this chapter."

The old section prescribed confidentiality of the material unless there was a proceeding involving a question of licensure or a matter involving the denial, suspension or revocation of a license.

In answer to your first question, the general rule is that the question of whether a statute operates retrospectively or prospectively only is one of legislative intent. In making a determination of such intent it is a general rule that all statutes are to be construed as being prospective only, unless the purpose and intent of the legislature to make it retrospective is clearly expressed or necessarily implied. *Schultz v. Gosselink,* 1967, 260 Iowa 115, 148 N.W.2d 434. See also, *Schnebly v. St. Joseph Mercy Hospital of Dubuque, Iowa,* 166 N.W.2d 780 (Iowa 1969); *Flake v. Bennett,* 1968, 261 Iowa 1005, 156 N.W.2d 849. We can find nothing in H.F. 1104 which either clearly expresses or implies a construction of retrospectivity to the Act.

In answer to your second question, the Act is quite specific that the applicant or licensee must have available the findings of the Department forty-five (45) days before said findings can be made public. The only exception to this is if a hearing under section 135C.11 is completed prior to the forty-five day limit.

Accordingly, we are of the opinion that all findings, of whatever nature, made by the Department of Health prior to July 1, 1974, cannot be made public except in a proceeding or matter as set forth in the old section 135C.19. This applies not only to the Department of Health, but also to other departments or agencies which may have in their possession such findings made by the Department of Health. Nor may such findings made after July 1, 1974, be made public before the expiration of the forth-five day limit, except as set forth above.

July 30, 1974

COUNTIES: Governmental agencies. Chapter 28E. A solid waste management agency established as a legal entity pursuant to Chapter 28E, Code of Iowa, may employ an attorney and pay for legal services rendered. Conflicting provisions of Attorney General opinion May 22, 1973, withdrawn. (Nolan to Erb, Floyd County Attorney, 7-30-74) #74-7-24

Mr. James A. Erb, Floyd County Attorney: Some time ago you requested an opinion concerning the authority for the Floyd-Mitchel Solid Waste Management Agency to employ legal counsel and for a clarification of the opinion on a similar subject issued by this office on May 22, 1973.

The questions you now submit are:

"1. Can the agency retain as its legal counsel one of the City Attorneys of the respective municipalities listed above and, if so, can the agency pay directly for any legal services rendered by said City Attorney?

"2. Could the agency legally retain an individual who is neither a County Attorney nor a City Attorney to act as its counsel?

"3. Is the opinion which you provided on May 22, 1973, meant to apply to a solid waste agency composed of two or more Counties, and, if not, could the agency retain either the Floyd County or Mitchel County Attorney to act as its legal representative?"

All of your questions are answered affirmatively. The solid waste agency is a legal entity created pursuant to Chapter 28E of the Code. Authority granted by statute to such legal entity is coextensive with the authorities granted to any and all of its participating members as such authority relates to the joint exercise of governmental power for which the entity was created. 1972 O.A.G. 32, 1968 O.A.G. 92. There is no incompatibility of office because the employment as counsel to the solid waste agency does not constitute the holding of an "office" but is merely employment.

The second part of your first question asks whether payment may be made directly for legal services rendered to the public waste agency by a person who is also employed as the city attorney. The answer to this, of course, depends upon the agreement setting up the solid waste agency and its provisions or lack of provisions for the contribution to be afforded by participating members and the payment, if any, for such services. We do not have this information. It is our view that unless the agreement setting up the public agency provided otherwise, there would be no reason why the public waste agency could not pay its legal counsel directly from its own funds.

In answer to your third question, the May 22 opinion stated:

". . . we do not find any authorization contained in Chapter 28E for the entity to retain legal counsel other than that supplied to it under §28E.11."

A reconsideration of this matter prompted by your request leads us now to the view that the entity must, of necessity, have such implied authority. The reason for this being that the underlying purpose for creating a separate legal entity can only be served effectively if the entity is able to act independently of any of its participating members. Accordingly, that part of the May 22, 1973, opinion in conflict herewith is now withdrawn.

July 30, 1974

COUNTIES AND COUNTY OFFICERS: Alcoholism. H.F. 1354, §§3, 19(1), Acts of the 65th G.A., 2nd Session; §336.2, 1973 Code of Iowa. A county attorney does not have a duty to bring actions for involuntary commitment of alcoholics. (Haskins to Eller, Crawford County Attorney, 7-30-74) #74-7-25

Thomas R. Eller, Crawford County Attorney: You ask whether a county attorney has a duty to bring actions for the involuntary commitment of alcoholics. We believe that he does not.

Senate File 1354, Acts of the 65th G.A., 2nd Session, establishes procedures for treatment of alcoholics. Section 19(1) of S.F. 1354 provides for the involuntary commitment of alcoholics. It states in relevant part:

"A person may be committed to the custody of the division by the district court upon *the petition of his spouse or guardian, a relative, the certifying physician, or the administrator in charge of a facility.*" (Emphasis added)

While commitment is to the custody of the division, a state agency, *see* S.F. 1354, §3, Acts of the 65th G.A., 2nd Session, the statute does not appear to contemplate the state as a party. Rather, commitment is on the petition of a private person such as a spouse or relative. Nor does the statute at any place specifically require the county attorney to bring the action on behalf of the petitioner. Indeed, nowhere in §19 of S.F. 1354 is the county attorney even mentioned. Had the legislature intended the state to be a party to the involuntary commitment action or the county attorney to being an involuntary commitment action on behalf of the petitioner, it could have expressly so stated.

For present purposes, the only obligations of the county attorney are those stated in §336.2, 1973 Code of Iowa, as follows:

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

"2. Appear for the state and county in all cases and proceedings in the courts of his county to which the state or county is a party, . . .

* * *

"11. Perform all duties enjoined upon him by law."

As indicated, the state is not a party to an action for the involuntary commitment of an alcoholic. And the county attorney is not specifically required to bring such an action. Accordingly, we are forced to conclude that a county attorney does not have a duty to bring actions for the involuntary commitment of alcoholics.

July 31, 1974

COURT REPORTERS: Use of Non-Certified Shorthand Reporters. §§115.4, 115.5, Code of Iowa, 1973; §605.9, Code of Iowa, 1973, as amended by Chapter 284, 65th G.A., §2 (1973). If a non-certified shorthand reporter be deemed competent under §115.6 he may be appointed on a temporary basis and must be paid the prevailing rate. However, as soon as feasible the regular reporter must resume duties or, if the temporary position is to continue indefinitely, a certified reporter must be appointed to fill the position. (Haesemeyer to Herrick, Chairman, Certified Shorthand Reporters Board, 7-31-74) #74-7-26

Allan A. Herrick, Chairman, Certified Shorthand Reporters Board: In your letter dated July 15, 1974, concerning the statutory authority of judges to hire non-certified shorthand reporters on a temporary or emergency basis, you state:

"This will acknowledge receipt of your opinion of July 8, 1974, pertaining to the pay of court reporters.

"In reviewing this matter with the court reporters in this district, they feel that there is one area that is not directly covered in your opinion, and that is the situation where the Judge names an uncertified reporter and permits him to continue to serve over a period of years. In other words, they feel that this goes beyond the emergency basis where the shorthand reporter is employed because of an extraordinary volume of work or temporary illness or incapacity of a regular shorthand reporter.

"In other words, the situation that they are questioning is where the Judge ignores the provisions of the Certified Shorthand Reporters Law and continues on a permanent basis to use an uncertified court reporter.

"We would appreciate it very much if you would directly answer the question as to why such a court reporter is entitled to the same pay as a certified court reporter."

Section 115.4, Code of Iowa, 1973, states that only a certified shorthand reporter shall be appointed court reporter of an Iowa District Court, but §115.5 qualifies this by providing that the judge may appoint as a temporary substitute any reporter ". . . whom he deems competent to act during the disability of the regular reporter or until a successor is appointed."

Thus, it appears that the legislative intent was to insure that all permanent court reporters be certified, but to allow for temporary use of non-certified reporters in exigent situations. If it appears that the absence of the regularly-appointed reporter will be indefinite or permanent, a certified successor should be appointed. If it appears that the workload mandates the use of an additional reporter indefinitely or permanently, that additional reporter should be certified. However, it is the function of the judge to determine whether or not the appointment is on a temporary basis, and in any event the Code clearly provides that temporary reporters be paid the same rate as permanent, certified reporters.

Section 605.9, Code of Iowa, 1973, as amended by Chapter 284, 65th G.A., §2 (1973) states: * * *

"In the event it is determined by any judge of the district court that it is necessary to employ an additional shorthand reporter because of an extraordinary volume of work, or because of the temporary illness or incapacity of a regular shorthand reporter, such judge may appoint a temporary shorthand reporter who shall serve as required by said judge, and shall be paid compensation on a per diem basis at the prevailing rates of compensation for such reporters as may be determined by the judge. *In such event, the district judge shall certify to each county auditor in his judicial district the name of the shorthand reporter so appointed, and the amount of compensation which shall be paid, and said reporter shall be paid in the same manner and in the same proportions as is herein provided.* A temporary shorthand reporter shall be paid in the same manner as a regular reporter." (Italics denotes deletion.)

Where a judge is using a non-certified reporter on a permanent basis, there would appear to be various remedies available to one aggrieved by the situation including complaints to the chief judge of the district, the Chief Justice of the Supreme Court or possibly even an action to compel him to appoint a certified reporter as per §§115.4, 605.6, Code of Iowa, 1973.

July 31, 1974

STATE OFFICERS AND DEPARTMENTS: Cities and City Officers; Public Health. Prophylactics. S.F. 301, Acts of the 65th G.A., 2nd Session; §135.11, 1973 Code of Iowa; Chapter 1088, §10, Acts of the 64th G.A., 2nd Session; Amend. 2, Amendments of 1968, Iowa Constitution; Regs. 6.1 - 6.5 (135), Iowa Department of Health. Municipal ordinances banning the sale of prophylactics other than by physicians and pharmacists are inconsistent with S.F. 301, Acts of the 65th G.A., 2nd Session, authorizing the Iowa Department of Health to establish standards for the distribution of prophylactics by methods not under the direct supervision of a physician or pharmacist, and hence are void. Reg. 6.4 (135) of the Iowa Department of Health providing that all local ordinances shall be complied with by the permit holder cannot be read to effectuate such municipal ordinances (Haskins to Dutton, Black Hawk County Attorney, 7-31-74) #74-7-27

Mr. David Dutton, Black Hawk County Attorney: You have requested an opinion on the following matter:

"We are in urgent need of an Attorney General's Opinion on Iowa's new venereal disease prophylactics law, Senate File 301. We have received an inquiry from the Black Hawk County Health Department and they are reluctant to advise prospective sellers of prophylactics that this is legal in Waterloo, as Section 17-1 of the Code of Ordinances of Waterloo makes it unlawful to sell, vend or distribute venereal prophylactics for retail sale and excepts only doctors and pharmacists.

"In this connection, we have two questions regarding the new venereal prophylactics law:

"1) Is a municipal ordinance such as Waterloo's Section 17-1, banning sale of prophylactics by anyone other than a doctor or pharmacist, 'consistent' with the new venereal disease prophylactics law within the meaning of Section 366.1 of the 1973 Code of Iowa, and therefore, within the authority of municipal corporations?

"Section 6.4 (135) of the regulations adopted by the Department of Health, pursuant to Senate File 301, states that all local ordinances shall be complied with by the permit holder.

"2) Even if the total ban on sale of prophylactics is construed as inconsistent with state law, Section 6.4 (135) of the standards issued by the Department of Health appears to contemplate some restrictions on the sale of prophylactics by municipalities. How far can municipalities go in regulating such sales?"

By virtue of S.F. 301, Acts of the 65th G.A., 2nd Session, the Iowa Department of Health is authorized to establish standards and issue permits for, and exercise control over, the distribution of venereal disease prophylactics by methods not under the direct supervision of a physician or pharmacist. Senate File 301 amended §135.11, 1973 Code of Iowa, to add a new subsection and read:

"The commissioner of public health shall be the head of the 'State Department of Health', which shall: * * *

"Establish standards for, issue permits, and exercise control over the distribution of venereal disease prophylactics distributed by methods not under the direct supervision of a physician licensed under chapter one hundred forty-eight (148), one hundred fifty (150), or one hundred fifty A (150A) of the Code or a pharmacist licensed under chapter one hundred forty-seven (147) of the Code. Any person selling, offering for sale or giving away any venereal disease prophylactics in violation of the standards established by the department shall be fined not exceeding five hundred dollars, and the department shall revoke their permit."

Regulations of the Iowa Department of Health authorize the sale of prophylactics by methods other than under the direct supervision of a physician or pharmacist, in other words, by vending machine. These regulations state:

"6.1 (135) *Definitions.*

"6.1(1) 'Department' means the State Department of Health;

"6.1(2) 'Person' means an individual, corporation, partnership, firm or association;

"6.1(3) 'Sell' means a sale by a manufacturer, wholesale dealer, distributor or jobber to a person who sells, or intends to sell, direct to the user; and also a sale to the ultimate user in person or by a vending machine;

"6.1(4) 'Venereal disease prophylactic' for the purpose of these rules means a condom, a prophylactic consisting of a sheath designed to be placed over the penis to prevent conception or venereal disease during coitus.

"6.2(135) *Application for Permit.* Any person seeking a permit to sell venereal disease control prophylactics shall file with the Venereal Disease Control Division of the Department a completed application on a form furnished by the Department. A permit shall be valid for a period of two years from the date of issuance. These rules shall not apply to a physician licensed under chapter one hundred forty-eight (148), one hundred fifty (150), or one hundred fifty A (150A) of the Code or a pharmacist licensed under chapter one hundred forty-seven (147) of the Code.

"6.3(135) *Permit Number and Decal to be Displayed.* The holder of any permit for the sale of venereal disease prophylactics shall have a copy of the numbered permit available where the prophylactics are sold. Any vending machine used for dispensing venereal disease prophylactics shall have permanently attached to the machine a tag or decal listing the name and address of the permit holder and the current permit number designated by the Department. The permit holder shall have attached to each vending machine a decal supplied by the Department containing venereal disease control information.

"6.4(135) *Compliance.* All state statutes, rules, regulations and local ordinances shall be complied with by the permit holder.

"6.5 (135) *Standards.* No condoms shall be sold in this state unless the following conditions are met:

"6.5(1) The condoms shall be in compliance with United States Food and Drug Administration standards and regulations for condoms; all condoms shall be manufactured in the United States;

"6.5(2) All condoms shall be individually sealed in plastic, foil or a comparable type seal to protect the product from deterioration from exposure to air;

"6.5(3) Individual condoms or individual condom containers shall bear the date of manufacture in uncoded form and the name of the manufacturer and trademark;

"6.5(4) No condoms shall be sold if they are three years or older from date of manufacture.

"These rules are intended to implement Senate File 301, Acts of the Sixty-fifth General Assembly.

"These rules shall become effective as provided in section 17A.8 of the Code of Iowa July 1, 1974, after filing in the office of the Secretary of State."

Reg. 6.4(135) will be dealt with shortly. It can be seen that the effect of S.F. 301 together with the regulations of the department is to authorize the sale of prophylactics by persons in addition to physicians and pharmacists. Of course, this was the purpose and intent of the act.

A municipal ordinance, such as Waterloo's, that would limit the sale of prophylactics to physicians and pharmacists is inconsistent with the state act, S.F. 301, and hence is void. Municipalities have no power to pass ordinances inconsistent with state statutes. Chapter 1088, §10, Acts of the 64th G.A., 2nd Session, states:

"A city may, except as expressly limited by the Constitution, *and if not inconsistent with the laws of the general assembly*, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges and improve the peace, safety, health, welfare, comfort, and convenience of its residents. This grant of home rule powers does not include the power to enact private or civil law governing civil relationships, except as incident to an exercise of an independent city power." (Emphasis added)

This provision became effective July 1, 1974, for all cities. *See* Chapter 1088, §9(3), Acts of the 64th G.A., 2nd Session. It replaced §366.2, 1973 Code of Iowa — referred to in your letter — which was repealed on July 1, 1974. *See* Chapter 1088, §§9(1), 199, Acts of the 64th G.A., 2nd Session. However, §366.2 contained a limitation on municipalities passing ordinances inconsistent with state laws. Hence, the repeal of §366.2 has no significance for the present matter. The Home Rule Amendment of the Iowa Constitution, which is Amend. 2, Amendments of 1968, Iowa Constitution, states in relevant part:

"Municipal home rule. Municipal corporations are granted home rule power and authority, *not inconsistent with the laws of the General Assembly*, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the General Assembly." (Emphasis added)

An ordinance such as Waterloo's is in fact inconsistent with S.F. 301. If every municipality passed an ordinance banning the sale of prophylactics other than by physicians and pharmacists, the implicit authorization in S.F. 301 of sale by other means would be effectively repealed and the intent behind it defeated within the municipal limits of the state. Such a result could not have been intended by the drafters of S.F. 301. Accordingly, municipal ordinances banning the sale of prophylactics other than by physicians and pharmacists are inconsistent with S.F. 301 authorizing the Department of Health to establish standards for the distribution of prophylactics by methods not under the direct supervision of a physician or pharmacist and hence are void.

Moreover, Reg. 614 (135) of the Iowa Department of Health providing that all local ordinances shall be complied with by the permit holder cannot be read to effectuate or revive otherwise invalid ordinances such as Waterloo's which prohibits the sale of prophylactics through means other than by physicians and pharmacists. The reason is simply that the purpose of S.F. 301 is to permit the sale of prophylactics by such means in accordance with reasonable regulations of the Department of Health. To argue that Reg. 6.4 (135) resurrects otherwise invalid ordinances such as Waterloo's which severely restricts the sale of prophylactics would be to interpret the regulations in such a manner as to defeat the entire purpose of S.F. 301. This purpose is to make prophylactics more readily available so that the spread of venereal disease may be lessened. Administrative regulations must be construed in such a manner as to render them compatible with the act under which they are promulgated. *Cf.* 2 Am. Jur.2d *Administrative Law*, §307, at 135. Reg. 6.4(135) must be construed to give force only to municipal regulations of the manner of distribution which are reasonable. It cannot effectuate unreasonable ordinances such as those which limit the sale of prophylactics to physicians and pharmacists and which thereby defeat the entire liberalizing purpose of the state act.

To reiterate, municipal ordinances banning the sale of prophylactics other than by physicians and pharmacists are inconsistent with S.F. 301, Acts of the

65th G.A., 2nd Session, authorizing the Iowa Department of Health to establish standards for the distribution of prophylactics by methods not under the direct supervision of physicians and pharmacists and are void. Reg. 614(135) of the Iowa Department of Health providing that all local ordinances shall be complied with by the permit holder cannot be read to effectuate such ordinances.

August 6, 1974

STATE DEPARTMENTS: Department of History. H.F. 1491, Acts, 65th G.A., 1974 Session. Present members of board of curators of State Historical Society hold over until provisions of H.F. 1491 for transition to division of Department of History and State Historical Board can be effected by the election and qualification of successors. (Nolan to Weaver, Chairman, State Historical Society of Iowa, 8-6-74) #74-8-2

Mr. W. O. Weaver, Chairman, Executive Committee, Board of Curators, State Historical Society of Iowa: You have requested an official opinion on the reorganization of the State Historical Society of Iowa under House File 1491, recently enacted by the 65th General Assembly of Iowa, 1974 Session. This new legislation provides for the membership of the Society to be elected by mailed ballots as provided in the bylaws of the Historical Society, and approved by the Historical Board. However, at the present time there is no Historical Board to approve these bylaws.

You point out that Section 4 of the new act provides that the Society may elect officers that could not determine policy, bringing up the question of the status of the corporation, the "State Historical Society", which was incorporated in 1869. You further point out that the act to establish a State Historical Department with a division of Historical Museum and Archives, a division of the State Historical Society, and a division of Historical Preservation and to establish a trust fund for life memberships in the State Historical Society, is effective on July 1, 1974.

Your questions are as follows:

1. Where does the present Board of Curators stand as of July 1, 1974 (out of office or holding over)?

2. Who makes the nominations as to those to be voted upon as to the six members of the Board to be elected by the Society?

3. Do the members of the Society vote only for the member nominated from their congressional district or is it a vote at large in which we vote statewide for all nominations from each congressional district?

House File 1491, Acts of the 65th General Assembly, 1974, provides in pertinent part:

"Section 1. *NEW SECTION.* ESTABLISHMENT OF DEPARTMENT. There is established the Iowa state historical department which shall be governed by a state historical board consisting of twelve members, six of whom shall be appointed by the governor and six of whom shall be elected by the members of the state historical society established in section four (4) of this Act. The members appointed by the governor shall include one professionally qualified architectural historian, one historian, and one archaeologist. One member appointed by the governor and one member elected by the society shall be residents of each congressional district. * * *

"Sec. 4. *NEW SECTION.* MEMBERSHIP IN STATE HISTORICAL SOCIETY. The state historical board shall establish rules for membership of the general public in the state historical society, including rules relating to membership fees. Members shall be persons who indicate an interest in the history, progress, and development of the state and who pay the prescribed fee. The members of the state historical society may meet at least one time per year to further the understanding of the history of this state. The election of members of the state historical board, as provided in section one (1) of this Act, shall be by mailed ballot as provided in bylaws adopted by the society and approved by the state historical board. The society may elect officers and the director of the division of the state historical society shall serve as secretary to the society. The officers of the society shall not determine policy for the division of the state historical society but may perform functions to stimulate interest in the history of this state among the general public. The society may perform other activities related to history which are not contrary to the provisions of this Act, subject to the approval of the board. * * *

"Sec. 5. *NEW SECTION.* POWERS AND DUTIES OF THE STATE HISTORICAL BOARD. The state historical board shall have the following powers and duties:

"1. Establish policy for the division of historical museum and archives, the division of the state historical society, and the division of historic preservation, eliminating duplication of services whenever possible.

"2. Appoint a director of the division of historical museum and archives, a director of the division of the state historical society, and a director of the division of historic preservation at annual salaries set by the general assembly. Directors of the divisions shall serve for six-year terms and may be reappointed. * * *

"Sec. 17. . . . and, Chapter three hundred four (304), Code, 1973, are repealed."

It appears from the foregoing statutory language that after July 1, 1974, no new members may be elected to the State Historical Society under the prior existing statutory provisions. However, the State Historical Society was also incorporated under Ch. 504 of the Iowa Code in 1942 and its charter runs to 1992. Unfortunately the records available in this office do not indicate the purpose of this incorporation. The Society itself was authorized by statute as early as the Acts of 1856-57 (Ch. 203, 6 GA) and until later date has been covered by Ch. 304, 1973 Code which is now repealed by §17 of HF 1491, supra. Therefore, since the Society had corporate articles and bylaws at the date the new law took effect, it is my view that the Society, and its board of curators should apply those articles and bylaws in all instances where they can reasonably be applied to bring about the transition to a division of the new Department created by the legislature.

Accordingly, the Board of Curators of the Society, as public officers hold over, by virtue of the provisions of §69.1 Code of Iowa 1973 until their successors are selected and qualified as members of the new state historical board.

In answer to your second question, nominations for the six members of the new Board to be elected by the society may be made by a committee appointed by the President, upon passage of motion by the Board pursuant to Sec. VI of the Bylaws.

With respect to your third question as to whether members of the Society vote only for the member nominated from their congressional district or vote for all nominees, it is my opinion that Section 1 of HF 1491 can be carried out with an at-large election provided that a resident of each congressional district is in fact nominated and elected to the Board.

August 6, 1974

CITIES AND TOWNS: Policeman's Retirement System. §410.6(3), Code of Iowa, 1973. A pension board under Chapter 410 of the Code must adjust a member's pension, if such member's former position has been abolished, as though said member's position had not been abolished. (Blumberg to Hoth, Des Moines County Attorney, 8-6-74) #74-8-3

Mr. Steven S. Hoth, Des Moines County Attorney: We are in receipt of your opinion request regarding Chapter 410 of the Code. Under your facts, it appears that the pensioner in question was Assistant Chief of Police at the time of his retirement. Subsequent to that time, the position was abolished and two Inspectors' positions were set up. In 1971, the position of Assistant Chief was recreated with a pay scale between that of an Inspector and the Chief of Police. Since the time that the position was abolished the pensioner has been paid a pension based upon the pay scale of an Inspector. Your question is whether the Pension Board can legally establish a hypothetical salary for a retired Assistant Chief as though the position had not been abolished.

Section 410.6(3) of the Code provides:

"The adjustment of pensions required by this section shall recognize the retired or deceased member's position on the salary scale within his rank at the time of his retirement or death. In the event that the rank or position held by the retired or deceased member at the time of his retirement or death is subsequently abolished, adjustments in the pensions of the members . . . *shall be computed by the board of trustees as though such rank or position had not been abolished and salary increases had been granted to such rank or position on the same basis as that granted to other ranks and positions in the department.*" (Emphasis added)

The intent and application of this section is clear. When a member's position is abolished after his or her retirement, an adjustment in the pension *shall* be made as though the position had not been abolished and salary increases had been given. In addition, we believe that since the position has been recreated, the pension should now be based upon an Assistant Chief's salary.

Accordingly, we are of the opinion that the Pension Board has the authority to, and must, compute the member's pension as though the position had not been abolished.

August 6, 1974

CRIMINAL LAW; JURY TRIALS: Necessity of trial for indictable misdemeanors. §780.23, Code of Iowa, 1973. §780.23 provides for waiver of jury trials in indictable misdemeanor cases when punishment allowed does not exceed the punishment in §687.7. The punishment for possession of marijuana under §204.401(1) exceeds the maximum under §687.7 and thus requires a trial by jury in determining guilt. (Coleman to Dutton, Black Hawk County Attorney, 8-6-74) #74-8-4

Mr. David J. Dutton, Black Hawk County Attorney: This is to acknowledge receipt of your letter dated July 17, 1974, in which you requested the following opinion from this office:

"1. May a defendant charged with possession of marijuana waive a jury trial under Section 780.23?

"2. Is any conversion factor used for converting dollar fines into jail terms, such as $3.33 per day as prescribed by I.C.A., Section 789.17, and would that have any effect on the first question? In other words, could you convert the $1,000.00 fine under 204.401 into days so that it would fall within Section 687.7?"

With regard to your first question, Section 780.23, 1973 Code of Iowa provides in pertinent part:

". . . However, when the punishment prescribed for a public offense does not exceed the punishment provided in section 687.7, the defendant may waive his right to jury trial by signing a statement which contains a written explanation fully apprising the defendant of his right to a jury trial . . . ."

From the foregoing it becomes apparent that any analysis must be made of the punishment allowed by law under Section 687.7, as compared to the punishment prescribed by law under Section 204.401, pertaining to the possession of marijuana. Section 687.7 reads:

"Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

Section 204.401(3) provides in part:

". . . If the controlled substance is marijuana, the punishment shall be by imprisonment in the county jail for not more than six months or by a fine of not more than one thousand dollars, or by both such fine and imprisonment . . . ."

It is readily ascertainable by comparison of the two statutes, 687.7/204.401) that the punishments are not compatible. While the provision in Section 204.401 providing for six (6) months incarceration in the county jail does not exceed the one year provision in Section 687.7 and is thus within the limits of Section 780.23, the provisions relating to fines are not.

As you will note in Section 780.23, the legislature chose to make the focal point or criterion for determining whether a jury trial might be waived, the *punishment* that might be imposed. Certainly, the legislature might have generally covered the area and resolved all doubt by referring to "indictable misdemeanors" instead of punishments, but they so chose not to do. Consequently when the punishment, in this instance the fine, is greater than the amount of fine which is the standard for comparison, the statutory directive that the punishment shall not exceed the standard is not met, and we must look to case law decisions for further direction.

The Iowa Supreme Court has consistently stated the position since 1884 that prosecutions for indictable crimes cannot be tried without a jury. Recently in *State v. Fagan,* 190 N.W.2d 800 (Iowa 1971) the Iowa Supreme Court con-

fronted an issue similar to the question that you raise in your opinion request. In *Fagan,* the Court stated:

"The rule prohibiting nonjury trial applies even though the prosecutor and the defendant agree upon such a trial. *State v. Tucker, State v. Rea.* The rule is not founded upon the inability of the defendant to waive a right in his favor, but upon the authority of the legislature, under the constitution, to mandate the manner in which prosecutions shall be tried.

"The question is not whether rights which are guarantied [sic] by the constitution may be waived, but whether an absolute provision of the law may be set aside, and a power which the statute has withheld be conferred, by agreement. Our conclusion [is] that it cannot be done * * *. The rule was established by the general assembly, and its application must be determined by the legislative enactments.

"In 1971, after the present case was tried, the general assembly amended §§777.16 and 780.23 to permit an accused to waive a jury when *the punishment does not exceed a year in jail and a fine of $500.* (emphasis added). 64 G.A., H.F. 393. That amendment does not reach cases like the present one which involve penitentiary offenses. The amendment does, however, confirm to the intention of the legislature — that prosecutions such as this one 'must be tried by a jury.' §777.16

". . . The rationale of the decisions appears to be that while civil cases involve only the interests of the parties, who may therefore waive a jury, criminal prosecutions involve larger concerns so that statutory imperatives relating to the conduct of the trial must be observed.

"We adhere to our previous decisions as they relate to indictable prosecutions not within the 1971 amendment to the statute . . . ." (emphasis added).

It can be seen that the Supreme Court recognized the fact that there were indictable offenses not within the gambit of §687.7, and that the then existent case applications of the statutes (780.23/777.16) would continue to apply to those matters not within the purview of §687.7.

With regard to your second question, in *Fagan,* supra, the Court quoted approvingly from *State v. Porter,* 176 La. 673, 678, 146 So. 465, 467:

"Parties cannot by their conventions change the forum for the trial and thereby make valid that which is prohibited by express law." See also citations.

It is clear that the thousand dollar ($1,000) fine that could be imposed under Section 204.401(3) is an independent punishment that is not contingent upon any time factor of incarceration; it may be and often is the sole punishment rendered.

It is our opinion therefore, that those prosecutions brought under Section 204.401 for possession of marijuana must be tried before a jury, with the exception, of course, of a guilty plea, and that in no circumstances of agreement by the defendant, the prosecutor, or the trial court may the jury trial be waived.

August 6, 1974

TAXATION: INHERITANCE TAX EXEMPTION FOR SURVIVING SPOUSE. §4, Senate File 1055 and §59, Senate File 1093, Acts, 65th G.A., Second Session (1974), both amending §450.9, Code of Iowa, 1973. §4.7,

Code of Iowa, 1973. §4, S.F. 1055, increasing the inheritance tax exemption for surviving spouses from $40,000 to $80,000 is a special statute and takes recedence over a general statute, §59, S.F. 1093, which eliminates reference to sex in the inheritance tax provision and only incidentally and in obvious error reinstated the old $40,000 exemption limitation. (Turner to Brown, Administrator, Inheritance Tax Division, 8-6-74) #74-8-5

Mr. Benjamin W. Brown, Administrator, Inheritance Tax Division, Department of Revenue: You have requested an opinion of the attorney general as to which section controls in an irreconcilable conflict between Senate File 1055, §4 and Senate File 1093, §59, Acts of the 65th General Assembly, Second Session, 1974, both of which amend §450.9, Code of Iowa, 1973, pertaining to the individual exemption of the surviving spouse for inheritance tax purposes. §4 of SF 1055 increases said exemption to $80,000 whereas §59 of Senate File 1093 sets the exemption at $40,000, as it has been for years.

While SF 1093 was apparently passed the last day of the session and I assume subsequent to SF 1055, SF 1093 is a *general* statute relating to the "statutory provisions affecting the legal treatment of male and female persons" and amending about 90 unrelated sections of the code to delete language differentiations between male and female, husband and wife, etc., and to substitute therefor genderless words such as "person", "personnel", "member", "spouse", "line person", "warehouse person", etc. ("newsboys" is even changed to "newspaper sellers", notwithstanding §4.1(3) which says words of one gender include those of others.)

On the other hand, SF 1055 was a *special* statute "increasing deductions and exemptions for certain state taxes," including the inheritance tax. The exemption for a "surviving spouse" was specifically increased to $80,000, a fact duly noted and repeatedly exclaimed in the press.

Formerly, §450.9(1) and (2) provided exemptions of $40,000 for both the "wife" and the "husband", respectively. Senate File 1093 merely consolidated these two subsections so that the term "surviving spouse" would encompass both "wife" and "husband" in one subparagraph; the General Assembly obviously overlooking the fact it had already desexed the language in passing SF 1055. There was no intention in Senate File 1093 to amend the amount of the exemption, which had already been amended in Senate File 1055.

§4.7, Code of Iowa, 1973, provides:

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

See also OAG Haesemeyer to Hutchins, 5-16-73, OAG Sullins to Price, 9-11-73 and *Goergen v. State Tax Commission,* 1969 Iowa, 165 NW2d 782.

Thus, it is my conclusion that the provisions of §4, Senate File 1055, fixing the exemption for the surviving spouse at $80,000, prevail over the provisions of §59, Senate File 1093.

August 6, 1974

POLICEMEN AND FIREMEN: Pension Benefits and Social Security. Chapter 410, Code of Iowa, 1973; Chapter 108, §§3 & 4, Laws of the 64th

G.A., Chapter 240, Laws of the 65th G.A. and §218(d)(1) of the Federal Social Security Act. The pension fund established in Chapter 410 was mandatory upon all cities and towns meeting the requisites of the Chapter. No overt action was necessary before the provisions of Chapter 410 were applicable. All "vested" Chapter 410 pension rights were preserved by Chapter 108, Laws of the 64th G.A., and non-vested Chapter 410 pension rights could have been preserved by meeting the requirements of Chapter 240, Laws of the 65th G.A. Policemen and firemen hired after March 2, 1934, who do not have "vested" Chapter 410 pension rights or who have not preserved their "unvested" pension rights by the utilization of Chapter 240, are entitled to receive social security benefits. (Kelly to Longnecker, Employment Security Commission, 8-6-74) #74-8-6

Mr. Ed Longnecker, Employment Security Commission: This opinion is in response to your request regarding Chapter 410 of the Code of Iowa and social security benefits.

Your first question stated:

"Is the requirement as set forth in §410.1 of the I.C.A. for establishment of a pension fund for firemen and policemen mandatory when the basic requirements are met?"

After a thorough review of the legislative history and case law dealing with this subject, it is this office's opinion that the requirements are mandatory.

In 1931, the Supreme Court of Iowa stated, when considering this statute,

"Section 6310 (now 410.1) of the Code is mandatory insofar as it imposes the duty upon certain cities to levy annually a tax for the purpose of creating a firemen's and policemen's pension fund, *Lage v. City of Marshalltown,* 212 Iowa 53, 235 N.W. 76 (1931)."

This mandatory attitude was echoed in *Mathewson v. Braid, 226 Iowa 61, 283 N.W. 256 (1939) and Mathewson v. City of Shenandoah,* 233 Iowa 1368, 11 N.W.2d 571 (1943) where the court held:

"Appellant is entitled to receive payment of his pension and there is a duty resting upon the city to provide a fund sufficient to make the payments accruing thereon."

Quite recently the Iowa Supreme Court has reinforced these past decisions in the case of *Johnson v. City of Red Oak,* 197 N.W.2d 548 (Iowa 1972). The court called Chapter 410 an "express legislative mandate" and held that ". . . the city of Red Oak could not escape its statutory duty to levy, by reason of funding problems facing the city."

It should also be noted that §410.1 and old §6310 use the word "shall" levy, not *"may"* levy an annual tax for the purpose of creating firemen's and policemen's pension funds. The use of the word "shall" in a statute may be used to indicate future application or to denote *compulsion, Krueger v. Rheem Mfg. Co.,* 149 N.W.2d 142 (Iowa 1967).

Directly related to your first question and the *Johnson* decision cited above are two 1971 amendments to Chapter 410. Chapter 108, §3 of the 64th G.A. amended the 410 pension chapter by including the following language:

"Section four hundred ten point one (410.1) Code of 1971, is amended by adding the following new paragraph:

'The provisions of this chapter shall not apply to policemen and firemen who entered employment after March 2, 1934'."

The 64th G.A. further amended Chapter 410. Section 4 of Chapter 108 of the 64th G.A. states:

"Any rights that may have accrued to any person pursuant to chapter four hundred ten (410) of the Code prior to the effective date of this Act shall be preserved. This section shall not be printed as a permanent part of the Code."

The effect of §3 of these two amendments is to make the 410 pension plan inoperative as to firemen and policemen hired after March 2, 1934. Section 4 merely preserves any "vested" pension rights under Chapter 410. A more detailed discussion of both of these amendments will follow shortly.

Your second question asks:

"Does any overt act have to be taken before the provisions of §410.1 are applicable?"

The court in *Dempsey v. Alber,* 236 N.W. 86 (Iowa 1931), held that a widow of a retired policeman was entitled to his pension even though he never contributed to his own pension fund. In *Sioux City v. Young,* 97 N.W.2d 907 (Iowa 1959), the court held that:

"It is the duty of a city or town to levy an annual tax for the purpose of creating a pension fund."

The court in the *Johnson* case, *supra,* reached the same conclusion and held:

"Johnson cannot be denied a disability pension, nor can the city escape its statutory duty to levy, by reason of the funding problems facing the city. Whatever the failure or difficulties they are not chargeable to Johnson."

These decisions indicate the view that overt action did not have to be taken by a party before the Chapter 410 provisions were applicable.

Your third question was:

"What right one preserves under Section 4 of Senate File 474, Chapter 108, Laws of the 64th G.A., which section reads as follows: 'Any rights that may have accrued to any person pursuant to Chapter 410 of the Code prior to the effective date of this Act shall be preserved'."

The court in *City of Iowa City v. White,* 111 N.W.2d 266 (Iowa 1961) held that a public employee has no "vested right" to a pension until either an application is filed or the pension board acts on the application. Thus, this case leaves open the possibility of modification of pension programs before the right to receive it accrues. In 1941, the court in *Talbott v. Independent School District of Des Moines,* 299 N.W. 556 (Iowa 1941) found that the legislature was empowered to raise the age of retirement eligibility and held that the new age requirement was applicable to an employee eligible to retire under the old law but who had not yet done so. In *Nelson v. Board of Directors,* 70 N.W.2d 555 (Iowa 1955), the court permitted the abolition of a pension system under which the plaintiff had been working because he was not yet eligible for its benefits. In *Gaffney v. Young,* 200 Iowa 1030, 205 N.W. 865 (1925), the Iowa court cited with approval cases in other jurisdictions that support the proposition that a pension "is not a matter of contract or vested right; that it is a mere grautity or bounty from the sovereign power, to be given, changed, or withheld at its pleasure." Therefore, there seems to be merit to the contention that all employees hired after March 2, 1934 (the date in §3 of the 1971 amendment to Chapter 410) who are not retired or eligible for benefits, or otherwise "vested" with 410 benefits are covered by the exclusionary

language of the §3 and §4 of the 1971 amendment and not covered under the 410 pension plan. However, in 1973, the Iowa Legislature passed the following amendment to §410.1 of the Code. This amendment not only preserves "vested" pension benefits, but it also preserves the 410 benefits for those persons who had been paying into the pension plan prior to July 1, 1971, but who were not retired or eligible or otherwise "vested" with pension benefits, if certain prerequisites are met. This 1973 amendment can be found at Chapter 240, Laws of the 65th G.A., and it states:

"The provisions of this chapter shall not apply to policemen and firemen who entered employment after March 2, 1934, except that any policeman or fireman who had been making payments of membership fees and assessments as provided in section four hundred ten point five (410.5) of the Code prior to July 1, 1971, shall on the effective date of this Act be fully restored and entitled to all pension rights and benefits, vested or not vested, under this chapter if the city has not returned to such policeman or fireman the membership fees and assessments paid by him prior to July 1, 1971 and if such policeman or fireman pays to the city within six months after the effective date of this Act the amount of the fees and assessments that he would have paid to his policemen's or firemen's pension fund from July 1, 1971, to the effective date of this Act if Acts of the General Assembly, 1971 Session, chapter one hundred eight (108) had not been adopted. If the membership fees and assessments paid by such policeman or fireman prior to July 1, 1971, have been returned to him, all pension rights and benefits, vested or not vested, under this chapter shall be fully restored to him on the effective data of this Act if, within six months after the effective date of this Act, such policeman or fireman repays the fees and assessments so returned and pays the amount of the fees and assessments to the city that he would have paid to his policemen's or firemen's pension fund from July 1, 1971, to the effective date of this Act if Acts of the General Assembly, 1971 Session, chapter one hundred eight (108) had not been adopted."

Those persons receiving benefits under 410 should not have been affected by the 1971 amendment at all. The courts in *Gaffney* cited earlier and *Rockenfield v. Kuhl,* 242 Iowa 213, 46 N.W.2d 17 (1951), held that pension rights already accrued (upon the happening of an event such as death or disability) become vested and subsequent legislation after accruement cannot adversely affect the pension rights. The 1973 amendment to §410.1 merely clarifies this position, but also provides a means of preserving non-vested 410 benefits.

Your last question stated:

"In light of the above, are policemen and firemen entitled to Social Security coverage effective July 1, 1953, retroactive to January 1, 1951, which has been granted to them in accordance with the Federal-State agreement, or are they to be considered employees in positions on July 1, 1953, which, on the date of execution of this agreement were covered by a retirement system, or required to be covered by law, thus not entitled to federal social security coverage?"

When the State of Iowa entered into the agreement with the Department of Health, Education and Welfare on July 3, 1951, establishing social security benefits for Iowans, both parties agreed that the terms of such agreement would be in accordance and conformity with §218 of the Social Security Act. Section two of the *Agreement* (entitled "Services Covered"), states,

"This agreement includes all services performed by individuals as employees of the state and as employees of those subdivisions listed in the appendix attached hereto, *except:* (a) Services performed by an employee in a position,

which on the date of execution or on the effective date specified under Part 9 of this agreement, whichever is the latter, is covered by a retirement system."

The present provision authorizing the establishment of a pension fund, Chapter 410, was first enacted in substantially similar form by an Act of the 33rd G.A. in 1909. This was recodified as §6310 in the 1927 Code of Iowa. Section 6310, which can now be found as §410, has been amended several times since 1927: Act 1933 (45th G.A.) Chapter 113, §1, Chapter 121, §63; Acts 1933-34 (Ex. G.A.), Chapter 75, §13; Act 1957 (57th G.A.), Chapter 199, §1; Acts 1971 (64th G.A.), Chapter 108 and Chapter 240, Acts, 1973 (65th G.A.). The 1971 §3 amendment's limitation to persons hired only before March 2, 1934, is the most significant change. On July 1, 1953, when the Social Security Act became effective in Iowa, Chapter 410 was in effect. By the terms of the Social Security Act, persons under a state pension plan at the time of the enactment date were not entitled to benefits under social security; therefore, it would seem that all of the firemen and policemen in Iowa who were eligible for benefits under Chapter 410 are not entitled to benefits from the Social Security Act.

As mentioned earlier, the provisions of Chapter 410 are mandatory upon the cities and towns that meet the requirements. Individual cities cannot terminate the provisions of Chapter 410 — termination can only be accomplished by express legislative action. See O.A.G. November 30, 1964. This places a number of Iowa towns in a precarious financial position.

The 1971 amendment to Chapter 410, 64th G.A., Chapter 108, §3 and §4, offers some relief to this rather bleak picture. The §3 amendment of Chapter 108 basically states that §410.1 does not apply to policemen and firemen who entered employment after March 2, 1934. Section 4 of Chapter 108 states that any rights that have accrued under Chapter 410 shall be preserved. Obviously, policemen and firemen hired after July 1, 1971, are not covered under Chapter 410 and therefore are entitled to social security benefits. However, this leaves us with several other major classes of persons, (1) those persons who were employed as firemen and policemen in towns meeting the Chapter 410 requirements, i.e., requisite population and "organized" police and fire departments status in 1953 when the social security agreement became effective in Iowa and (2) those persons who were working in towns that didn't meet the Chapter 410 requirements in 1953 but have since grown to the requisite 410 population level and their fire and police departments have subsequently achieved the "organized" status outlined in Chapter 410.

The first classification presents the most difficult problem (those persons working in towns meeting the 410 requirement in 1953). These persons appear to be under the *exception* clause of the 1953 agreement and therefore not entitled to social security coverage. In 1953, Iowa Code Chapter 410 was in effect, thus seemingly disqualifying any firemen and policemen from social security benefits who were covered under Chapter 410. It does not make any difference whether the town or city satisfying the requirements was following the terms of Chapter 410 or not — these people appear to be without coverage. There have been two cases enforcing this contention, *Secretary of Health, Education and Welfare v. Snell,* 416 F.2d 840 (5th Cir. 1969) and *State of West Virginia v. Richardson,* Unemployment Insurance Reporter — Social Security, New Matters, §16,446 (U.S. Court of Appeals, 5th Cir., 1971). The *Richardson* case involved an H.E.W. decision excluding members of the police

force of New Martinsville, West Virginia, from social security coverage. The district court upheld the decision upon the conclusion that the policemen were in positions covered by a retirement system on January 1, 1951 (date of the state social security system's enactment) even though the City of New Martinsville never enacted an ordinance providing for a policemen's pension or relief fund, as required by West Virginia law. The policemen's positions, for which the state had provided a retirement system could not be changed into positions not covered by such a system merely by the failure of the city, a political subdivision of the state, to comply with an express statutory mandate. The court felt to rule otherwise would be tantamount to holding that a political subdivision could determine the scope of the agreement between the state and the Secretary of H.E.W.

The *Snell* action in 1969 was brought by a school bus driver seeking judicial review of the final decision of the Secretary of H.E.W. denying inclusion of salary earned by the driver in a social secruity account. The court held that even though the driver was personally disqualified from the state retirement plan, but was in a position covered by a state retirement system, he was not entitled to social security coverage. The court ruled that the state must initiate an agreement with the Social Secruity Commission to make certain categories of employees covered by social security. In page 843 of their decision, the court stated:

"A 'position covered by a state retirement system' cannot be transmitted into a position not covered by failure of the state to collect contributions from those holding the position. The statutory scheme does no more than give the state an opportunity to act so as to trigger federal benefits for its employees not receiving state benefits. We cannot infer from this a congressional guarantee of federal benefits where the state fails to operate its system that those who are in covered positions and should receive state benefits do not do so. The thrust of the state statute is an opportunity for the state to bring its employees within each of the benefits, either state or federal, by an effectual state triggered meshing of the systems. It is not one of federal commitment to close every state benefit system . . . The short answer to this problem is that the state's failure to treat the position of bus driver in Tangipahool Parish (plaintiff's residence) as 'covered' and its failure to amend the 1952 agreement so as to bring within the ambit of federal benefits persons such as Snell who are 'covered' but disqualified, are matters between the state and its citizens."

After consideration of the above cases, the Social Security Act, and the 1953 Iowa and H.E.W. agreement it would seem that persons in this first classification are without social security coverage and should have been exclusively under the Chapter 410 plan. However, the 1971 amendments mentioned earlier, Senate File 474, Chapter 108, §§3 and 4, Laws of the 64th G.A. (1st Session), distinguishes Iowa's situation from *Snell* and *Richardson.* By its terms, this amendment states that any policeman and fireman who entered employment after March 2, 1934, are not covered by Chapter 410, but those persons who have "vested rights" under Chapter 410 prior to the effective date of the 1971 amendment are still under the state plan's coverage. Determining the ramifications of the 1971 amendment upon the 1953 agreement is the basic problem involved here.

Usually the Iowa courts don't hold that legislation has a retroactive effect unless the statute specifically contains language to that effect. The court in *Flake v. Bennett,* 156 N.W.2d 849 (Iowa 1968), held:

"Whether a statute operates retrospectively or prospectively is a matter of legislative intent. Within constitutional limits, the legislature may by clear and express language state its intentions." (citing *Krueger v. Rheem Mfg. Co.*, 149 N.W.2d 142 (Iowa 1967); *Manilla Community School District v. Halverson*, 251 Iowa 496, 101 N.W.2d 705 (1960).

The *Flake* court also stated:

"As a rule all statutes are to be construed as prospective in operation unless the contrary intent is expressed or clearly implied. The rule is subject to an exception where the statute relates solely to remedies or procedure." *Hill v. Electronics Corp. of America*, 253 Iowa 581, 113 N.W.2d 313, 318 (1962); *Bascom v. District Court of Cerro Gordo County*, 231 Iowa 360, 1 N.W.2d 220; *Davis v. Jones*, 247 Iowa 1031, 78 N.W.2d 6, 8 (1956); *Schultz v. Gosselink*, 148 N.W.2d 434 (Iowa 1957).

In the present situation, it is fairly obvious that the legislature expressed an intent for this amendment to work retroactively except in the case of vested rights and those persons meeting the requirements under Chapter 240, Laws of the 65th G.A. (1973). As stated previously, once the benefits under Chapter 410 have accrued they become "vested rights", but before they become vested, pensions may be altered, taken away, and amended. *City of Iowa City v. White; Talbott v. Independent School District of Des Moines; Nelson v. Board of Directors; Gaffney v. Young* and *Rockenfield v. Kuhl.* Therefore, those persons who were hired after March 2, 1934, and do not have a "vested right" or have not met the requisites of Chapter 240, Laws of the 65th G.A. (1973), as deliniated in the above Iowa cases, are not covered by Chapter 410, logically fall under the social security coverage established in 1953.

In *Schnebly v. St. Joseph Mercy Hospital of Dubuque, Iowa*, 166 N.W.2d 780 (Iowa 1969) the high court held if a statute relates to a substantive right it ordinarily applies prospectively only, but if it relates to *remedy* or procedure, it ordinarily applies both prospectively and retroactively. Its apparent that the legislature was attempting to remedy a deficiency created years before.

Utilizing this reasoning, it would appear that policemen and firemen hired after March 2, 1934, and not presently receiving Chapter 410 benefits or who have not preserved their "unvested" pensions under Chapter 240, Laws of the 65th G.A. (1973), are covered under social security. Those persons hired after March 2, 1934, but who are currently receiving benefits under Chapter 410 or have preserved their "unvested" pensions by Chapter 240, Laws of the 65th G.A. (1973), are not entitled to social security and remain under the benefits of Chapter 410.

The second classification that arises is those persons who were working in towns that did not meet the Chapter 410 requirements in 1953 but have since grown to the statutorily designated population or their fire and police departments have achieved an "organized" status.

This classification can easily be kept under social security benefits by relying upon an opinion written by Mr. Joe S. Rockwood, the Regional Director of the Social Security Commission in Kansas City in 1961. This opinion has been used as a guide since that date by the Iowa Employment Security Commission. It stated,

"The bar of Section 218(d)(1), (excluded positions) of the Social Security Act is applicable only to a position covered by a retirement system on the

earlier of the two following dates: (1) September 1, 1954, (2) the date the agreement was made applicable to the coverage group of which the employee occupying the position is a member. The agreement became applicable to service for all cities of Iowa on July 1, 1953. This statement is subject to the qualification that the particular city must have been in existence on that date."

Mr. Leo W. Smith, manager of the District Office of H.E.W. at that time, added to the opinion:

"There is no doubt in my mind that this is a correct interpretation of the Federal Social Security Act and that once having worked under social security and continuing to work in their same jobs such coverage cannot be taken away from these firemen and policemen, due to the fact that under the Iowa law they are now forced to join a public retirement system other than IPERS."

Section 218(d)(1) of the Social Security Act does not contain any language concerning subsequent positions that would be placed under a state retirement plan. The Act was merely concerned with positions covered at the time of the 1953 agreement date. Therefore, people coming under the requirments of Chapter 410 after the 1953 agreement date, are still entitled to be under social security and Chapter 410. Also, the retroactive effect of the 1971 410 amendments eliminates the 410 plan except in cases of "vested" pensions and "unvested" pensions preserved under Chapter 240, Laws of the 65th G.A. (1973).

These two classifications seem to be largest and most controversial in the state. The utilization of §3 of the 1971 amendment appears to have successfully maintained firemen's and policemen's rights under the Social Security Act in the first classification. And those persons who later came under the provisions of Chapter 410 are still entitled to the social security benefits with the application of the above mentioned opinions and a literal reading of the Social Security Act.

Whether H.E.W. will accept the "retroactive" effect of the 1971 amendment to Chapter 410 eliminating coverage for employees hired after March 2, 1934, cannot be determined by this office. However, there is both legislative and case law authority for such acceptance.

August 6, 1974

CORPORATIONS: Assumed name. §496A.7(5), Code of Iowa, 1973. It is not necessary to add a word such as company, incorporated as an abbreviated suffix to an assumed name to qualify it for registration under §496A.7(4) of the Iowa Code. (Nolan to Galvin, Corporations Director, Secretary of State, 8-6-74) #74-8-8

Mr. John C. Galvin, Corporations Director, Office of the Secretary of State: This refers to your request for clarification of the requirements of §496A.7(5), Code of Iowa, 1973. You have inquired whether it is necessary, under the section in question, for a suffix similar to that used by a corporation to be added to an assumed name adopted by the corporation.

The pertinent language from the statute is as follows:

"A corporation may elect to adopt an assumed name that is not the same as or deceptively similar to the corporate name of any other domestic corporation existing under the laws of this state or of any foreign corporation authorized to transact business in this state, or the same as or deceptively similar to any name registered or reserved under the provisions of this chapter.

"Such election shall be made by filing with the secretary of the state an application executed by an officer of the corporation, setting forth such assumed name and paying to the secretary of state a filing fee of twenty dollars.

"If such assumed name complies with the provisions of this chapter the secretary of state shall issue a certificate authorizing the use of said name, but such certificate shall not confer any right to the use of said name as against any person having any prior right to the use thereof. * * * "

Clearly, the corporate name is required by §496A.7 to contain the word corporation, company, incorporated, limited or an abbreviation of such word. However, this same section of the Code also permits corporation business in the State under one or more assumed names, different from the corporate names. (§496A.7(4))

It is well settled that in matters of statutory construction, effect must be given to the entire statute and in searching for legislative intent, the Courts will consider the object sought to be accomplished as well as the language used. Further, it is a well-established rule of statutory construction that statutes should not be enlarged by construction. Thus, requirements not specifically found in the statutes or necessary to accomplish the purpose of the statutes should not be read in by implication.

Accordingly, it is our view that addition of the word limited, company, incorporated or some other similar word or abbreviation thereof is not necessary to qualify such assumed name under §496A.7(5) of the Code.

August 7, 1974

COUNTIES: Supervisors. §331.22, Code of Iowa, 1973, S.F. 441, 65th G.A., 1973 Session. Legislation authorizing supervisors to collect mileage when engaged in performance of official duties "limited to the aggregate of $1,000 for each supervisor" establishes the sum total of mileage available to all supervisors as the limit. (Nolan to Wornson, Cerro Gordo County Attorney, 8-7-74) #74-8-7

Mr. Clayton L. Wornson, Cerro Gordo County Attorney: You have requested an opinion of the Attorney General interpreting Code §331.22, as amended by Senate File 441 of the 65th General Assembly, which pertains to mileage for county supervisors. Your letter states:

"One of the supervisors in my County is being asked to refund money which he claimed and collected from the County for mileage during the year 1973 to the extent that such mileage paid to him by the County exceeded $1000.00.

"This refund is being demanded by the State auditors and I have been requested by the supervisors to obtain a ruling as to the meaning of the provisions of law as contained in unnumbered paragraph 2 of Code Section 331.22 as it was amended by Senate File No. 441 of the 65th GA which became effective July 1, 1973. The provisions of the law read as follows:

"'These salaries shall be in full payment of all services rendered to the County by said supervisors except statutory mileage while actually engaged in the performance of official duties. *Such mileage shall be limited to the aggregate of $1000 for each supervisor per year.* underlining supplied.

"The wording of the above section of law prior to the amendment quoted above was in this language — 'Such limitation shall be limited to $1000 for each supervisor'.

"The question is — what is meant by the addition of the words 'aggregate of'?

"It is the understanding of the supervisors here, and apparently this understanding is shared by supervisors in other counties, that this amendment to the law was intended to provide a total supervisor limit equal to the aggregate of $1000 for each of the supervisors comprising the board, and that this total accumulated limitation (in our case there being 3 supervisors, the limitation would be $3000) could be divided in any manner agreeable to the supervisors.

"Inquiry among a number of legislators who passed this legislation supports this interpretation as having been the intention of the legislature when they made the amendment. The purpose of this interpretation, of course, is very obvious. Some supervisors live at the seat of government. Others may live as much as 20 or 30 miles from the seat of government. This necessitates greater mileage for such a supervisor than might be required for one whose district is close to the seat of government.

"I believe that this probably is a matter of concern for supervisors in all 99 counties of the State, and I would request that you advise whether the accumulated total of $1000 each for a supervisory board of three supervisors — that is, $3000, may be divided among the supervisors as they see fit with, of course, the understanding that this is not a matter of additional compensation due the supervisors but is limited to actual authorized mileage to be reimbursed for proper travel conducted by a supervisor in carrying out his duties."

It is the opinion of this office that your interpretation of the amended statute is a reasonable and proper interpretation and that the term, "aggregate" must be intended to mean the sum total of mileage available to all supervisors. The legislature is its own lexicographer and we leave to that body the task of further clarifying this provision of the Code.

August 13, 1974

RAILROADS: Energy Policy Council: S.F. 1222, 65th G.A., 1974 Session; Art. 8, §3, Iowa Constitution. For purposes of §9 of S.F. 1222 an emergency exists whenever the Energy Policy Council determines that certain sections of road beds must be immediately upgraded but the railroad in charge of those sections does not have the funds available to accomplish the upgrading; a railroad branch line is an offshoot, tributary, or feeder line of the railroad's main line; as such, an intrastate railroad which operates only a short line is operating a main line, and that line cannot be deemed to be a branch line for purposes of S.F. 1222; within the ambit of authority granted by S.F. 1222 the Energy Policy Council can give financial aid to railroads in the form of loans, but such loans cannot be made to shippers. (Haesemeyer to Roorda, State Representative, 8-13-74) #74-8-9

The Honorable Norman Roorda, State Representative: Reference is made to your letter of July 26, 1974, and in which you request an opinion of the attorney general with respect to the following:

"1. What is an emergency as the term is used in Section 9 of Senate File 1222?

"2. What is a branch line as the term is used in Section 9 of Senate File 1222?

"3. Can an intrastate railroad having only a short line be a branch line under Section 9 of Senate File 1222?

"4. Can the Energy Policy Council give financial aid to railroads pursuant to Senate File 1222 in the form of loans?

"If the Energy Policy Council can give financial aid in the form of loans, can these loans be to railroads only, to shippers on a branch line only, or to a combination of shippers and railroads?"

Section 9 of Senate File 1222 Acts, 65th G.A., Second Session (1974) reads as follows:

"The Energy Policy Council shall identify those segments of branch line railroad trackage which, if improved, may provide increased transportation services for the citizens of this state. The Council shall develop and implement programs to encourage the improvement of rail freight services on such railroad trackage. If the Council determines that public assistance is in the best interest of the citizens of this state, the Council may, in emergencies, provide financial assistance on behalf of the citizens of the state to railroad companies, which assistance shall be used exclusively to upgrade branch line railroad road beds in order to improve the freight-carrying capacity of the railroad and to increase the speed limitations of the railroad trackage. In the alternative, there is granted a tax exemption to the branch line railroad road beds and if the Council determines that there is a need for continuation of rail transportation services to the area and communities served by the railroad, that discontinuance of rail services will not be in the best interest of the citizens of this state who reside in the area or community served, that an undue economic hardship will result in that area or community if service is discontinued, and that other transportation facilities are not available or are inadequate to meet the economic needs of the area or community. Before granting a tax exemption, the Council shall require and the railroad company shall agree that an amount equal to the amount which would otherwise be paid for taxes if the tax exemption was not granted, shall be expended by the railroad company to upgrade the railroad road bed for which the tax exemption is granted."

1. The term "emergency" has been defined in so many different ways that it seems only logical for us to conclude that its meaning in any particular context must depend upon a fair reading of the language in which it is found. Thus, while the term is most frequenty used to mean an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy, this definition was found to be inappropriate as applied to the situation of a public telephone and telegraph company which had been incurring losses over a ten month period and was seeking to justify a rate increase according to the use of the term emergency within the meaning of a statutory provision. *New England Telephone and Telegraph Co. v. State,* 95 N.H. 58, 57 A.2d 267 (1948). The use of the word emergency is not restricted to situations where sudden occurrences mandate quick remedial action, but can apply to instances where a set of facts has prevailed over such a sufficient period of time as to be finally considered exigent.

Section 9 of S.F. 1222 expressly and explicitly states that the duty of the Energy Policy Council is to "identify those segments of branch line railroad trackage which, if improved, may provide increased transportation services for the citizens of this state." If it has been determined that certain branch line tracks must be upgraded, but the railroad does not have the funds available to do the upgrading, the Council must then determine whether it is also in the best interests of the citizens of this state to provide financial assistance to that railroad in order to accomplish the upgrading. An emergency exists where the

Energy Policy Council feels that it is of paramount importance to upgrade certain branch line tracks and the interests of the citizens of the State of Iowa will be best served by giving financial assistance to the railroads in order to accomplish this much needed improvement.

2. A branch line of a railroad is sui generis, and is distinct and distinguishable from the main operating line of a railroad. Branch lines have been variously defined as feeder lines, offshoot lines, limb lines, or secondary lines, and have been analogized to the tributaries of a river. 5A Words and Phrases, Branch Line, page 280 (1968) and pocket part thereto; 74 C.J.S., *Railroads,* §1 (1951). Since the legislature specifically referred to branch line railroad road beds rather than using the general or generic term railroad road beds, we conclude that the legislature intended that the aid provided under §9 apply only to operating lines which are offshoots from the main trunk line of the railroad.

3. Accordingly, an intrastate railroad which operates only a short line could have only a main line, since there could not possibly be a branch line unless there was first a main line from which the branch lines could extend. *Baltimore & O.S.W. etc. RR v. U.S. Com. Ct.,* 195 F.962 Aff'd. 226 U.S. 14, 33 S.Ct. 5, 57 L.Ed. 104 (1912); *Ocean Spray Cranberries, Inc. v. Doyle,* 81 Wash.2d 146, 500 P.2d 79 (1972); *Union Pac. Railway v. Anderson,* 167 Ore. 687, 120 P.2d 578 (1941); *Borough of Bethlehem v. Lehigh etc. RR,* 253 Pa. 251, 97 A. 1074 (1916).

4. Since the language of §9 refers to financial aid in general, it is clear that by prescinding from specifically categorizing the type of aid to be made available, the legislature evidenced its intent that the decision as to the type of a grant should be left to the administrative agency's discretion and expertise. While there exist specific constitutional prohibitions and restrictions upon administrative bodies incurring debts or pledging the state's credit, (Art. 8, §3, Iowa Const.) the legislature acted within the ambit of its powers in delegating authority to the energy policy council to become a creditor. See e.g., *Edge v. Brice,* 1962, 253 Iowa 710, 113 N.W.2d 755. While we must act with great caution in limiting the legislatively granted powers of an administrative agency, we note that the legislature may in the future state with specificity what types of financial assistance it had contemplated would be given by the Energy Policy Council.

It is clearly stated in §9 that any financial assistance grant or tax exemption matching funds will be used exclusively for the improvement and reconditioning of road beds in order to improve the economic operating efficiency of the railroad. Therefore, we conclude that the Energy Policy Council has no authority to grant financial aid to shippers, whether they be on a branch or main line.

August 14, 1974

STATE OFFICERS AND DEPARTMENTS: Aeronautics Commission — §§328.21 and 328.22, Code of Iowa, 1973. The lowest registration fee for an aircraft is twenty-five percent of the original fee, and in no event shall it be less than ten dollars. (Blumberg to Berlin, Director, Iowa Aeronautics Commission, 8-14-74) #74-8-10

Mr. Frank W. Berlin, Director, Iowa Aeronautics Commission: We are in receipt of your opinion request of August 6, 1974. You are seeking an interpretation of §§328.21 and 328.22 of the 1973 Code of Iowa regarding license fees.

Section 328.21 provides that there shall be an annual registration on an aircraft, computed as follows:

"1. For the first registration, a sum equal to one and one-half percent of the manufacturer's list price of the aircraft.

"2. After said aircraft has been registered once the registration fee shall be seventy-five percent of the rate fixed for the first registration; after two time fifty percent; and *after three times twenty-five percent;* provided, however, that no aircraft shall be registered for a registration fee of less than ten dollars." (Emphasis added).

Section 328.22 provides that in the event the original registration is for a used aircraft, the fee shall be determined as if the age of the aircraft was the same as the number of registrations.

Thus, pursuant to both of these sections, the lowest percentage fee to be collected on an aircraft is twenty-five percent of the original fee, and in no event shall it be less than ten dollars.

August 14, 1974

TAXATION: Property tax — Penalties; §445.39, Code of Iowa, 1973, as amended by H.F. 177 Acts, 65th G.A., Second Session; all property taxes delinquent after July 1, 1974, are subject to penalty of one percent per month regardless of the date said taxes were certified to the county treasurer. (Capotosto to Kelso, Supervisor of County Audits, 8-14-74) #74-8-11

Mr. William E. Kelso, Supervisor of County Audits, Office of Auditor of State: You have requested an Opinion of the Attorney General relative to the imposition of penalties for late payment of property taxes in instances where there was a late certification of the tax list to the county treasurer. Specifically your inquiry is as follows:

"If because of late certification, then penalty on the first half attached June 1, 1974, would the rate charged in June be three-fourth (¾) of one (1) percent and for July be one and one-half (1 ½) percent, etc., or would you in June revert back to April and charge two and one-fourth (2 ¼) percent for June and three (3) percent for July?

The certification date was March 31, 1974. We are familiar with the ninety-one (91) days before penalty, but are not sure what penalty after the ninety-one (91) days."

Property taxes normally are certified to the county treasurer on or before December 31 of the tax year. Section 443.4, Code of Iowa, 1973. In cases where this certification is timely made, the first half taxes for that year become delinquent if not paid before April 1 of the succeeding year. Section 445.37, Code of Iowa, 1973.*

*For years after 1973 the certification and delinquency dates will change as a result of the conversion to the fiscal year system for Iowa counties. The auditor shall certify the tax list to the treasurer on or before June 30, Ch. 1020, §70, Acts 64th G.A., Second Session. Payment of first half taxes are delinquent the following October 1, Ch. 1020, §81, Acts 64th G.A., Second Session.

In cases where certification to the treasurer is late it is settled law in Iowa that the taxpayer is entitled to a 91-day period from the date of actual certification to pay his first half taxes. 1940 O.A.G. 493; 1968 I.A.G. 416. Thus when certification to the treasurer was on March 31, 1974, the first installment for the 1973 taxes does not become delinquent until after 91 days from that time, or July 1, 1974.

No penalty attaches to unpaid taxes until they are delinquent. Therefore, taxpayers are liable for penalties only for periods beginning July 1. No penalty would be imposed for April, May, or June of 1974 as would be the case if timely certification had been made. Taxpayers cannot be penalized for delays caused by governmental bodies and over which the taxpayer has no control. 1968 O.A.G. 416, supra.

The question arises with respect to taxes which become delinquent on July 1, 1974, as to the amount of penalty to be imposed. Had timely certification been made to the treasurer these taxes would have been delinquent as of April 1, 1974, and the penalty for April, May and June would have been ¾ of one percent per month under §445.39 Code of Iowa, 1973. However, §445.39 was amended by H.F. 177, Acts 65th G.A., Second Session. This amendment, effective July 1, 1974, provides for interest penalty on delinquent property taxes of one percent per month rather than ¾ of one percent. The effect of this change in the law on delinquent taxpayers in jurisdictions where there was late certification is obvious. Whereas they would have been subject to a ¾ percent penalty otherwise, now because the delinquency arises at a later date they are subjected to a full one percent penalty. Nevertheless, as of July 1, 1974, the rate of penalty on delinquent property taxes is one percent. This is the case whether certification was late and delinquency did not thus begin until July 1, or whether certification was timely and the taxpayer is continuously delinquent past July 1. All delinquent real property taxes that are delinquent after July 1, 1974, are penalized at a rate of one percent per month.

In conclusion, it is the opinion of the Attorney General that where the tax list is certified to the county treasurer on March 31, 1974, first half taxes become delinquent 91 days thereafter, or July 1, 1974. From the latter date forward interest penalty accrues at a rate of one percent per month. No penalty is charged back or attributed to the months of April, May or June of 1974.

August 15, 1974

STATE OFFICERS AND DEPARTMENTS; DEPARTMENT OF PUBLIC SAFETY: Private Detective Licensing. Sections 80A.1, 80A.3 and 80A.4, Code of Iowa, 1973. A person or firm engaged in either the business of transporting money or securities or the operation of a polygraph must obtain a private detective license from the Department of Public Safety. A licensed private detective may assist a peace offficer, on a full or parttime basis, with or without compensation, provided that there is no actual conflict between the two functions. (Voorhees to Larson, Commissioner of Public Safety, August 15, 1974) #74-8-12

Mr. Charles W. Larson, Commissioner, Department of Public Safety: You have requested an opinion from the Attorney General on several questions regarding the licensing of private detectives. The questions are as follows:

"1. Must a license be obtained by a person or firm engaged in the business of transporting money or securities?

"2. Must a license be obtained by a person or firm engaged in the business of operating a polygraph?

"An attorney General's opinion rendered on March 7, 1969, states '. . . the offices of private detective agency and of a policeman are incompatible and . . . a *policeman* should not be licensed or authorized to engage in the private detective business.' (emphasis added)

"3. Is the Department prohibited from licensing, as a private detective any peace officer, as designated in Section 748.3, or any detective agency that employs detective agents who are peace officers?

"4. Is the Department prohibited from licensing private detectives, or a detective agency that employs detective agents, who ride with or assist peace officers on a full or parttime basis, with or without compensation?

"5. If the Department is prohibited from licensing one who is within one of the categories described, is the Department to suspend or revoke that person's license if already issued?"

Sections 80A.3 and 80A.4, Code of Iowa, 1973, require a private detective license of any person or firm in the private detective business. Private detective business is defined by Section 80A.1, Code of Iowa, 1973, as including, among other things, the investigation of:

". . . reputation or character of any person, firm or corporation; the credibility of witnesses or other persons . . . ."

Or the furnishing of:

". . . guards or other persons to protect persons or property; or to prevent the theft or the unlawful taking or use of real or personal property, or the business of performing the services of such guard or other person for any of said purposes."

It seems clear that the business of transporting money or securities would fall into the latter category and that the operation of a polygraph would fall into the former category. Accordingly, it is our opinion that a person or firm engaged in either of these businesses must obtain a license from the Department of Public Safety.

The next two questions center on whether the position of peace officer and private detective are incompatible.

In a previous opinion we stated that a conflict might arise between a policeman's duty to maintain law and order, prevent and detect crime, and enforce the law, and a private detective's duty to serve his client. Such a conflict made the offices of policeman and private detective incompatible (1970 O.A.G. 55). While this is certainly the case generally, it may not always be so.

Under §80A.1 the position of private detective is very broadly defined. As noted above, a private detective license is required for such non-investigatory functions as guarding property. We believe that where no actual conflict exists between the duties performed by an individual in the capacity of private detective and those duties performed in the capacity of police officer, the Department may license that individual as a private detective and may license a firm that employs such an individual. It is our opinion that where an individual or firm is limited in their practice of the private detective business to guard duty and patrolling, individuals employed by the firm may ride with or assist peace officers, on a full or parttime basis, with or without compensation. In such a

situation, we feel it would be appropriate to expressly limit the scope of the private detective licenses involved to guard duty, patrolling, or other non-investigatory functions.

Since we have answered questions 3 and 4 in the negative, resultantly question 5 can be summarily answered in the negative.

August 16, 1974

CITIES AND TOWNS: Building Regulations — §§414.1 and 414.3, Code of Iowa, 1973; Amend. 2, Art. III, Iowa Constitution. Pursuant to its police powers and Home Rule, a Municipality may adopt an ordinance regulating the construction of certain improvements on land to be adjacent to dedicated streets. (Blumberg to Oppen, Hardin County Attorney, August 16, 1974) #74-8-13

Mr. Allan Oppen, Hardin County Attorney: We are in receipt of your opinion request of July 17, 1974, wherein you asked whether a municipality had the authority to enact an ordinance requiring a denial of a building permit unless the land upon which the improvement is placed is adjacent to a dedicated street of the municipality.

Section 414.1 of the Code provides:

"For the purpose of promoting the health, safety, morals, or the general welfare of the community, any city or town is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and *the location and use of buildings,* structures, and land for trade, industry, residence, or other purposes." (Emphasis added)

Also, §414.3 of the Code provides:

"Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the street, to secure safety from fire, flood, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.

"Such regulations shall be made with reasonable consideration, among other things, as to the character of the area of the district and the peculiar suitability of such area for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city or town."

Iowa case law in this area appears to be that "municipal corporations, in the proper exercise of their police power may, and generally do, require that permits or certificates be obtained from designated public officials or boards as a prerequisite to the erection, or for the use or improvement of land in a particular manner or in a particular area." *Hirsh v. City of Muscatine,* 1943, 233 Iowa 590, 10 N.W.2d 71. Such building controls and regulations are limited only by the requirements that they are "reasonable, and for the protection of property, the public morals, or the welfare of the inhabitants of such municipality." *Rehmann v. City of Des Moines,* 1925, 200 Iowa 286, 204 N.W. 267, 40 A.L.R. 922.

Although building regulations are distinct in character from zoning regulations they are not necessarily inconsistent with zoning regulations. Both sets of regulations rest on the police power, and both are designed to promote public safety, health and welfare. 101 C.J.S. *Zoning §3.*

City zoning ordinances have been held not unconstitutional because power was vested in a city council to determine whether building permits should be granted. The ordinances in these cases did not leave the city council with uncontrolled discretion but spelled out what conditions were necessary for the issuance of building permits. Such ordinances have been held to be within the police power of a municipality. *Marquis v. City of Waterloo,* 1930, 210 Iowa 439, 228 N.W. 870; *Hirsh v. City of Muscatine,* 1943 supra.

In a conversation with the city attorney of Iowa Falls it was stated that the purpose of the proposed ordinance referred to in the opinion request is to facilitate the adequate provision of sewerage in accordance with a comprehensive plan that is in the best interest of the inhabitants of the City of Iowa Falls. This would appear to be a valid exercise of the police power of the municipality.

In addition to the above, we are faced with the concept of Home Rule. Amendment 2 of 1968 to Article III of the Iowa Constitution provides that municipalities may determine their local affairs and government, if not inconsistent with the laws of the General Assembly. We can find nothing in the Constitution or the Code which would prohibit or be inconsistent with such an ordinance.

Accordingly, we are of the opinion that the city may adopt an ordinance regulating the construction of certain improvements on land, as long as said ordinance is reasonable and not otherwise violative of the constitution.

August 16, 1974

DEPARTMENT OF SOCIAL SERVICES — Rest Home — Fourteenth Amendment of U.S. Constitution and Title 42 U.S.C. §1983. Non-racial classification of applicants seeking admissions into Lutheran Home is constitutionally permissible. Such an admissions policy therefore does not warrant a finding of "state action" for Fourteenth Amendment purposes, or a finding that the Home operated under "color of law" for the purposes of 42 U.S.C. §1983. (Roberts to Hansen, State Senator, August 16, 1974) #74-8-14

Mr. Willard R. Hansen, State Senator: You have requested an opinion as to the following matter:

"I have been requested to seek an opinion as to the legality of the following:

"A Lutheran Home located in my district, built and supported by seven participating Lutheran churches desires to give priority to certain persons in admitting them to residency. First consideration would be given to members of the seven participating churches, second consideration to parents of members who belong at one of the seven participating churches, third consideration to residents of this locality, and fourth consideration to people who live in surrounding areas. The only state aid they receive is for people who are living in the home who do not have personal resources. Otherwise, they have never received any state money. Their question is whether or not this would be labelled 'segregation' and thus render them unable to receive this state aid if this policy were in effect.

"It seems that the waiting list is so large that members who have contributed to the support of this home are being denied entrance."

The first issue which your question raises is whether the Lutheran Home, through the receipt of financial aid from the state, and by virtue of its other normal ties with the state, should be divested of its private status for Fourteenth Amendment purposes. This must necessarily be the initial inquiry since the Lutheran Home is formally "private" in its activities and functions. It will be remembered that the Fourteenth Amendment which proscribes nearly all species of discrimination, applies only to "state action":

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 1, Fourteenth Amendment of United States Constitution.

However, there are instances where private conduct will be found to have taken on the characteristics of "state action". For example, in *Marsh v. Alabama,* 1946, 326 U.S. 501, 66 S.Ct. 276, the Supreme Court stated the following:

"Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

There are several cases which articulate guidelines for determining whether conduct, otherwise private in nature, will be denied such status for Fourteenth Amendment purposes:

1. When the conduct has traditionally been within the "public domain". *Marsh v. Alabama,* supra.

2. When the conduct has become entwined with government regulations. *Evans v. Newton,* 1966, 382 U.S. 296, 86 S.Ct. 486.

3. When the conduct has been mandated by an affirmative order of a governmental agency. *Public Utility Commission v. Pollak,* 1952, 343 U.S. 451, 72 S.Ct. 813.

4. When the conduct is compelled by a state statute or custom. *Adickes v. Kress,* 1970, 398 U.S. 144.

5. When the conduct is supported by financial aid from the state or federal government, *Simkins v. Moses H. Cone Memorial Hospital,* 1963, 323 F.2d 959.

It is clear, that of the criteria given above for state action, only two and five are particularly relevant to the matter at hand. It is beyond dispute, that the Lutheran Home must become involved in at least a fair amount of governmental regulations. First, by virtue of the fact of having to meet the state licensing laws; and second, by virtue of the fact of its acceptance of people who receive financial assistance through the Social Security Act. However, the Lutheran Home's susceptibility to this kind of governmental regulation, should not be considered as a compelling factor in determining whether or not there is state action. In *Miles v. Powe,* 1969, 407 F.2d 73, the Court explicitly stated that it is not enough to find that a state has some involvement with the activities of the

institution in whose shoes the state is alleged to stand, but it must be found that the state is involved in the activity which gives rise to the alleged discrimination. Using the *Powe* standard, therefore, it can not be said that the state or federal government regulations have become entwined in the proposed Lutheran Home admission policy. This conclusion is further substantiated by the discussion which follows.

More important than the question of governmental regulation is the matter of the Lutheran Home's receipt of state aid. This would seem to be the strongest single factor, in any case to be made against the Lutheran Home for discrimination in its proposed admissions policies. In the *Simkins* case, supra, the defendant hospital was stripped of its private status in the face of admitted racial discrimination. The hospital was the recipient of federal assistance through the Hill-Burton joint federal and State aid program. The funds were used pursuant to a comprehensive state-wide hospital construction program. The Court in *Simkins*, however, was careful to point out the quality of financial assistance, at page 967:

"The massive use of public funds and extensive state-federal sharing in the common plan are all relevant factors. We deal here with the appropriations of millions of dollars of public monies pursuant to comprehensive government plans."

In addition to the quality of assistance involved in *Simkins*, a factor of even greater significance in distinguishing that case from the matter at hand is the presence of an admitted hospital policy of racial discimination. The presence or absence of racial discrimination, in cases involving private action alleged to be state action, at times seems to be outcome-determinative. In *Bright v. Isenbarger*, 1970, 314 F.Supp. 1382, the Court suggested as much at page 1392:

"Almost all applications of the Fourteenth Amendment to private conduct based upon a finding of 'State action' have involved an attack upon 'private' racial discrimination. . . . The Court notes the absence of any claim of racial discrimination in this case because it appears that the 'State action' doctrine has developed in response to efforts to eliminate certain forms of private racial discrimination."

In *Grafton v. Brooklyn Law School*, 1973, 478 F.2d 1137, the Court was faced with a claim of state action against the Brooklyn Law School, based on that institution's receipt of a specified amount of money from the state, for the institution's award of certain academic degrees. The Court in refusing to find state action stated the following at page 1142.

"While a grant or other index of state involvement may be impermissible when it 'fosters or encourages' discrimination on the basis of race, the same limited involvement may not rise to the level of 'State action' when the action in question is alleged to affront other constitutional rights."

Notwithstanding the *Simkins* case, it is my opinion, therefore, that the proposed admission policy of the Lutheran Home would not give rise to a finding of "state action."

This conclusion is strengthened by referring back to the *Powe* case. In *Powe*, Alfred University, a private institution, operated the New York State College of Ceramics under a contract with the State of New York. The University also received state aid. The state, of course, exercised regulatory powers over the University's educational standards. There were no allegations of racial discrimination. The plaintiffs were students who had been suspended from the

University, because of their participation in a campus demonstration. The plantiffs claimed "state action" by the University in infringing upon Fourteenth Amendment rights. The Court found on "state action", and declared that it must be the state action, not the private action, that is the subject of the complaint. See *Ryan v. Hofstra,* 1971, 324 N.Y.S. 2d 964, for a case where the Court found state action on the part of a private university, on the basis of a lessee-lessor analysis. In *Bright v. Isenbarger,* supra, the Court had no problem in finding that a Catholic School was particularly "private" in nature, despite indirect financial assistance through a property tax exemption. In *Doe v. Bellin Memorial Hospital,* 1973, 479 F.2d 756, the Court confronted a claim of alleged discrimination in violation of 42 U.S.C. §1983. Under this statute, "color of law" is the functional equivalent of state action. See *U.S. v. Price,* 1966, 383 U.S. 780, 86 S.Ct. 1152. In *Doe* the defendant hospital had received state and federal funds, and was subject to state and federal regulations pursuant to the Hill-Burton Act. The Court held, however, that:

"The fact that defendants have accepted financial support, is alleged . . . and that the hospital is subject to detailed regulation by the state, do not justify the conclusion that its conduct, which is unaffected by such support or such regulation, is governed by §1983." Supra at p. 761.

With the issue of the applicability of the Fourteenth Amendment out of the way, the next question is whether some other civil rights legislation might cause the Lutheran Home's proposed admission policy to be characterized as discriminatory in nature. Title 42 U.S.C. §1983 has already been mentioned. It is specifically designed to provide a civil remedy for private discrimination. The key issue, however, is whether the alleged discrimination has been perpetrated under "color of law." As has been suggested above, "state action" and "color of law" are similar in concept and definition. The Court will use the same criteria as outlined above, in determining whether an act has been committed under color of law. It is unlikely, therefore, that a finding of discrimination would be made in a suit brought under §1983.

In conclusion, it is the opinion of the undersigned that the Lutheran Home's proposed admissions policy would not involve the Home in conduct which rises to the level of state action or conduct which may be said to be under color of law. It will be recalled, that there are three factors around which the foregoing discussion has been structured which support this conclusion: First, governmental regulation of the Lutheran Home's activities, do not specifically relate to the Home's admission policy. Second, the quality of governmental aid to the Lutheran Home is relatively minimal. Indeed, the private nature of the Home is reflected in the fact that money for the construction of the Home came from seven participating Lutheran churches. These participating churches also provide continuing financial support for the Home. A final factor, and perhaps most important is the absence of the element of racial discrimination in the Home's proposed admission policy. Allegations of racial discrimination more than anything else are the sine qua non in sustaining a claim of state action, or a correlative claim under §1983 color of law.

August 19, 1974

GARNISHMENT: Exemptions — §642.21, "Code of Iowa, 1973". The $250.00 maximum yearly amount which may be garnished from an employee's earnings for each judgment creditor includes the cost of garnishment. (McGrane to Anderson, Washington County Attorney, 8-19-74) #74-8-15

Mr. Tracy Anderson, Washington County Attorney: Reference is made to your letter of June 25, 1974, in which you ask for an Attorney General's opinion with regard to the following question:

"Does the $250.00 maximum yearly amount which may be garnished from an employee's earnings for each judgment creditor include the cost of garnishment; or may this cost be added on to the $250.00?"

Code of Iowa, 1973, §642.21 is set forth in pertinent part below:

"§642.21 — Exemption From Net Earnings.

"The disposable earnings of an individual shall be exempt from garnishment to the extent provided by the Federal Consumer Credit Protection Act, Title III. The maximum amount of an employee's earnings which may be garnished during any one calendar year is two hundred fifty dollars for each judgment creditor, except as provided in Section 627.12."

Statutory construction must be made in light of legislative intent, taking into strong consideration the purpose for which the legislature enacted the statute. The statute providing for a maximum garnishment per calendar year of $250.00 per judgment creditor expresses public policy and must be liberally construed in order to serve the purpose of the statute which is to preserve to the debtor and his family a means of living without becoming charges upon the public.

Code of Iowa, §642.21, includes a provision exempting from garnishment disposable earnings to the extent of the Consumer Credit Protection Act, Title III (82 Stat. 163, 15 U.S.C. 1671). It is apparent that the legislature intended to incorporate into this Iowa statute the substance and spirit of the exemptions provided in the Consumer Protection Act. *Hodgson v. Hamilton Municipal Court,* 349 F.Supp. 1125 (Ohio 1972), states regarding the federal exemptions that "garnishment procedures should never operate so as to deprive an employee of more than 25% of his disposable earnings paid for any one pay period." This would indicate that the debtor is *never* to be deprived of more than the maximum set by law.

It is our opinion, therefore, that reading the state statute in context with the federal statute would necessarily lead to an interpretation that state garnishment procedures should *never* operate so as to deprive an employee during any one calendar year of more than $250.00 for each judgment creditor, except as provided in Section 627.12. This would mean $250.00 would be the maximum, inclusive of any costs of proceedings.

August 19, 1974

JAILS: Construction of walls, §356.39, Code of Iowa, 1973. A part of a jail wall which is constructed of a transparent or transluscent and impenetrable material does not constitute a window for purposes of §356.39 of the Code. (Haesemeyer to Rodenburg, Pottawattamie County Attorney, 8-19-74) #74-8-16

Mr. Lyle A. Rodenburg, Pottawattamie County Attorney: By your letter of August 15, 1974, you have requested an opinion of the Attorney General with respect to the following:

"Will a prisoner's direct access to a wall constructed partially of the material submitted herewith, namely, 'Lexgard', be in violation of that part of

Section 356.39 of the Iowa Code, which states, to-wit: '. . . no prisoners in confinement areas shall have direct access to windows in the walls of the building.'."

You state that the "Lexgard" panels will be constructed as part of the wall of the jail, will not be capable of being opened, will not allow ventilation, and will be unbreakable. It is proposed that this material will be used in the construction of the new Pottawattamie County Courthouse and jail facility.

Upon examination of the proposed plan, we have found that the material is to be used to permit the infiltration of light through embrasures which are to be constructed in various parts of the outer wall of the jail facility, which will be on the fifth floor of the courthouse. We have also examined material furnished by General Electric Company, the manufacturer of "Lexgard", in which they state that "Lexgard" is not susceptible to assaults from either climate or inmate, and that should fragments be defaced from the "Lexgard" they would be ineffective as weapons or objects which could cause personal harm. We have also noted from the submitted plans, that the areas of wall space which would be constructed of "Lexgard" would be five inches in width and two feet to six feet in length, so that in the unlikely event should the material somehow be destroyed, an escape would nevertheless be impossible because the opening would still be only five inches wide.

Section 356.39, Code of Iowa, 1973, states:

"The term 'safe and suitable jails,' as used in sections 356.37 to 356.44, inclusive, is further defined to mean that, for reasons of safety to officers and security, the entrance and exit to each group of enclosures forming a cell block or group of cells and compartments used for the confinement of three or more prisoners shall be through a safety vestibule having one or more interior doors in addition to the main outside entrance door to such cell block, all arranged to be locked, unlocked, opened or closed by control means located outside of any such enclosure or cell block. All such enclosures or cell blocks, for the confinement of prisoners, shall be separated from the building wall on at least one side, by a corridor not less than three feet wide and so designed that no prisoners in confinement areas shall have direct access to windows in the walls of the building."

Therefore, we must consider the question of whether or not the proposed wall construction would constitute a "window" and therefore be violative per se of the above quoted section of the Code. *Webster's Third New International Dictionary of the English Language Unabridged* (1967) defines window as "1a (1) an opening in a wall of a building . . . to admit light usually through a transparent or translucent material (as glass), usually to permit vision through the wall or side, and *often* to admit air." (emphasis supplied) And in *Hale v. Springfield Fire and Marine Insurance,* 46 Mo.App. 508 (1891) the court said:

"A window is defined, by standard lexicographers, to be an aperture or opening in the wall of a building for the admission of light and air to the interior, and to enable those within to look out (citing dictionaries). The plaintiff contends that, since the glass injured was part of the front of the building, a plate glass front which was immovable and stationary, had but one of the qualities of a window, i.e., that of admitting light into the building, but not for ventilation; that it does not, therefore, fulfill the definition of a window . . . . The insurance clause in question is at least susceptible of the interpretation claimed by the assured."

In *People v. Brasi,* 118 N.Y.S.2d 608 (1973) the New York court recognized the apparent conflict in definitions of the term "window":

"The next question to be determined is whether or not the glass panels are windows within the meaning of the statute. Again there is a dearth of cases in this jurisdiction on this question. 'A window is an opening in a building for light and air'. *Benner v. Benner,* 119 Me.79, 109 A. 376, 377; *Hale v. Springfield Fire and Marine Ins. Co.,* 46 Mo. App. 508, 510, . . . 2 *Bouvier's Law Dictionary, Rawle's Third Revision,* defines a window as: 'An opening made in the wall of a house to admit light and air and to enable those who are in to look out' . . . *Murray's New English Dictionary* defines 'window' as: 'An opening in a wall, or side of a building, ship or carriage to admit light or air or both, and to afford a view of what is outside or inside.' The *American College Dictionary* defines 'window' as: '1. An opening in a wall or roof of a building, the cabin of a boat, etc., for the admission of air or light or both . . . an analysis of the cases and definitions cited above leads to the conclusion that every opening in a wall, and every sheet of glass in a wall does not constitute a window. The purposes for which the same are intended must be taken into consideration. . . . Intention as to use and function often determines whether something is realty or personalty, and the question of intent in the instant case is clearly analogous to these cases." (citing cases)

While according to certain of the above quoted definitions, an aperture need not necessarily be openable to permit ventilation in order to be termed a window, we are of the opinion that the subject material will constitute a congruous and continuous part of the prison wall and will not provide either a means of egress for prisoners or a means of communication between prisoners or between prisoners and persons on the outside. Accordingly, it is our opinion that the use of the subject material in the construction of the proposed Pottawattamie County Courthouse and jail facility will not be violative of either the spirit or the letter of §356.39 of the Iowa Code.

August 22, 1974

ELECTIONS: Ballots, method of printing, §49.57, Code of Iowa, 1973, as amended by Ch. 136, Acts 65th G.A., §142, 1973 Session, and further amended by House File 1399, Acts 65th G.A., §36, 1974 Session; §49.58, Code of Iowa, 1973, as amended by Ch. 136, Acts 65th G.A., §143, 1973 Session; §49.61, Code of Iowa, 1973, as amended by Ch. 136, Acts 65th G.A., §145, 1973 Session; §52.10, Code of Iowa, 1973; §49.51, Code of Iowa, 1973, as amended by Ch. 136, Acts 65th G.A., §137, 1973 Session, the county commissioner of elections is not expressly prohibited from mimeographing ballots en masse from a single original, but the Code mandate that ballots and associated materials be printed does prevent tye typing one by one of machine ballots or printer packs to be used in the back of voting machines. (Haesemeyer to Synhorst, Secretary of State, 8-22-74) #74-8-17

Honorable Melvin D. Synhorst, Secretary of State and State Commissioner of Elections: This opinion issues in response to your letter of August 16, 1974, in which you ask several questions relative to the new election law, to-wit:

"May the commissioner mimeograph ballots rather than have them printed by a printer? May the commissioner type the candidates names and any public measures on the printer packs that fit in the back of voting machines? May the commissioner type the strips that fit in the front of the voting machines?"

Section 49.57, Code of Iowa, 1973, as amended by Chapter 136, Acts, 65th G.A. §142, 1973 Session, states the method and style in which ballots shall be printed:

"Method and style of printing ballots. Ballots shall be prepared as follows:

"1. They shall be on plain white paper, through which the printing or writing cannot be read.

"2. The party name shall be printed in capital letters, not less than one-fourth of an inch in height.

"3. The names of candidates shall be printed in capital letters, not less than one-eighth, nor more than one-fourth of an inch in height.

"4. A square, the sides of which shall not be less than one-fourth of an inch in length, shall be printed at the beginning of each line in which the name of a candidate is printed, except as otherwise provided.

"5. On the outside of the ballot, so as to appear when folded, shall be printed the words 'Official ballot', followed by the name and location of the polling place for which the ballot is prepared, the date of the election, and a facsimile of the signature of the commissioner who has caused the ballot to be printed."

Section 49.58, Code of Iowa, 1973, as amended by Chapter 136, Acts, 65th G.A. §143, 1973 Session, goes on to state:

"The name supplied for a vacancy by the certificate of the state commissioner, or by nomination certificates or papers for a vacancy filed with the commissioner shall, if the ballots are not already printed, be placed on the ballots in place of the name of the original nominee."

Obviously, it was contemplated by the legislature that ballots would be produced *en masse* from a single original so that errors and inconsistencies among the ballots would be minimized. Section 49.61, Code of Iowa, 1973, as amended by Chapter 136, Acts, 65th G.A., §145, 1973 Session, additionally provides that where the printed ballots have been delivered to the precinct election officials before a vacancy has been certified, the name of the substituted nominee is to be furnished on mass-printed pasters, whenever possible to do so, for the apparent purpose of avoiding the above mentioned inconsistencies in the ballots. Accordingly, we answer your first question in the affirmative, since mimeographing, xeroxing and other such duplicating procedures produce the same result as commercial type printing in that all copies are produced from the same original.

Moreover in *State, ex rel Page, et al. v. Vossbrinck, et al.*, 1953, Mo. App. 257 S.W.2d 208, the court held that the mere fact that ballots used at an election on a proposed consolidation of school districts had been prepared on a duplicating machine from an initial typewritten form rather than by running paper through a printing press and having impressions made thereon by contact with inked type did not prevent ballots from being "printed" within the meaning of a statute requiring that all ballots cast shall be "printed".

We must reply to your second and third questions in the negative for the same reason, since, were all printer packs and machine strips typed up individually, the chances of inconsistency and error among them would be greatly increased and could materially affect the conduct of the election. Section 52.10, Code of Iowa, 1973, states:

"All ballots shall be printed in black ink on clear, white material, . . ."

It cannot be said that the individual typewriting of machine strips is synonymous with mass reproduction of an original, and the typewriting of in-

dividual machine ballots would be similar to individual write-in of candidates' names which was specifically prohibited by our Attorney General's opinion of October 24, 1973. It is also essential that the printer packs be identical, since even a small error or inconsistency among the various packs could seriously deter the accurate tallying of votes cast upon the several machines. It is our opinion that while §49.51, Code of Iowa, 1973, as amended by Chapter 136, Acts, 65th G.A., §137, 1973 Session, expressly gives the commissioner total control over the printing of ballots and associated materials, he should in most cases contract for the commercial mass printing of ballots, pasters, and printer packs, and should only undertake the mass duplicating of such materials himself in the exceptional case where time does not permit such printing and should not make this a rule of practice.

August 23, 1974

HIGHWAYS: Motor vehicle fees and fuel taxes, use for removal of abandoned vehicles. Amendment 18, Constitution of Iowa; §§4.12, 321.89(4), 321.126, 321.128, 321.129, 321.145(2), Code of Iowa, 1973. Statutory provisions authorizing expenditure of motor vehicle fees and fuel taxes for removal of abandoned vehicles from areas other than public highways is unconstitutional. Proceeds from the sale of an abandoned vehicle disposed of under §321.89(4) must be returned to the police authority. (Voorhees to Holden, State Representative, 8-23-74) #74-8-18

Honorable Edgar H. Holden, State Representative: In your letter of June 19, 1974, you requested an opinion concerning a junk car removal program being administered by the Department of Public Safety in cooperation with the Office of Planning and Programming. Under the program, citizens' organizations are encouraged to collect abandoned cars and tow them to a central point, where they are stored until a car crusher can come to the site and destroy them. The organization receives whatever value the crusher is willing to pay for each motor vehicle, plus one dollar per mile the car was towed, and one dollar per day it was stored. Such funds are paid by the local police department with money received from the Department of Public Safety's "reimbursement fund".

In regard to this program you have asked:

"1. Can the reimbursement fund established in section 321.145(2), Code 1973, be used for other than its established purpose (to pay refunds)?

"2. Is this practice a violation of the 18th Amendment of 1942 to the Constitution of Iowa? This would not appear to be a 'cost of administration' of either the collecting of registration fees, licenses and excise taxes, or administration of highway 'construction, maintenance and supervision'."

Sections 321.129 and 321.145(2), Code of Iowa, 1973, establishes the reimbursement fund as one percent of all fees and penalties collected by the county treasurer for the registration of motor vehicles. The money is then forwarded to the Department of Public Safety to serve as a fund from which motor vehicle fee refunds can be paid pursuant to §321.126 and §321.128, Code of Iowa, 1973. Another use of these funds has been authorized, however, by §321.89(4), Code of Iowa, 1973. That section permits the use of these funds to reimburse police departments for certain costs and expenses incurred in collecting abandoned vehicles. Your first question concerns whether this second authorization of funds is permissible.

It must be remembered that §321.145(2) is simply an act of the legislature and is subject to repeal or modification by the legislature at its will. The legislature was exercising its options to modify the effect of §321.145(2) when it enacted §321.89(4). The legislature is, of course, subject to constitutional limitations when enacting statutes. Whether this particular statute is in derrogation of the constitution is a question that will be postponed pending consideration of the statute's provisions as they relate to the junk car program.

A portion of §321.89(4) establishes the method of disposal of abandoned vehicles which are inoperable, and further provides:

"*From the proceeds of the sale of an abandoned motor vehicle the police authority shall reimburse itself for the expenses of* the auction, *the costs of towing,* preserving, *and storing* which resulted from placing the abandoned motor vehicle in custody, all notice and publication costs pursuant to subsection 3, the cost of inspection, and any other costs incurred except costs of bookkeeping and other administrative costs. * * *

"The costs to police authorities of auction, towing, preserving, storage, and all notice and publication costs, inspection costs and all other costs which result from placing other abandoned vehicles in custody, whenever the proceeds from a sale of such other abandoned motor vehicles are insufficient to meet these expenses and costs, shall be paid from the reimbursement fund of the department of public safety under section 321.145 subsection 2." (emphasis added)

Thus, once the police have custody of the vehicles they must be sold and the proceeds used to offset the costs and expenses incurred in bringing the vehicles in and to sale. If the sale price is not sufficient to cover the costs and expenses incurred, the deficit is paid to the police by the department of Public Safety out of the reimbursement fund. It should be noted that if the police hire the towing and storage of the vehicle to be done, it is the clear intent of the statute that any money recovered from the sole of the vehicle must be received by the police to be used to offset their expenses of hiring the towing and storage.

The program, as previously stated, does not so provide. The funds received from the sale of the car are not returned to the police, but are kept by the individual or group that picked up the vehicle. This practice is obviously violative of §321.89(4). However, there is a more fundamental problem with this program. The 18th Amendment to the Iowa Constitution provides:

"All motor vehicle registration fees and all license and excise taxes on motor vehicle fuel, except cost of administration, *shall be used exclusively for the construction, maintenance and supervision of the public highways* exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds." (emphasis added)

The question is thus whether removal of abandoned vehicles constitutes ". . . construction, maintenance and supervision of the public highways."

Section 321.89(1)(b), Code of Iowa, 1973, defines for the purposes of that section and §§321.90 and 321.91 abandoned vehicles as any of the following:

"(1) A motor vehicle that has been left unattended on public property for more than forty-eight hours and lacks current registration plates or two or more wheels or other structural parts which renders the vehicle totally inoperable, or

"(2) A motor vehicle that has remained illegally on public property for more than fifteen days, or

"(3) A motor vehicle that has been unlawfully parked on private property or has been placed on private property without the consent of the owner or person in control of the property for more than twenty-four hours, or

"(4) A motor vehicle that has been legally impounded by order of a police authority and has not been reclaimed for a period of thirty days."

It is worth noting that none of these definitions limit the application of the statutes to vehicles located on or along "public highways". This presents some difficulty with regard to §321.89(4) since under that section, motor vehicle fees and fuel taxes are authorized to be expended. Although these funds come directly from the reimbursement fund, they are nevertheless subject to the 18th Amendment. The source of these funds is motor vehicle fees and fuel taxes, despite the fact that they were diverted to the reimbursement fund.

It would seem reasonable to construe removal and disposal of abandoned vehicles from highway right of way as highway maintenance. However, a substantial departure from the words of the statute would be required to similarly construe such activities in areas other than public highways. Although the phrase "construction, maintenance and supervision of the public highway" has been interpreted only a few times, the Iowa court has followed a fairly strict construction. In *Frost v. State,* 172 N.W.2d 575 (Iowa 1969) the 18th Amendment was successfully used to challenge the validity of the funding provision of the interstate bridge act. The Court held as unconstitutional provisions which permitted the highway commission to advance funds from primary road funds to pay part of the construction costs and to spend monies from annual primary road fund receipts on an interstate bridge, part of which and certain approaches for which would be in another state.

Previous opinions of the Attorney General have also taken this approach in holding that road use funds could not be used to remove billboards, signs, and junkyards outside the right of way of the highway (1972 O.A.G. 362); nor for flood control (1970 O.A.G. 162); but could be used for the construction of interstate rest stops (1968 O.A.G. 494).

Prior judicial interpretation as well as our opinions have construed this constitutional provision narrowly. It is apparent that there is a substantial constitutional problem with §321.89(4). To the extent the statute permits the expenditure of motor vehicle fees and fuel taxes for the removal and disposal of abandoned vehicles from areas other than public highways, it is unconstitutional. However, this does not render the entire section invalid. §4.12, Code of Iowa, 1973, provides that if any provision of a statute is held invalid, other provisions of the statute that can be effected without the invalid provision are not affected. Thus, with the exception of the portion of §321.89(4) authorizing payment of excess costs from the reimbursement fund, the remainder of §321.89 remains operative.

In summary, it is our opinion that the program that is the subject of your inquiry is invalid because (1) proceeds from the disposal of the vehicles are not returned to the police authority and, more important (2) provisions of §321.89(4) that authorized the expenditure of motor vehicle fees and fuel taxes for purposes other than highway construction, maintenance and supervision are in derrogation of the 18th Amendment to the Iowa Constitution.

September 4, 1974

STATE OFFICERS AND DEPARTMENTS: Board of Nursing — The Board of Nursing has no authority to require continuing education for renewal of nursing licenses. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 9-4-74) #74-9-1

Mrs. Lynne M. Illes, Executive Director, Iowa Board of Nursing: We are in receipt of your opinion request of August 14, 1974, regarding education for nurses. You specifically asked:

"Does the Iowa Board of Nursing have the authority, under the present Code of Iowa, to require continuing education for registered nurses and licensed practical nurses as a prerequisite for renewal of licensure?"

You made reference in your letter to that part of §147.107 of the 1973 Code specifying that fees collected for nursing licenses shall be used to administer and enforce the applicable laws, elevate the standards of schools of nursing, and promote the educational and professional standards of nursing.

Section 147.107 does not make reference to continuing education. Nor do we infer any such intent from the language referred to above. We find no reference to continuing education in §§147.105 through 147.110 which specifically apply to the Board of Nursing. Nor is there any such reference in Chapter 152 of the Code.

Generally, State agencies and departments are only empowered to do what the Legislature provides. See, e.g., *Merchants Motor Freight v. State Highway Commission,* 1948, 239 Iowa 888, 32 N.W.2d 773. As an example of this, see §147.127 which specifically empowers the Board of Examiners for Nursing Home Administrators to provide for continuing education. You have no such authorization in any statutes relative to your Board.

Accordingly, we are of the opinion that the Board of Nursing does not have the authority to require continued education.

September 4, 1974

ENVIRONMENTAL PROTECTION: Sanitary Disposal Projects — Permits — §§455B.75 through 455B.84, Code of Iowa, 1973. Public or private agency may dispose of solid waste resulting from its own residential, farming, manufacturing, mining or commercial activities on land owned or leased by it without a permit issued pursuant to Chapter 455B of the Code. Such permit is required for the disposal of solid waste other than that specified, and for the disposal of solid wastes not generated by the agency owning or leasing the disposal site. (C. Peterson to J. Edward Brown, Hearings Officer, Department of Environmental Quality, 9-4-74) #74-9-2

Mr. J. Edward Brown, Hearings Officer, Department of Environmental Quality: You have requested the opinion of the Attorney General as to the effect of §455B.82, Code of Iowa, 1973, on the other requirements of Part I of Division IV of Chapter 455B, Code of Iowa, 1973, (§§455B.75 through 455B.84, Code of Iowa, 1973) in the following terms:

"Under the provisions of 455B.82, there is an exemption for private or public agencies who are '. . . dumping or depositing solid waste resulting from its own residential, farming, manufacturing, mining or commercial activities on land owned or leased by it . . .' it would appear that a large number of disposal projects would not need approval of the executive director.

"On the other side of the question, the same section qualifies the exemption by allowing the operation if 'such action does not violate any statute of this state or rules promulgated by the Commission or local Boards of Health, or local ordinances, or rules issued by the Air Quality Commission or the Water Quality Commission of the Department.'

"The first point in need of clarification is whether the net effect of these two parts of the section is to eliminate the requirement for approval of the executive director while maintaining the responsibility for compliance with all rules including site location, hydrologic requirements and all other aspects of landfill design incorporated in the rules.

"Does this exemption in any way allow private or public agencies to circumvent the requirements of the rules promulgated by any Commission of the Department of Environmental Quality? It seems to hold them to a higher standard since if they operate without a permit they must rely on their own determination that their operation is in compliance with the Law and the rules while permit holders have the benefit of departmental review.

"Finally, what limitations are there upon the operations? Can a county agency, such as a county home operate its own site for its own disposal only, or may it accept waste from other county agencies?"

The answer to your questions must be found in the following statutes, quoted in pertinent part:

"455B.75 Definitions. * * *

"3. 'Sanitary disposal project' means all facilities and appurtenances including all real and personal property connected with such facilities, which are acquired, purchased, constructed, reconstructed, equipped, improved, extended, maintained or operated to facilitate the final disposition of solid waste without creating a significant hazard to the public health or safety, and which are approved by the executive director. * * *

"455B.76 Duty of cities and counties. Every city, town and county of this state shall provide for the establishment and operation of a sanitary disposal project for final disposal of solid waste by its residents not later than the first of July, 1975. Sanitary disposal projects may be established either separately or through co-operative efforts for the joint use of the participating public agencies as provided by law. . . .

"455B.78 Rules established. The commission shall establish rules for the proper administration of the provisions of this part 1 of division IV which shall reflect and accommodate insofar as is reasonably possible those current and generally accepted methods and techniques for treatment and disposition of solid waste which will serve the purposes of said part which shall take into consideration such factors, including others which it may deem proper, as existing physical conditions, topography, soils and geology, climate, transportation, and land use, such rules including but not limited to rules relating to the establishment and location of sanitary disposal projects, sanitary practices, inspection of sanitary disposal projects, collection of solid waste, disposal of solid waste, pollution controls, the issuance of permits, approved methods of private disposition of solid waste, the general operation and maintenance of sanitary disposal projects, and the implementation of said part. . . .

"455B.79 Certification of plans by director. The executive director shall certify if disposal projects operated or planned to be operated by or for cities, towns, counties and those operated by private agencies meet the standards provided for by this part 1 of division IV and the rules of the commission, by issuing a permit for existing disposal projects which fully comply, and for

planned sanitary disposal projects whose plans fully comply, with all provisions of said part and rules issued pursuant thereto. Permits shall be issued for existing disposal sites which have not met all the provisions of said part and rules issued pursuant thereto, if a comprehensive plan for compliance within the time limitations required by said part is developed by a city, town, county or private agency and is approved by the executive director. Every city, town or county of this state and every private agency involved in the final disposal of solid waste shall qualify for a permit by the first of July, 1975, or be subject to such legal actions authorized by section 455B.82. . . .

"455B.82 Dumping—where prohibited.

1. Commencing July 1, 1975, it shall be unlawful for any private agency or public agency to dump or deposit or permit the dumping or depositing of any solid waste at any place other than a sanitary disposal project approved by the executive director. This section shall not prohibit a private agency or public agency from dumping or depositing solid waste resulting from its own residential, farming, manufacturing, mining or commercial activities on land owned or leased by it if such action does not violate any statute of this state or rules promulgated by the commission or local boards of health, or local ordinances, or rules issued by the air quality commission or water quality commission of the department. A violation of this subsection shall be a misdemeanor. . . ."

These statutes have been implemented by duly promulgated administrative rules detailing state requirements with respect to solid waste disposal. See 1973 Iowa Departmental Rules, page 295, et seq.

In construing statutes, courts are required in the first instance to discover from the words used the intent of the legislature (*Olson v. District Court in and for Dickinson County,* 1952, 243 Iowa 1211, 55 N.W.2d 339) to give effect to all parts of the enactment. §4.4(2) (*Chappell v. Board of Directors of City of Keokuk,* 1949, 241 Iowa 230, 39 N.W.2d 628)

We are persuaded by a careful reading of Chapter 455B, and particularly those sections cited above dealing in comprehensive fashion with the disposal of solid waste, that the legislature thereby intended that the disposal of solid waste be accomplished under permit issued by the executive director of the Department of Environmental Quality pursuant to rules governing same promulgated by the solid waste disposal commission. Prior to July 1, 1975, such permits are issued pursuant to §455B.79 for (1) existing or proposed projects which fully comply and for (2) existing disposal sites not fully complying if a comprehensive plan for timely compliance is developed by the agency and approved by the executive director.

Commencing July 1, 1975, solid waste may be deposited only at a sanitary disposal project approved by the executive director except that solid waste resulting from its own residential, farming, manufacturing, mining or commercial activities may be deposited on land owned or leased by the public or private agency if such action does not violate any statute of this state or rule of the Solid Waste Disposal Commission or other named public agency. §455B.82(1)

Exceptions from a general scheme of regulation are construed narrowly. 82 C.J.S., Statutes, §382; *U.S. v. Scharton,* 1932, 285 U.S. 518; *Heiliger v. City of Sheldon,* 1945, 236 Iowa 146, 18 N.W.2d 182; *Garrison v. Gortler,* 1944, 234 Iowa 541.

The exception contained in the second sentence of §455B.82(1) merely permits the dumping of solid waste resulting from specified activities of the agency on land owned or leased by it rather than at a "sanitary disposal project approved by the executive director". In so doing, the agency must comply with all statutes of this state and the rules of the Solid Waste Disposal Commission and other named regulatory bodies.

The disposal of solid waste under the exception is governed in specific terms by Rule 26.3(1) appearing at page 296 of Iowa Departmental Rules and which provides:

"26.3(1) A public or private agency dumping or depositing solid waste resulting from its own residential, agricultural, manufacturing, mining, commercial or other activities on land owned or leased by it must operate and maintain such sites so that they create no public health hazard or nuisance."

Thus the only regulation imposed by Chapter 455B and rules adopted pursuant thereto upon the disposal of solid waste under the exception is that the disposal site be operated and maintained so that no public health hazard or nuisance is thereby created.

As stated above, the general statutory scheme or plan for the disposal of solid waste after July 1, 1975, is to require the disposal thereof at sanitary disposal projects in accordance with plans submitted and under permit from the executive director of the Department of Environmental Quality. Both §455B.76 and Chapter 28E, Joint Exercise of Governmental Powers, authorize cooperation by and between public agencies in the exercise of their governmental powers, here the establishment and operation of sanitary disposal projects.

The exception, however, simply states that the requirement as to disposal at sanitary disposal projects shall not prohibit an agency from disposing of *its own* solid waste on land owned or leased by it and Rule 26.3(1) permits such disposal if no public health hazard or nuisance is thereby created. The exception to the general scheme for the disposal of solid waste is not a grant of power which may be exercised jointly. Rather, by its express terms, the exception merely exempts from the general scheme the disposal by an agency of *its own* solid waste on land owned or leased by it. We must conclude that the legislature intended this exception to apply individually. It is not reasonable to suppose that the legislature intended by the exception to authorize large joint operations outside the general statutory scheme and to thereby make it possible for the exception to become the rule.

In summary, we are of the opinion that, if such action is otherwise lawful, a public or private agency may deposit solid waste resulting from its own residential, farming, manufacturing, mining or commercial activities on land owned or leased by it and no permit therefor is required under Chapter 455B of the Code as for sanitary disposal projects. Such disposal, however, may be undertaken as a joint operation by two or more agencies only at an approved sanitary disposal project.

September 4, 1974

TAXATION: Penalties Upon Delinquent Mobile Home Taxes, §§4.1(1), 4.5, and 135D.24, Code of Iowa, 1973, as amended by S.F. 19, Acts of 65th G.A., Second Session. The amount of penalties upon mobile home taxes which became delinquent prior to July 1, 1974, and which are thereafter

collected by the county treasurer shall be computed at five percent per month through June, 1974, and at one percent per month commencing July 1, 1974, until paid. Further, there is no statutory authority to compute this penalty differently than one percent per month of the delinquent taxes owed. (Griger to Kelso, Supervisor of County Audits, 9-4-74) #74-9-3

Mr. William E. Kelso, Supervisor of County Audits, Office of State Auditor: You have requested an opinion of the Attorney General concerning S.F. 19, Acts of the 65th G.A., Second Session, which became effective on July 1, 1974, and which changed the penalty on delinquent mobile home taxes from five percent per month to one percent per month until paid. Specifically, your inquiry pertained to the amount of penalty owed on the first half mobile home taxes which were delinquent on February 1, 1974, but which were not paid until September, 1974. Your basic question is whether, under these circumstances, the amount of penalty owed is to be computed at five percent per month until paid, one percent per month until paid, or five percent per month through June, 1974, and one percent per month from July 1, 1974, through September, 1974. Also, you inquire whether the penalty, under S.F. 19, can be computed differently than one percent of the delinquent taxes.

Senate File 19 amended §135D.24, Code of Iowa, 1973, by simply changing the penalty on the tax delinquency from five percent per month to one percent per month until paid. This amended statute reads in relevant part:

"The semiannual tax provided herein shall be due and payable to the county treasurer semiannually on or before January 1 and July 1 in each year; and shall be delinquent February 1 and August 1 in each year, after which a penalty of one percent shall be added each month until paid."

Section 4.1(1), Code of Iowa, 1973, provides as follows:

"In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute:

"1. . . . The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, *any penalty incurred,* or any proceeding commended, under or by virtue of the statute repealed." (Emphasis supplied)

A statute is presumed to be prospective in its operation unless expressly made retroactive. See §4.5, Code of Iowa, 1973.

In *Needham Packing Company v. Iowa Employment Securities Commission,* 1963, 255 Iowa 437, 123 N.W.2d 1, the Court stated at 255 Iowa 441:

"As is stated in section 4.1, Code of Iowa, it is the manifest intent of the legislature that determines whether a statute amending or repealing another statute is to apply to the future or is to affect matters pending at the time of its enactment."

The Iowa case on point and dispositive of your basic question is *Bartruff v. Remey,* 1863, 15 Iowa 257. In that case, the taxpayer owed delinquent property taxes for the years 1858, 1859, 1860, and 1861. The county treasurer sought to collect penalties on such taxes as were provided for in an 1862 law which had repealed and replaced prior law on penalties. The Court held that this 1862 law operated prospectively. The Court stated at 15 Iowa 259:

"Section 18 of the act of 1862 repeals the penalty on delinquent taxes contained in section 760 of the Revision of 1860, subject, however, to the saving clauses of section 29, of the Code, which reads as follows: 'The repeal of a statute does not revive a statute previously repealed, nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under and by virtue of the statute repealed.'

"The provisions of this section continue the right to enforce the penalties that shall have accrued under repealed statutes; so that it becomes the duty of the collector whenever a new Revenue Law is passed, prospective in its operation according to the rule above suggested, changing the penalty upon delinquent taxes, to collect such penalties by virtue of the law under which they were incurred. This rule or construction makes the duty of county collectors a plain one, and easily to be understood by all parties interested, whilst it carries out the intent of the law makers."

The Court further held that in the event that a tax delinquency which arose under the prior law on penalties continued after the taking effect of this 1862 law, the penalties allowed by the latter law would attach commencing with that law's effective date.

There is nothing in S.F. 19 which would indicate that a different conclusion than that in *Bartruff v. Remey* should prevail. Consequently, it is the opinion of this office that the amount of penalties upon mobile home taxes which became delinquent prior to July 1, 1974, and which are thereafter collected by the county treasurer shall be computed at five percent per month through June, 1974, and at one percent per month commencing July 1, 1974, until paid. Further, the penalty, authorized by S.F. 19, must always be computed at one percent per month since that is the only method authorized.

September 4, 1974

PHYSICIANS AND SURGEONS: Hospitals: Physical Therapists. §§147.2, 147.55 and 147.56, 1973 Code of Iowa. If a corporation or institution, be it a hospital or not, employs a physical therapist or exercises a significant degree of control over a physical therapist so that he or she becomes its agent, it is engaged in the unlawful practice of physical therapy. If a physical therapist employed by such a corporation or institution or acting as its agent agrees to divide fees with the corporation or institution received for his or her professional services without the consent of the patient, his or her license to practice physical therapy could be revoked or suspended. (Haskins to Riley, State Senator, 9-4-74) #74-9-4

The Honorable Tom Riley, State Senator: You present three hypothetical situations involving the services of a physical therapist and the practices of a hospital, which situations were prepared by a physical therapist. Seven questions based on the situations are then propounded. The situations and the questions are as follows:

"I. A physical therapist who specializes in the treatment of disease or injury by the application of modalities and rehabilitation procedures incident to the practice of physical therapy for the alleviation of human ailments and the maintenance or restoration of health as prescribed by a physician has entered into a contract with an Iowa non-profit corporation engaged in operating a general hospital. This contract establishes an employer-employee relationship. The hospital maintains a physical therapy department with the necessary equipment and non-professional personnel to provide physical therapy services under the direction of the licensed physical therapist. The physical

therapists agrees to provide his professional services in the treatment of patients, provide consultation to other practitioners, maintain appropriate medical records and carry out such other duties and services incident to his professional responsibilities. Patients that the physical therapist provides his professional services for are referred to the physical therapy department and may be either inpatients of the hospital, or outpatients. Referral is not made directly to a named physical therapist who is duly licensed to provide the professional care.

"II. The general hospital mentioned in situation I above, contracts with a medical doctor to serve as director of physical medicine and rehabilitation, a service which the physical therapy department is a part of. This medical doctor provides administrative supervision of the service(s), and also provides professional medical services in terms of diagnosis, treatment and referral of patients within the physical medicine-rehabilitation service he administers.

"III. The general hospital mentioned in situation I above, contracts with a second non-profit Iowa Corporation to provide physical therapy services in patients homes, and/or on the premises of the second corporation. Neither of these corporate entities can acquire a license to practice physical therapy.

"In each of the above situations, the hospital in its own name, or the second non-profit corporation in its own name, bills and collects a fee for all services rendered for the use of the equipment and the employed physical therapist connected therewith. In accordance with the terms of the employment contract, the hospital, without the knowledge of the patient, pays the physical therapist a portion of these fees for his services.

"In the case of the second non-profit corporation, the corporation bills for and collects a fee from the patient for the physical therapy services rendered to him by employees of the general hospital. The hospital determines the amount of these fees, which are rendered to it upon collection by the second corporation.

"Inasmuch as physical therapy is a licensed profession under the provisions of Chapters 147 and 148 of the Code of Iowa which delineate the requirements of licensure and practice of physical therapists, an opinion is requested on the following questions:

"a. Is the corporation that operates the hospital practicing physical therapy in violation of the law?

"b. Is the contract between the hospital and a second non-profit Iowa corporation to provide physical therapy services, in violation of the law? (Neither corporation can be granted a license to practice physical therapy.)

"c. Is the patients freedom of choice of a physical therapy practitioner violated when a referral from a medical doctor is sent to a physical therapy department instead of an identified physical therapist selected by the patient or his legal guardian?

"d. Is the physical therapist who enters into an employment contract with the general hospital guilty of misconduct?

"e. Is a medical doctor, practicing under arrangement with the hospital and providing medical direction to the physical therapy department, violating the patients freedom of choice of a physical therapy practitioner when he refers patients exclusively to those physical therapy services under his supervision without giving the patient the right to select the services of any physical therapist practitioner available?

"f. Does a patient, or his legal guardian, have the right under Iowa law to select a physical therapist practitioner of his own choice when such services are ordered by a duly licensed physician?

"g. Assuming that a patient does have a freedom of choice in the physical therapist practitioner who renders service to him, does this freedom of choice by an inpatient of a hospital, extend to any duly licensed physical therapist practioner available?"

It is well established that a corporation or institution cannot lawfully practice a profession recognized under §147.2, 1973 Code of Iowa, since a corporation or institution is incapable of passing an examination and meeting the other personal qualifications for licensure. *See State v. Bailey Dental Co.*, 211 Iowa 701, 234 N.W. 260, 263 (1931). Nor can a corporation or institution practice a (§147.2) profession through its agents even though they are licensed professionals. *See State v. Plymouth Optical Co.*, 211 N.W.2d 278 (Iowa 1973); *State v. Kindy Optical Co.*, 216 Iowa 1157, 248 N.W. 332 (1933). Physical therapy is, of course, one of the professions under §147.2. Section 147.2 states:

"No person shall engage in the practice of medicine and surgery, podiatry, osteopathy, osteopathic medicine and surgery, chiropractic, *physical therapy*, nursing, dentistry, dental hygiene, optometry, pharmacy, cosmetology, barbering, funeral directing or embalming as defined in the following chapters of this title, unless he shall have obtained a license for that purpose. (Emphasis added)

Hence, if a corporate hospital employs a physical therapist or exercises a significant degree of control over a physical therapist so that he or she becomes an agent of the hospital, it would be engaged in the unlawful practice of physical therapy. *Cf. State v. Plymouth Optical Co., supra.* However, where the physical therapist is not formally denominated an employee or agent of the hospital, the control over the physical therapist must exist to a significant degree before the corporation would be engaged in the lawful practice of the profession through its defacto agents or employees. *Cf. State v. Ritholz*, 226 Iowa 70, 283 N.W. 268 (1939). If the physical therapists are in fact mere independent contractors with respect to the corporation, the corporation would not be unlawfully practicing. *Cf. id.* The question of whether a particular physical therapist is in fact an employee or agent or whether he or she is merely an independent contractor is not determined solely by the label given the relationship of the physical therapist to the hospital and will depend on the facts of each case. *Cf. State v. Plymouth Optical Co., supra.* The reality behind the relationship, rather than the name given it, governs. Before proceeding further, however, it should be noted that exemptions from the above rules have been created for certain professions and specialties.

In 1954 O.A.G. 122, we opined that a hospital corporation which maintained a radiology department and a clinical pathology laboratory and which contracted with physicians specializing in those fields to give opinions as to the condition of patients based upon x-ray films and laboratory tests was engaged in the practice of medicine and surgery in violation of law. Subsequently, special statutory arrangements were created for hospitals to have radiology and pathology departments. *See* §§135.19-32, 1973 Code of Iowa. No such special statutory arrangements have been created for hospitals employing physical therapists. A special exemption has also been made for the profession of funeral directing and embalming so that a corporation may employ persons who practice it. *See* §156.1(3), 1973 Code of Iowa. And, of course, a pharmacy

corporation may employ pharmacists. *Cf.* §§155.10, 155.6, 155.3(4), 1973 Code of Iowa. No such special exemption exists for physical therapists. Accordingly, since no exemption exists for physical therapists, the general rules set forth above govern the profession of physical therapy.

Turning to the specific questions presented, with respect to situation I, it would seem that the hospital there would be engaged in the unlawful practice of physical therapy since the physical therapists are employees of the hospital. Likewise, in situation II, the hospital would be unlawfully practicing if the physical therapists were employed by the hospital, regardless of whether there was a supervising physician. In situation III, the physical therapists would presumably not be employees of the hospital; hence, the hospital would not be lawfully practicing. No violation of law by the hospital, it should be noted, would occur in situation III so long as the relationship of the hospital to the second corporation was that of an independent contractor. If the contractual relationship of the hospital to the second corporation became so close that the second corporation became an agent of the hospital and if the second corporation employed physical therapists, then the hospital would be unlawfully practicing. Of course, if the second corporation employed physical therapists, it itself would be unlawfully practicing.

The remaining questions deal with a patient's alleged "right of freedom of choice" of his own physical therapist and misconduct by a physical therapist who permits himself to be employed by a corporation. We can find no direct legal authority for a patient's "right of freedom of choice" and while not saying that such a right does not exist and will not eventually be recognized by the courts, the scope of such a right is so unclear at present and so intertwined within ethical considerations of the physical therapy profession, about which we have no expertise, that we decline to comment on it at this time. We leave it to the courts or the ethics committees of the physical therapy profession to tailor such a right out of the whole cloth of a particular factual situation and by the illuminating light of time and experience. As to the misconduct issue, it would appear that if employment by a corporation entailed an agreement by the corporation and the physical therapist to divide with the corporation fees received for professional service without the consent of the patient, grounds for revocation or suspension of the physical therapist's license would arise. A license to practice physical therapy shall be revoked or suspended for "unprofessional conduct". *See* §147.55(3), 1973 Code of Iowa. "Unprofessional conduct" is defined in §147.56(4), 1973 Code of Iowa, to include the following:

"For the purposes of Section 147.55, 'unprofessional conduct' shall consist of any of the following acts: * * *

"4. Division of fees or agreeing to split or divide the fees received for professional services with any person for bringing or referring a patient or assisting in the care or treatment of a patient without the consent of said patient or his legal representative."

Of course, there is no violation of law if the consent of the patient is obtained for dividing fees.

To summarize, if a corporation or institution, be it a hospital or not, employs a physical therapist or exercises a significant degree of control over a physical therapist so that he or she becomes its agent, it is engaged in the unlawful practice of physical therapy. If a physical therapist employed by such a corporation or institution or acting as its agent agrees to divide with the cor-

poration or institution fees received for his or her professional services without the consent of the patient, his or her license to practice physical therapy could be revoked or suspended.

September 4, 1974

CRIMINAL LAW: Authority of peace officer to compel assistance of physician in OMVUI case. §§742.2, 743.5, 735.11, Code of Iowa, 1973. A peace officer has no authority to compel the assistance of a physician in obtaining a blood specimen for chemical testing incident to an OMVUI arrest. (9-4-74) #74-9-5

Mr. Jay E. Howe, Adair County Attorney: You have requested an opinion of the Attorney General concerning the authority of peace officers in compelling the assistance of physicians in OMVUI chemical tests. In your letter of May 7, 1974, you ask:

"What authority does a peace officer possess, if any, to compel the assistance of an available licensed physician when a Defendant arrested for OMVUI elects to submit to a chemical testing of his/her blood?"

At common law all citizens of the county were bound to attend the sheriff on his command to pursue a fellow when the "hue and cry" was raised. Those failing to respond were subject to possible fine or imprisonment. 1 *Holdsworth, History of English Law* 294, (4th Ed., 1931); 1 *Blackstone Commentaries* 343. In Iowa this common law has been replaced by certain specific statutory provisions. Peace officers have been given the power to compel assistance for service of process, (Section 742.2, Code of Iowa, 1973); to compel assistance for dispelling an unlawful assembly. (Section 743.5, Code of Iowa, 1973); and to summon aid to effect an arrest, (Section 755.11, Code of Iowa, 1973). Nowhere in the Code, however, is there a grant of authority to peace officers to compel assistance in aiding in the collection of evidence, or any other "non-emergency" situation, nor have any powers been judicially construed.

It is therefore my opinion that a peace officer possesses no authority to compel the assistance of an available licensed physician when a defendant arrested for OMVUI elects to submit to a chemical testing of his/her blood. I would point out, however, that H.F. 343, Acts of the 65th General Assembly, Second Session, provides that the arresting officer is no longer obligated to first ask for a blood test before requesting chemical tests of breath, urine, or saliva.

September 4, 1974

STATE OFFICERS AND DEPARTMENTS: Department of Public Safety — Confidential Records. Chapter 294 (S.F. 115), Acts of the 65th General Assembly, 1st Session. The Department of Public Safety may not provide criminal history data to defense attorneys or a court for the purposes of impeaching the credibility of a witness. (Voorhees to Larson, Commissioner of Public Safety, 9-4-74 #74-9-6

Hon. Charles W. Larson, Commissioner, Department of Public Safety: You have requested an opinion regarding Chapter 294 (S.F. 115) Acts of the 65th General Assembly, 1st Session. Specifically you asked:

"1. May the Bureau of Criminal Investigation, not withstanding the provisions of S.F. 115, provide the defense attorney criminal history data of witnesses for the prosecution?

"2. If your opinion is that the Bureau of Criminal Investigation cannot provide the above information to defense attorneys, is it legal for the presiding judge to examine the criminal history data In Camera and if said judge determines that the witness for the prosecution may have been convicted of a crime, shall the judge give notice of the witness' criminal record to the defense attorney?"

The relevant portion of Chapter 294 is §2, which provides, in part:

"The department or bureau may provide copies or communicate information from criminal history data *only* to criminal justice agencies, or such other public agencies as are authorized by the confidential records council . . . ." (Emphasis added)

Since distribution of the criminal history data to defense attorneys is not authorized by this provision, it is our opinion that such a practice would not be permissible.

Your second question raises several issues, and cannot be answered summarily. As was noted above, §2 permits criminal history data to be disseminated to any "criminal justice agency". This term is defined by §1.10:

"'Criminal justice agency' means any agency or department of any level of government which performs as its principal function the apprehension, prosecution, *adjudication,* incarceration, or rehabilitation of criminal offenders." (Emphasis added)

Based on this definition, it would appear that a court is a criminal justice agency, and may receive criminal history data from the department, *provided* that the other provisions of the act are complied with. §2 requires that the data may be received only if:

"1. The data is for *official purposes in connection with prescribed duties,* and (Emphasis added)

"2. The request for data is based upon name, fingerprints, or other individual identifying characteristics."

These provisions raise the question of whether inquiring into a witness' criminal record is an official purpose in connection with a prescribed duty. Although the phrase "official purposes in connection with prescribed duties" is somewhat ambiguous, we believe that the term must be construed as meaning a purpose in connection with a function enumerated in the definition of criminal justice agency. Thus a court may receive criminal history data if the information was to be used in its function of "adjudication . . . of criminal offenders".

It is our opinion that criminal history data may be disseminated to a court only if the data is related to the alleged criminal offender. Any criminal history data concerning persons who are not parties to the litigation is not related to any "prescribed duties" of the court. The investigation of a witness' background is a duty of counsel, not the court. The court has no duty to aid either party in the preparation of their case. We do not believe that attorneys should be able to obtain confidential information from the court that would otherwise be unavailable.

The obvious purpose of Chapter 294 is to protect individuals from indiscriminate publication of their criminal history records. It would seem

violative of this purpose to allow the criminal history records of a witness to be made available in a proceeding where he is not on trial.

The Iowa Supreme Court has recently held that prior felony convictions may be used for the purpose of impeaching the credibility of a witness only if:

". . . (1) the felony involved dishonesty or false statement, and (2) the judge determines any danger of unfair prejudice does not substantially outweigh the probative value of such prior felony conviction, taking into account such factors as (a) nature of the conviction, (b) its bearing on veracity, (c) its age, and (d) its propensity to improperly influence the minds of the jurors." *State v. Martin,* 217 N.W.2d 536, 542 (Iowa 1974)

It is apparent that public policy as expressed by the court in this case is not favorable toward the use of prior felony convictions for the purpose of impeaching a witness' testimony. This expression, combined with the policy expressed by the legislature in Chapter 294, leads us to conclude that court may not receive criminal history data for the purpose of impeaching the credibility of a witness.

September 4, 1974

CITIES AND TOWNS: Burglar Alarm Systems. The City of Cedar Rapids may continue to engage in the distribution and installation of alarm systems to be connected to a city control panel. (Blumberg to Patchett, State Representative, 9-4-74) #74-9-7

Honorable John E. Patchett, State Representative: We are in receipt of your opinion request of April 4, 1974, regarding a city competing with private business in sales and servicing of a product. From the material attached to your request it appears that the City of Cedar Rapids is presently involved in the installation and maintenance of burglar alarms and the monitoring of the control panels by the Cedar Rapids Police Department. The city became involved in this operation as a result of the expiration of a federally funded project where burglar alarm systems were installed by Wells Fargo, a New Jersey based alarm company. The city charges for its services at a rate which allows the city to operate without gain or loss. The services are provided to only those who can pay the established charges. There are private alarm firms in the Cedar Rapids area that are capable of providing services presently performed by the city with the exception of actually monitoring the alarm panels. These companies are able to do alarm business in Cedar Rapids only upon the payment of a monthly charge to the Cedar Rapids Police Department for each alarm hooked up to the city's control panel. Your question is whether the city has the right to compete against private business firms in the sales and operations of alarm systems.

There is no statute or case law in Iowa that deals directly with the issue you have presented. A general statement of law is that the city's police power may be used to provide for the safety and general welfare of its inhabitants. See, for example, *Cecil v. Toenjes,* 1930, 210 Iowa 407, 228 N.W. 874. And such police power is not invalid as long as the police power does not constitute an arbitrary infringement on private rights. *Downey v. Sioux City,* 1929, 208 Iowa 1273, 227 N.W. 125.

In a case before the Supreme Court of Georgia, a fact situation nearly identical to the one here, was before the court. There, a citizen engaged in the installation, maintenance and service of burglar alarms sued the City of Atlanta

which was also engaged in installing, servicing and maintaining burglar alarms. The plaintiff alleged that such was not a governmental function of the city but rather a private enterprise for pecuniary profit. The court held in *Lee v. City of Atlanta,* 1944, 29 S.E. 2d 774, 775-776:

"We know of no activity in which a municipality may engage that is more essentially a governmental function than the apprehension of criminals and the suppression of crime. Where a city is engaged in installing, servicing, and maintaining a burglar alarm system through the wires of a telephone company, so that when the electric current is broken a signal will flash at the police station and be relayed by radio to police officers, such operation is in virtue of the police powers of the municipality and is a governmental function. And where the work is essentially for public welfare and for the general good of all the inhabitants of the city, its operation as a governmental function is not changed by the fact that the city makes a charge for the cost of installation, and a monthly service charge for its maintenance and operation, where it is not undertaken for gain or for private objects."

We believe it matters not whether this is a governmental or proprietary function as to the permissability of the city to engage in such an activity.

In 6 E. McQuillin, *Municipal Corporations,* §24.94, it is stated:

"Installation and operation of a burglar alarm system by a city are by virtue of the police powers of the municipality and are governmental functions. Hence, an injunction against such a municipal activity will be denied although it is in competition with the business of the petitioner."

In addition to the above, we are faced with Home Rule. That proposition states that cities may do what is necessary for their local government as long as it is not specifically prohibited by or in conflict with any state law. We can find no specific prohibitions of this type of activity. Nor do we see a conflict with any law.

It has been brought to our attention that the City Council has orally approved of this activity, but that there was no resolution or ordinance passed authorizing it. Ordinances are usually defined as laws passed in the exercise of a sovereign or governmental power, and of a permanent nature. Resolutions are less formal, and deal with matters of a special or temporary nature. They are simply an expression of opinion on some item of business, ministerial in nature and relating to the administrative business of the city. Motions are many times synonymous with resolutions, however, they are not always recorded. See, 5 E. McQuillan, *Municipal Corporations,* §§15.02-15.08 (1969); *Mill v. Denison,* 1946, 237 Iowa 1335, 25 N.W.2d 323.

Although the courts have interpreted this function to be governmental by its very nature its implementation includes the administrative business end of it. We do not believe that an ordinance must be passed solely because this is a function of the police power. This obviously is of a temporary or special nature. Therefore, only a resolution or motion is necessary. Since motions are synonymous with resolutions, they will suffice in this matter.

Accordingly, we are of the opinion that the City of Cedar Rapids may continue to engage in the distribution and installation of burglar alarms to be connected to the control panels of the police department.

September 6, 1974

CORPORATIONS: Non Profit. Chapters 504 and 504A, Code of Iowa, 1973. All nonprofit corporations formed after the effective date of Chapter 504A must incorporate under such chapter. (Kelly to Vogel, Poweshiek County Attorney, 9-6-74) #74-9-8

Richard J. Vogel, Poweshiek County Attorney: This opinion is in response to your request dated August 23, 1974, regarding non-profit corporations.

You asked whether a person may still incorporate under Chapter 504 of the Code of Iowa. The answer to your question can be easily found in §504A.100(6), Code of Iowa, 1973, which clearly and unambiguously states:

"Except for the exceptions and limitations of subsection 1 of this section, this chapter shall apply to: All domestic corporations organized after the date on which this chapter became effective; domestic corporations organized or existing under chapter 504 which voluntarily elect to adopt the provisions of this chapter and comply with the provisions of subsection 3 of this section; all foreign corporations conducting or seeking to conduct affairs within this state and not holding, July 4, 1965, a valid permit so to do; foreign corporations holding, on the date the chapter becomes effective, a valid permit under the provisions of chapter 504 which, during the period of two years from and after said date, voluntarily elect to adopt the provisions of this chapter and comply with the provisions of subsection 3 of this section; and, upon the expiration of the period of two years from and after July 4, 1965, all foreign corporations holding such a permit on July 4, 1965."

September 6, 1974

ELECTIONS: Time Limit on filing nominations. §§43.60, 43.73, 43.74, 44.4, Code of Iowa, 1973, as amended. For state offices nominations made under Chapter 43 must be submitted to the state commissioner at least 45 days prior to the general election. For county offices nominations can be made if received in time to be printed on the ballot. (Haesemeyer to Synhorst, Secretary of State, 9-6-74) #74-9-9

Honorable Melvin D. Synhorst, Secretary of State: We have your letter of September 3, 1974, in which you request an opinion of the Attorney General with respect to the following:

"Your opinion is respectfully requested on the following question:

"Where a political party did not have the name of a candidate for a general assembly office on the June 4, 1974, primary election ballot, or, where a candidate for a general assembly office who was nominated at the June 4, 1974, primary election subsequently filed an affidavit of withdrawal in the office of the state commissioner, what is the final date on which a political party may file a certification of a name of a candidate to be placed on the November 5, 1974, general election ballot?

"What will the final filing date be for county offices under the circumstances set forth in the preceding paragraph?

"Your attention is called to enactments by the 65th G.A. which amended Sections 43.74 and 44.4, Code of Iowa, 1973."

Sections 43.73 and 43.74, Code of Iowa, 1973, as amended by §§48 and 49, Chapter 136, 65th G.A., First Session (1973) and §§13 and 14, H.F. 1399, Acts, 65th G.A., Second Session (1974) provide respectively:

"43.73 State commissioner to certify nominees. Not less than fifty-five days before the general election the state commissioner shall certify to each commissioner, under separate party headings, the name of each person nominated as shown by the official canvass made by the executive council, or as certified to him by the proper persons when any person has been nominated by a convention or by a party committee, the office to which he is nominated, and the order in which the tickets of the several political parties shall appear on the official ballot.

"43.74 Certificate in case of additional nominations. If, after the foregoing certificate has been forwarded, other authorized nominations are certified to the state commissioner, including nominations to be voted on at any time at a special election, the state commissioner shall at once, in the form provided in section 43.73, certify said nominations to the commissioners with a statement showing the reason therefor. *Authorized nominations must be submitted to the state commissioner at least forty-five days prior to the general election.*" (Emphasis added)

It is evident from the foregoing that at least insofar as nominations made under Chapter 43, the chapter dealing with nominations by primary election, the law contemplates that nominations may be submitted to the state commissioner of elections up until forty-five days prior to the general election and it is the duty of the state commissioner at once to certify such nominations to the several county commissioners for inclusion on the general election ballot. Nominations for the following offices are required to be certified by the state commissioner: (1) United States Senator; (2) All state offices; (3) United States Representative; (4) senators and representatives in the general assembly, §43.60, Code of Iowa, 1973, as amended by §40, Chapter 136, 65th G.A., First Session (1973).

Section 44.4, Code of Iowa, 1973, as amended by §171, Chapter 136, 65th G.A., First Session (1973) and §19, H.F. 1399, Acts, 65th G.A., Second Session (1974) to which you make reference provides in relevant part:

"44.4 Nominations and objections—time and place of filing. Nominations made under the provisions of this chapter and chapter 45 which are required to be filed in the office of the state commissioner shall be filed in that office not more than eighty-five days nor later than five o'clock p.m. on the sixty-seventh day prior to the date of the general election to be held in November; and those nominations made for a special election called pursuant to section 69.14 shall be filed not less than twenty days prior to the date of an election called upon at least forty days' notice and not less than seven days prior to the date of an election called upon at least ten days' notice. Nominations made pursuant to this chapter and chapter 45 which are required to be filed in the office of the commissioner shall be filed in that office not later than five o'clock p.m. on the fifty-fifth day prior to the date of the general election. Nominations made under this chapter or chapter 45 for city office shall be filed not more than sixty-five days nor later than five o'clock p.m. on the fortieth day prior to the city election, with the city clerk, who shall process them as provided by law. * * *"

It is to be observed that the time limitations for filing nominations with the state and county commissioners of elections specified in this section are by the terms of the statute limited to nominations made under the provisions of Chapter 44, nominations by non-party political organizations and Chapter 45, nominations by petition. Prior to the 1974 amendment of §44.4, nominations under Chapter 43 were also specifically included. Since the legislature deliberately removed Chapter 43 nominations from the coverage of §44.4 we

must conclude that they intended that the time limitations spelled out in such §44.4 no longer apply to nominations made under Chapter 43. Thus, the only cut-off for filing nominations with the state commissioner of elections for the offices of state representative and state senator is that found in §43.74, i.e., forty-five days before the general election.

In reaching this conclusion we are not unmindful of the practical difficulties it presents. For example, §49.63 provides:

"49.63 Time of printing—inspection and correction. Ballots shall be printed and in the possession of the commissioner in time to enable him to furnish ballots to absent voters as provided by sections 53.8 and 53.11. The printed ballots shall be subject to the inspection of candidates and their agents. If mistakes are discovered, they shall be corrected without delay, in the manner provided in this chapter."

And §53.11 requires the county commissioner of elections to deliver an absentee ballot to any qualified elector applying in person at his office not more than forty days before the date of the general election. Thus it is conceivable that there could be a period of only five days from the time a nominating certificate is forwarded to the state commissioner of elections in which to certify the nomination to the county commissioner of elections, have the ballots printed and make them available to absentee voters.

While as we have seen §43.74 effectively acts to prevent the submission of nominations to the state commissioner for certification less than forty-five days prior to the general electoin, there does not appear to be a corresponding statutory provision applicable to nominations which are not certified by the state commissioner such as nominations for election to county office. The only apparent limitation on making nominations for the latter offices would appear to be that which is found in §43.88 which states in part:

"43.88 Certification of nominations. Nominations made by state, district, and county conventions, shall, under the name, place of residence, and post-office address of the nominee, and the office to which he is nominated, and the name of the political party making the nomination, be forthwith certified to the proper officer by the chairman and secretary of the convention, or by the committee, as the case may be, *and if such certificate is received in time, the names of such nominees shall be printed on the official ballot the same as if the nomination had been made in the primary election. * * *" (Emphasis added)*

In this connection again see §§49.58 through 49.62.

September 10, 1974

PHYSICAL THERAPISTS; HOSPITALS: Unlawful practice of physical therapy. §§147.2, 147.83, 147.86, 148A.1, 148A.2, 148A.3(4), 1973 Code of Iowa. An unlicensed hospital aide of a licensed physical therapist who performs physical therapy treatment on a patient at the direction of the physical therapist is not on the hospital premises is not necessarily engaged in the unlawful practice of physical therapy. But if the aide is so engaged, it makes no difference if the services of the aide are not referred to as physical therapy by him or in a hospital bill or otherwise. A hospital aide who engages in the unlawful practice of physical therapy, or the hospital employing him, but not the licensed physical therapist, could be held accountable by way of criminal prosecution or injunction. (Haskins to Rogers, Board of Physical Therapy Examiners, 9-10-74) #74-9-10

Warren J. Rogers, L.P.T., Board of Physical Therapy Examiners: You have requested our opinion on the following questions:

"The Iowa Board of Physical Therapy Examiners would like opinions concerning the following areas of the Practice Acts relating to Physical Therapy:

"Example: A licensed physical therapist goes to a hospital; establishes a treatment program as ordered by a physician; shows an aide what is to be done; and she then carries out the program. She may give the treatments that afternoon while he is servicing another hospital, or she may give them all week until he returns one week later to check the progress of the patients and revise and update the therapy program.

"1. May a person not licensed as a physical therapist, provide physical therapy modalities such as heat, whirlpool, massage, exercise, etc., as directed by a licensed physical therapist, when the licensed physical therapist is not on the premises?

"2. May the above situation (#1) take place if the service provided by the aide is not called physical therapy and is not billed as physical therapy?

"3. If the above situation (#1) takes place, and the service provided by the aide is billed as physical therapy, either by the licensed physical therapist or the employer (such as a hospital), is the non-licensed individual, in fact, indirectly claiming to be a physical therapist?

"4. If any of the above situations are not legal, who may be held liable; the aide, the licensed physical therapist, the employer, or all of them?"

It is elemental that no person may practice physical therapy without a license. *See* §147.2, 1973 Code of Iowa. Physical therapy is defined in §148A.1, 1973 Code of Iowa, as follows:

"For the purposes of this chapter, physical therapy is defined as that branch of science that deals with the treatment of disease or injury by the application of the modalities and rehabilitation procedures incident to the practice of physical therapy for the alleviation of human ailments and the maintenance or restoration of health as prescribed by a physician licensed as such in Iowa."

Certain exceptions exist to the scope of physical therapy as set forth in §148A.1. Among these is that for hospital staff aides working under the supervision of a physician or physical therapist as provided for in §148A.3(4), 1973 Code of Iowa. That section states:

"Section 148A.1 shall not be construed to include the following classes of persons: * * *

"4. Nonprofessional workers in hospitals, clinics, offices, sanitoriums or health care facilities as defined in section 135C.1 who perform their services under the *supervision* of a physician or physical therapist licensed as such in Iowa and provided that such worker does not hold himself out as or accept employment as a licensed physical therapist." [Emphasis added]

The question is whether the word "supervision" in the above section mandates the presence of the licensed physical therapist on the hospital premises when the aide is working on the physical therapist's patient. We believe that it does not necessarily do so. (It is assumed here that a physician is not supervising the aide.)

The word "supervision" is derived from the word "supervise". Neither word is entirely precise. On the one hand, the word "supervise" has been

defined as meaning to coordinate, direct and inspect continuously and at first hand the accomplishment of another, or to oversee with power of direction and decision the implementation of one's own or another's intention. *See Saxton v. St. Louis Stair Co.*, 410 S.W.2d 369, 377 (Mo. App. 1966). On the other hand, the word "supervise" has been defined somewhat differently as to have general oversight over, to superintend, and to inspect. *See State v. Manning*, 220 Iowa 525, 259 N.W. 213, 221 (1935). The latter definition implies that continuous monitoring is not necessarily required. In the present case, the word "supervision" does not appear to contemplate that the physical therapist must in all cases be on the hospital premises. It is true that in some cases effective supervision dictates the physical presence of the licensed physical therapist in the hospital. But it need not always dictate it. Much depends on the nature of the patient's condition. In some circumstances, "supervision" might not require the presence on the hospital premises of the physical therapist. The question of what constitutes "supervision" must be determined on a case-by-case basis having due regard for the professional judgment of the physical therapist, the welfare of the patient, and the need for mobility of the physical therapist in order to treat as many patients as possible. A *per se* rule cannot be laid down. The fact that the licensed physical therapist is not on the hospital premises is merely a factor to be considered in determining whether there is an absence of "supervision". That fact alone does not inevitably mean that there is a lack of "supervision". It may mean it in some situations, but need not always mean it.

However, if an unlicensed hospital aide were not in fact working under the "supervision" of a physical therapist (or physician), whatever that might mean in a particular case, he would no longer fall within the exception of 148A.3(4) and would therefore be engaged in the practice of physical therapy, unlawfully so because he would have no license to practice. It would not matter if his services were not referred to as physical therapy by him or in a hospital bill or otherwise. In other words, the aide need not publicly profess to be a physical therapist or to perform physical therapy services in order to engage in the unlawful practice of physical therapy. To be so engaged, it is enough that he in fact treats persons by physical therapy, whether or not his services are referred to as physical therapy by him or others. Section 148A.2, 1973 Code of Iowa states:

"For the purpose of this chapter the following classes of persons shall be deemed to be engaged in the practice of physical therapy:

"1. Persons who treat human ailments by physical therapy as defined in this chapter.

"2. Persons who publicly profess to be physical therapists or who publicly profess to perform the functions incident to the practice of physical therapy."

As can be seen, two separate classes of persons are deemed to be engaged in the practice of physical therapy: both those who publicly profess to be physical therapists or to treat by physical therapy and those who in fact do treat by physical therapy. Falling into either category causes one to run afoul of the law; one need not fall into both categories to do so.

A hospital aide who engages in the unlawful practice of physical therapy can be held accountable by way of criminal prosecution or injunction. *See* §§147.83, .86, 1973 Code of Iowa. Likewise, the hospital employing the aide could be held accountable, since a hospital, being an entity, may not obtain a

license to practice a profession such as physical therapy, *cf. State v. Bailey Dental Co.*, 211 Iowa 781, 234 N.W. 260, 263 (1931), and the hospital would be practicing physical therapy through its agents whenever its aide-employee engaged in the practice of physical therapy. However, the physical therapist himself could not be held liable, since he is licensed and may therefore practice physical therapy through his agents, such as the aide.

In conclusion, an unlicensed hospital aide of a licensed physical therapist who performs physical therapy treatment on a patient at the direction of the physical therapist when the physical therapist is not on the hospital premises is not necessarily engaged in the unlawful practice of physical therapy. But if the aide is so engaged, it makes no difference if the services of the aide are not referred to as a physical therapy by him or in a hospital bill or otherwise. A hospital aide who engaged in the unlawful practice of physical therapy or the hospital employing him, but not the licensed physical therapist, could not be held accountable by way of criminal prosecution or injunction.

September 11, 1974

LIBRARIES: Microfilming Magazines. State Library Commission should obtain commercially produced microfilms of deteriorated or voluminous periodicals rather than undertaking such reproduction itself. (Nolan to Porter, State Librarian, 9-11-74) #74-9-11

Mr. Barry L. Porter, State Librarian: This opinion is in response to your letter of June 28, 1974, in which you ask:

"Can the State Library Commission of Iowa legally microfilm magazine holdings without being in conflict with current copyright laws? If not, could you recommend alternatives to a microfilm program?"

17 U.S.C., §1 (1973) states:

"Any person entitled thereto, upon complying with the provisions of this chapter, shall have the exclusive right: (a) To print, reprint, publish, copy and vend the copyrighted work; . . ."

Since the passage of the statute set out above, which was Title 17 originally enacted [as Chapter 320] in 1909, the courts have developed a doctine known as fair use, which allows for certain copying of copy-righted works so long as an "infringement" of the copyright owner's rights does not occur. However, the concept has remained nebulous, and ease of application has not been its prominent feature. With the advent of fast, economical copying, the need to codify the fair use concept was realized and on January 22, 1969, S. 543 was introduced in the U.S. Senate. In the 91st Congress, 2nd Session, Senate Report #91-1219 by the Judiciary Committee's Subcommittee on Patents and Trademarks and Copyrights dealt with S. 543 and two paragraphs of that report, dealing with §108 of S. 543 are especially elucidative:

"5. The doctrine of fair use is one of the most important limitations on the copyright owners' exclusive rights. The fair-use limitations, which is a judicially developed doctrine, permits a limited amount of copying without it being an infringement of copyright. The bill provides for the first statutory recognition of the doctrine and specifies that the fair use of a copyrighted work, including the reproduction of copies for purposes of teaching or research is not a copyright infringement. In determining whether the doctrine applies to a particular case, the bill specifies that four factors are to be considered. These factors are the purpose and character of the use, the nature of the work, the

amount of the work used and the effect of the use upon the potential market or value of the copyrighted work.

"6. Another of the limitations on a copyright owners' exclusive rights is the reproduction of copyrighted works by libraries and archives. The bill provides that under certain conditions it is not an infringement of copyright for a library or archives to reproduce or distribute no more than one copy or phonorecord of a work. The reproduction or distribution must not be for any commercial advantage and the collections of the library or archives must be available to the public or to other persons doing research in a specialized field. The measure also specifies that the reproduction or distribution of an unpublished work must be for the purpose of preservation and security, or for deposit for research use in another library or archives. The bill further provides that the reproduction of a published work must be for the purposes of replacement of a copy that is damaged, deteriorating, lost, or stolen, and that the library or archives has determined that an unused replacement cannot be obtained at a normal price from commonly-known trade sources in the United States. The rights given to the libraries and archives by this provision of the bill are in addition to those granted under the fair-use doctrine."

It would seem to us that, all other considerations aside, it would be much more feasible from an economic standpoint for a library to purchase commercially microfilmed periodicals than to devote the man hours to doing its own microfilming. But, even if a library should deem it advisable to do its own filming, it would still be prudent for the library to seek permission from the publisher. *Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847 (2nd Cir., 1963); *MacMillan Co. v. King*, 223 F. 862 (D. Mass. 1914).

Further, the above-quoted Report indicates that the purpose of S. 543 is to delimit statutorily the concept of free use and would specifically restrict library microfilming to cases where granted commercial reproductions are unavailable.

Therefore, we advise that the State Library Commission obtain commercially produced films of deteriorated or voluminous periodical back-issue which it wishes to reproduce, rather than attempting such reproduction itself. Such practice appears to us to be in comportment with contemporary copyright theory. See Copyrights: *The Librarian and the Law*, Rutgers Univ. Grad. School Library Service. (1972-Lukac Ed.).

September 11, 1974

COUNTIES: Officers—Offices. §§332.3(15), 332.9, Code of Iowa, 1973. The county board of supervisors shall designate the office or rooms to be occupied by the county sheriff. (Nolan to Oppen, Hardin County Attorney, 9-11-74) #74-9-12

Mr. Allan M. Oppen, Hardin County Attorney: In your letter of August 14, 1974, you requested an Attorney General's opinion on the question of whether or not the county board of supervisors has the authority to designate the office or rooms which shall be occupied by the county sheriff. Your letter states that the sheriff intends to move his office from the county office building to the jail.

Section 332.3, Code of Iowa, 1973, states:

"The board of supervisors at any regular meeting shall have the power:
* * *

"15. To build, equip, and keep in repair the necessary buildings for the use of the county and of the courts."

Section 332.9, Code of Iowa, 1973, additionally states:

"The board of supervisors shall furnish the . . . sheriff . . . with offices at the county seat, but in no case shall any such officer, except the county attorney, be permitted to occupy an office also occupied by a practicing attorney."

Since the board of supervisors has the power and duty to provide, pay for, and equip county offices, it is our opinion that the supervisors' control would also extend to the designation of officers to certain facilities or rooms. Naturally, we would deem it propitious for the supervisors to consider the informed opinion of the officer himself as to the most suitable location for his offices in making their decision on such assignment of office space.

September 11, 1974

CIVIL RIGHTS: U.S. Constitution 14th Amendment. 42 U.S.C. 2000e. Height and weight requirements for the job of police patrol officer are unconstitutional only (1) if there is a showing that such requirements eliminate more persons of a particular class and (2) if no business necessity or compelling state interest for retaining such requirements is demonstrated. (Conlin to Tate, Executive Director, Iowa Civil Rights Commission, 9-11-74) #74-9-13

Joseph L. Tate, Executive Director, Iowa Civil Rights Commission: You have requested an opinion from our office as follows:

Is it in accordance with the United States Constitution and the Iowa Constitution for an employer to use a height and weight requirement for employment when there is no business necessity?

Neither the 14th Amendment of the United States Constitution, nor the Iowa Constitution proscribe such employment standards as height and weight. The 14th Amendment provides, however, that no state shall deny any person the equal protection of the laws. Therefore if height and weight standards preclude a class of persons from employment, if they have a discriminatory effect, the job requirements are tested in light of their relationship to job performance and may be found unlawful if there is no rational relationship between the height and weight requirement and job performance. Accepting the fact that there is nothing illegal in establishing job requirements, the question of their constitutionality is then two fold: (1) Does the requirement discriminate against a class of people? and (2) Is there a business necessity for the requirement, i.e., does the requirement have a rational relationship to the job that outweighs its discriminatory effect?

For instance, the court in *Smith v. City of East Cleveland,* 363 F. Supp. 1131 (N.D. Ohio 1973) found that the height and weight requirements for police officer prevented most women from qualifying for the job. Using an equal protection analysis, the court held that regardless of the motive for such requirements, since the effect alone was discriminatory the question of whether or not it was lawful depended on whether the height and weight requirement was rationally related to the performance of the job of police officer. This is a factual question. The court reviewed the duties and skills required for the job to determine if they were related to the height and weight requirement. The court found that they were not.

Hardy v. Stumpf, 112 Cal. Rptr. 739 (1974) also states that when a seemingly neutral job requirement (such as height and weight) has the effect of disqualifying a disproportionate number of one sex (or of one race or of one national origin), it creates a discriminatory classification under the equal protection clause. The requirement must then be reviewed to see if it is demonstrably related to job performance. If there is no relationship, the requirement is unconstitutional. The court also noted that no other authority has found a relationship between height and weight and the skills and duties required of a police officer.

Height and weight were found to be a legitimate job requirement because necessary and essential to the job of truck driver in *United States v. Lee Way Motor Freight, Inc.,* 7 EPD 9066 (D.C. Okla. 1973). The constitutionality for the height and weight requirement was not then, in question. The court found, however, that though the job requisites were not racially motivated, the company had taken every possible advantage of these requirements to deny employment to blacks while at the same time conveniently overlooking overweight and over-height on the part of whites.

Thus, height and weight as a job standard is not, a priori, unconstitutional. If such a requirement is found to deny employment to a class of persons, the business necessity or rational relationship test is used to determine its constitutionality. As stated in *Robinson v. Lorillard Corp.,* 444 F.2d, 791 (4th Cir. 1971), the business necessity test has evolved "as the appropriate reagent for detecting which employment practices are acceptable and which are invalid based on factors that are the functional equivalent of race" the business necessity test determines if the challenged practice is necessary to the safe and efficient operation of the business. It must be sufficiently compelling to override any discriminatory impact, it must effectively carry out its alleged purpose and there must not be any acceptable alternative practices that would accomplish the same purpose.

The state cannot, under the 14th Amendment to the United States Constitution, create job requirements that discriminate against a certain class of persons. The question of whether height and weight requirements discriminate is a fact question, tested by the business necessity or rational relationship test.

September 11, 1974

COUNTIES: Clerk of the District Court: Office of Friend of the Court; Support Payments. §§598.22, 606.15, 625.1, 625.7, Code of Iowa, 1973. The practice of the Friend of the Court's Office of charging four dollars ($4.00) per year postage and handling fee to recipients of support payments under §598.22, Code of Iowa, 1973, is not an allowable fee. (Boecker to Mayer, Citizens' Aide, 9-11-74) #74-9-14

Mr. Thomas R. Mayer, Office of the Citizens Aide: This is in answer to your request for an opinion with respect to the practice of the office of the Friend of the Court in Polk County of charging a four dollar ($4.00) per year fee to cover postage and handling of checks received from a father as child support payments. As we understand it this fee is charged to the individual to whom the support payment is disbursed. Under the circumstances related in your letter this does not appear to be an allowable fee under Iowa law.

Section 598.22, Code of Iowa 1973, governs support payments made pursuant to a dissolution of marriage. This section provides:

"All orders or judgments providing for temporary or permanent support payments shall direct the payments of such sums to the clerk of the court for the use of the person for whom the same have been awarded. An order or judgment entered by the court for temporary or permanent support shall be filed with the court clerk. Such orders shall have the same force and effect as judgments when entered in the judgment docket and lien index and shall be a record open to the public. The clerk shall disburse the payments received pursuant to such orders or judgments. All moneys received or disbursed under this section shall be entered in a record book kept by the clerk, which shall be open to inspection by the parties to the action and their attorneys.

If the sums ordered to be paid are not paid to the clerk at the time provided in said order or judgment, the clerk shall certify a default to the court which may, on its own motion, proceed as provided in Section 598.23.

Prompt payment of sums required to be paid under Sections 598.11 and 598.21 shall be the essence of such orders or judgments and the court may act pursuant to section 598.23 regardless of whether the amounts in default are paid prior to the contempt hearing."

This section specifically directs the clerk of court to disburse all payments received. There is no statutory fee imposed by Section 598.22. It is clear that this is a service to be provided by the clerk of court for the benefit of the person to whom support payments have been awarded.

Further Section 606.15, Code of Iowa 1973, lists the fees which shall be charged by the clerk of the district court. Nowhere in Section 606.15 is there allowed a fee to cover the cost of postage and handling of Child Support Payments.

The clerk of the district court is allowed to charge a one dollar fee for the taxing of costs. Section 606.15(10) Code of Iowa 1973. Postage is a taxable cost as set out in Section 625.7 Code of Iowa 1973:

"Postage paid by the officers of the court, or by parties, in sending process, deposition, and other papers being part of the record, by mail, shall be taxed in the bill of costs."

However, the postage and handling fee, now being charged by The Friend of the Court for distributing support payments, is not one of the allowable postage fees set out in Section 625.7. The postage fee provided for in Section 625.7 states specifically what are chargeable items—sending process, depositions and papers part of the record.

In any event the cost is taxable against "the losing party" Section 625.1 Code of Iowa 1973. In the vast majority of instances this will not be the party to whom the support payment is distributed.

Friend of the Court operates as an arm of the clerk's office and therefore cannot charge a fee which the clerk cannot charge. Accordingly, we are of the opinion that the charging of this four dollar ($4.00) cost and handling fee by the Polk County office of The Friend of the Court is not an allowable fee.

September 11, 1974

CORRECTIONS — CRIMINAL LAW — Robbery with Aggravation. §§247.5, 789.13, 711.3, 1973 Code of Iowa. Robbery with aggravation is in-

corporated within the indeterminate sentencing law and persons convicted thereunder are subject to consideration by the Iowa Board of Parole concerning parole. (McGrane to Olson, Parole Board Executive, 9-11-74) #74-9-15

Donald L. Olson, Parole Board Executive, The Board of Parole: You have requested an opinion of the Attorney General on the following question:

"Can the Board of Parole grant a parole under the Indeterminate Sentence Law, Section 789.13 of the Code of Iowa (1973) when an inmate is serving time in one of our institutions for Robbery with Aggravation, Section 711.2 of the Code of Iowa (1973)?"

Section 789.13 (Indeterminate Sentences) reads as follows:

"When any person over sixteen years of age is convicted of a felony, except the crime of escape, treason, murder, or any crime the maximum penalty of which is life imprisonment, the court imposing a sentence of confinement in the penitentiary, men's or women's reformatory shall not fix the limit or duration of the same, but the term of such imprisonment shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted."

This section specifically excludes from indeterminate sentencing only persons over sixteen years of age convicted of a felony, who have been convicted of treason, murder, escape or whose crime is subject to the penalty of life imprisonment. Robbery with aggravation does not fall within the categorical exclusions.

Section 247.5, Code of Iowa, defines who shall be subject to its parole powers:

". . . The Board of Parole shall, except as to prisoners serving life terms, or under sentence of death, or infected with venereal disease in communicable stage, have power to parole persons convicted of crimes and committed to either the penitentiary or the men's or women's reformatory; . . ."

The confusion has arisen because §711.2 (Robbery with Aggravation), 1973 Code of Iowa, sets what appears to be a determinate rather than indeterminate sentence. The section reads as follows:

"If such an offender at the time of such robbery is armed with a dangerous weapon . . . he shall be imprisoned in the penitentiary for a term of twenty-five years."

The inquiry and confusion occurred because of the precise language "twenty-five years," rather than "not more than" or "not exceeding" a number of years.

Can parole be granted? It is the opinion of the Attorney General the specific wording does not affect the question of whether parole can be granted and that such language merely stipulates the maximum period the prisoner may be confined under the law.

The wording of the criminal statutes was not substantially changed after the parole statute, §247.5, and indeterminate sentence statute, §789.13, 1973 Code of Iowa, were adopted in 1907. This factor indicates that statutory wording was not conclusive in determining whether certain crimes fell within the scope of indeterminate sentencing. Before the passage of the Indeterminate Sentencing Act in 1907, many criminal statutes had language such as, "not exceeding a

term of years", which allowed the judge to set a determinate sentence so long as such sentence did not exceed the maximum statutory penalty. This meant that the discretion as to the length of a sentence rested with the judge. After the indeterminate sentence law was passed, parole board discretion was substituted for judicial discretion, and the only sentencing function the judge possessed with crimes subject to indeterminate sentencing was to set the maximum statutory penalty. But see §789.15, 1973 Code of Iowa (Discretion as to Sentence). It was left to the parole board to determine exactly how much of the maximum sentence the prisoner would serve. The reasoning behind indeterminate sentencing is that the parole board, with the help of correctional facilities, penology experts, and greater opportunity to supervise and evaluate criminals should determine the actual length of sentence rather than the judge who has less time and resources to handle such a task.

Further evidence of the superfluous nature of the statutory wording in the sentencing provision of specific criminal statutes is that in 1967 the crime of "escape" was specifically excluded from indeterminate sentencing and the legislature did not alter the wording of the escape statute, which still reads, not to exceed five years, §745.1, 1973 Code of Iowa. The controlling language is the specific exclusionary wording of the Indeterminate Sentence Act itself.

The indeterminate sentence statute, §789.13, specifically excludes escape, treason, murder, and any crime subject to a maximum sentence of life imprisonment, all other felonies committed by a person over sixteen years of age who is convicted by a court of law, in Iowa, shall be subject to an indeterminate sentence. It is the opinion of the Attorney General that a person convicted of robbery with aggravation is under the indeterminate sentence law and may be paroled.

September 11, 1974

CITIES AND TOWNS: Subdivision—plats. §409.1, Code of Iowa, 1973. For purposes of §409.1 of the Code, when land is subdivided into three or more parcels, the size of the parcel is an irrelevant criterion; rather, it is the location of the land or the intended use to which the land will be put which determines whether or not the land must be platted according to the terms of Chapter 409 of the Code. (Nolan to Keller, Dallas County Attorney, 9-11-74) #74-9-16

Peter A. Keller, Dallas County Attorney: In your February 27, 1974, request for an Attorney General's opinion, you state:

"[T]here have been various disputes in our county concerning whether 10 acre parcels are considered farms and therefore whether they require the platting procedures referred to above. [Chapter 409] There have been several individuals who claim that if the tracts exceed 10 acres they are classified as farms rather than building lots and therefore do not fall within the platting requirements. The question, apparently, is where do you draw the line? For instance, if a farmer owns a 160 acre farm and divides it into 4 tracts of 40 acres does he have to plat this as a subdivision?"

Section 409.1, Code of Iowa, 1973, states:

"Every original proprietor of any tract or parcel of land, who has subdivided, or shall hereafter subdivide the same into three or more parts, *for the purpose of laying out a town or city, or addition thereto, or part thereof, or suburban lot*, shall cause a registered land surveyor's plat of such subdivisions, with

references to known or permanent monuments, to be made by a registered land surveyor. . . ." (Emphasis supplied)

No mention is made of the size of the tracts into which the parcel will be divided as being a criterion to be used in determining whether the land must be platted according to Chapter 409. In 1970 O.A.G. 669 we said:

". . . a suburban lot as used in section 409.1, Code of Iowa, 1966, means a lot which is located on land which is in the process of being presently or in the reasonably foreseeable future, overflowed with the expanding population of nearby urban areas. . . . The definition of an addition to a city or a town as used in section 409.1, Code of Iowa, 1966, refers to territory which is contiguous to the territorial limits of the city or town to which it is a proposed addition."

In 1972 O.A.G. 475, we said:

"Your last question asks whether the statute requires the filing of a plat where a vendor sells the first tract of land shown by a drawing of several contiguous tracts or other indication of an intent to sell. Our answer to this question would depend on the necessity for opening streets, roads, etc., and whether the owner has offered for sale or lease any other additional lots or tracts. [Section 409.45] If these elements are present, the answer would be affirmative."

It should also be noted here that we have previously spoken on the question of the legislative intent in drafting §409.1 of the Code:

"It was the intent of the legislature in promulgating section 409.1 to promote orderly urban growth and to prevent disorderly, disorganized projects without minimal facilities and services." 1970 O.A.G. 669.

It would not have been the intent of the legislature to have platted land which was to be subdivided for agrarian or other rural uses, and accordingly we find that any land which is subdivided into three or more tracts, regardless of size, when the land is intended to be used to originate a city or town or to constitute an addition to a city or town, or when the land is in an area contiguous to a city or town and such area may become populated in the foreseeable future, such tracts must be platted according to the provisions of Chapter 409 of the Code.

September 12, 1974

ELECTIONS: Regional Library Trustees. Ch. 200, 65th G.A., 1st Session (1973), §47.2, Code, 1973, as amended by Ch. 136, 65th G.A., 1st Session §93 (1973). Nomination papers for regional library trustee are filed with the Commissioner of Elections of the control county of the district from which the trustee is to be elected and the election results are canvassed and the certificates issued by said commissioner; Ch. 62, Code, 1973. Election contests, if any, shall be determined in accordance with §62.1; the regional library trustee must post bond in order to qualify for office; Ch. 200, 65th G.A., 1st Session, §4 (1973). If a vacancy of a regional library board occurs more than 90 days before the next general election, the vacancy shall be filled by the regional board, but if it occurs less than 90 days before the next general election it shall not be filled. (Nolan to Keller, Dallas County Attorney, 9-12-74) #74-9-17

Mr. Peter A. Keller, Dallas County Attorney: This is written to answer questions raised in your letter of June 17, 1974:

1. Where are nomination papers for regional library trustees filed?

2. Who canvasses the results of the election from the several counties in a single district and who issues the certificates of election?

3. Who canvasses the results of the election from a single-county district and who issues the certificates of election?

4. Would any contests of elections for library trustees be controlled by Chapter 61 instead of Chapter 62 of the Code?

5. In addition to subscribing to the oath under Section 73.10, must regional library trustees post a bond under Section 64.7 in an amount fixed by the governor under Section 64.19(1)?

6. How are vacancies on a regional library board filled?

In response to the above questions, we advise:

1. According to the provisions of Chapter 200, Laws of the 65th General Assembly, 1973 Session, as amended by House File 1399, Acts of the 65th G.A., 1974 Session, the nomination papers for regional library trustees are filed in the office of the Commissioner of Elections for the county having jurisdiction over that election.

House File 1399, supra, provides:

"A trustee of a regional board shall be elected without regard to political affiliation at the general election by vote of the electors of his district from a list of nominees, the names of which have been taken from nomination papers filed in accordance with chapter forty-five (45) of the Code in all respects except that they shall be signed by not less than twenty-five eligible electors of the respective districts. The election shall be administered by the commissioner who has jurisdiction under section forty-seven point two (47.2) of the Code."

Under §47.2 of the Code of Iowa, 1973:

"If a political subdivision is located in more than one county, the county commissioner of elections of the county having the greatest taxable base within the political subdivision shall conduct the election. . ."

The regional library system, as contemplated by Chapter 200 consists of seven geographic regions. Each region is divided into several trustee districts, each of which, in the opinion of this office, constitute a "political subdivision" under the statute. Section 47.2 would, therefore, apply to each regional library trustee district, instead of the library region as a whole, as each regional trustee, is to be elected from a separate trustee district. Accordingly, any person wishing to file papers with the commissioner of elections in the county having jurisdiction over the election for his district. (i.e. the county having the greatest taxable base in the district).

2. Under the election laws of the State of Iowa, canvass of the votes is specifically provided for in Chapter 50 of the Code. Section 50.1 provides that the election board at each polling place shall canvass the vote in the manner prescribed as soon as the poll is closed. Subsequently, at nine o'clock on the morning of the first Monday after the day of each election, unless another date is specified by law, the county board of supervisors shall open and canvass the tally lists prepared by the election board. The board of supervisors then prepares abstracts stating the number of votes cast in the county or in that portion of the county for which the election was held for each office and nameing the persons receiving votes for each office and the number of votes each person named receives for that office. Further, under §50.27, the county board

canvass is required to contain a declaration of the results of the election as determined by the canvasses and the commissioner of elections having jurisdiction over that election then certifies a duplicate of the abstract and declaration to the governing body of the political subdivision.

Although it might be urged that lacking specific statutory direction the local results should be certified with the state board of canvassers under §50.30(6), for final canvass and issue of certificates of election, it is my opinion that this is neither necessary nor authorized by the election laws. Section 50.30 specifically states those offices to be canvassed by the state canvass board. Subparagraph 6 provides for the canvass of the election of a state officer not otherwise specified but nowhere do we find that the regional library trustee has been designated a "state officer". Accordingly, we must apply the maxim expressio unius est exclusio alterius and advise that the state canvass board does not have jurisdiction to canvass the results of the election of regional library board trustees.

3. The canvass and issuance of certificate of election in a single county library trustee district would, in the opinion of this office, follow the same rules as are applied to multi-county trustee districts. In other words, the election should be canvassed by the board of supervisors of the county, where the election is held, and the results declared by that board and certified to the commissioner having jurisdiction of the election who then issues the certificates of election.

4. Contests of election for library trustees should, like contests in the election of directors of merged areas under §280A.13, be determined in accordance with the provisions of Chapter 62 of the Code, although there appears to be no expressed statutory direction in this regard. Reasoning would indicate that since the regional library trustees are elected in elections under the jurisdiction of the commissioner of elections of the county having the largest taxable base within the district, the provisions for contesting county elections are more closely applicable than those for the contest of state elections.

5. The regional library trustee is, in our opinion, a public officer and is required by §64.2 to give bond as a condition for qualifying for the office.

6. Under §4 of Chapter 200, supra, vacancies on the regional library board shall be filled by appointment by the regional board for the unexpired term if the vacancy to be filled occurs not less than ninety days before the general election. Under §69.12 of the Code, when a vacancy occurs in any elective office of a political subdivision and the method of electing the person to the vacant office for the remainder of the unexpired term is not otherwise provided by law, the vacancy shall be filled pursuant to §69.12. Accordingly, except where the vacancy occurred not less than 90 days before the general election, the provisions of §69.12 govern the filling of vacancies on the board.

September 16, 1974

HIGHWAYS — Equalizing the condition of primary roads — §313.8, 1973 Code of Iowa. To equalize the condition of the primary roads, the Highway Commission must build the roads to established grade, and insure that they are bridged and surfaced. (Schroeder to Kennedy and Blouin, State Senators; and Carr and Norpel, State Representatives, 9-16-74) #74-9-18

Honorable Gene V. Kennedy and Michael T. Blouin, State Senators; Honorable Robert M. Carr and Richard J. Norpel, State Representatives: This is in reply to your letter of August 19, 1974, requesting a clarification of our Opinion of May 23, 1974, in reference to Section 313.8, Code of Iowa, 1973. Section 313.8 states:

"313.8 Improvement of primary system. The state highway commission shall proceed to the improvement of the primary road system as rapidly as funds become available therefor until the entire mileage of the primary road system is built to established grade, bridged, and surfaced with pavement or other surface suited to the traffic on such road. Improvements shall be made and carried out in such manner as to equalize the condition of the primary roads, as nearly as possible, in all sections of the state."

In your letter you ask the following seven questions:

1. What is the "existing standard" to which all existing primary highways must be compared to determine if they are equal to others throughout the state?

2. What are the elements, or factors, which comprise this "existing standard"?

3. What are the "conditions" which must be equalized by the Highway Commission?

4. Does the opening of a new road raise the "existing standard", and if it does then are existing roads that previously met that standard equal? If not, why not?

5. If the opening of a new road does not change the "existing standard" is the new road unequal? If not, why not?

6. What would allow, or require, a change in the existing standard?

7. Is the geographical unit the Highway Commission must consider in determining whether the conditions of the existing primary roads are as nearly equal as possible throughout the state, the entire state, a county, a section or some other area?

To answer your questions, one must look to the first sentence of §313.8 where it states ". . . until the entire mileage of the primary road system *is built to established grade, bridged, and surfaced* with pavement or other surface suited to the traffic on such road." (Emphasis added) In other words, the "existing standard", the elements or factors of the "existing standard", and the "conditions" which must be equalized are those items that are underlined in the quote of §313.8. The opening of a new road does not change the standard because the Code has set out the standard. The standard could be changed by legislative action. Finally, to determine whether the conditions are as nearly equal as possible throughout the state, the Highway Commission must look at the entire state.

In conclusion, to equalize the condition of the primary roads, the Highway Commission must build the roads to established grade, and insure that they are bridged and surfaced.

September 16, 1974

LIENS: HOSPITALS: COUNTIES: Free treatment certificate for tuberculosis patient — §254.8, 173 Code of Iowa. A lien may not be placed on the property of a patient or his next of kin for the cost of treatment for tuberculosis where the patient has received a free treatment certificate under §254.8, 1973 Code of Iowa. (Haskins to Pawlewski, Commissioner of Public Health, 9-16-74) #74-9-19

Mr. Norman L. Pawlewski, Commissioner of Public Health: You ask our opinion on the following matter:

"It has been brought to the attention of the State Department of Health that occasionally liens have been placed against the property of patients or next of kin for cost of the treatment regardless of whether the patient has received a free treatment certificate for tuberculosis. This practice has resulted in some patients with tuberculosis to hesitate to make use of the law for free treatment of tuberculosis although such expenditures are declared in Section 254.8 of the Code of Iowa to be 'for the protection of the public health and not as moneys advanced in the nature of welfare or relief.' The rules of the Department for free treatment are found in 1973 IDR pages 459 and 460.

"Therefore, would you please render an opinion concerning whether or not there is authority to place a lien on the property of a patient or his next of kin for the cost or part of the cost of treatment for tuberculosis where the patient has received a free treatment certificate issued under Section 254.8 of the Code."

It is our opinion that a lien may not be placed on the property of a patient or his next of kin for the cost of treatment for tuberculosis where the patient has received a free treatment certificate under §254.8, 1973 Code of Iowa.

§254.8 authorizes free treatment for indigent persons who have tuberculosis. That section states:

"Treatments shall be supplied free to any legal resident of Iowa suffering from tuberculosis upon the signed certificate of his county director of social welfare, or the overseer of the poor, as the board of supervisors may direct, or in case of a county maintaining a separate public tuberculosis hospital, his board of hospital trustees, that such person has applied for such treatment and agreed to remain under treatment until discharged by the sanatorium, as no longer having tuberculosis in a communicable stage and is not possessed of sufficient income or estate to enable him to make payment of the costs of such treatment in whole or in part without affecting his reasonable economic security or support in light of his resources, obligations and responsibilities to dependents; and expenditures of public funds for treatment of tuberculosis shall be considered expenditures for the protection of the public health and not as moneys advanced in the nature of welfare or relief. The state department of helath shall promulgate rules and regulations for the uniform administration of the provisions of this section, which shall govern the county directors of social welfare, overseers of the poor, and boards of hospital trustees in the issuance of such certificates. Any applicant who is denied a certificate by the county director of social welfare, overseer of the poor or the board of hospital trustees, may apply to a judge of the district court of his county of residence, either in term or on vacation, for a review thereof and hearing thereon which shall be de novo. The district judge shall promptly hear such application and shall render final decision thereon and enter an order accordingly. The director, overseer and board of hospital trustees shall file a copy of such certificates issued by them and the clerk of the court shall file a

copy of any order entered by the district judge with the county auditor of the county of legal settlement of the applicant."

No where in the above section or in any other section is the creation of a lien on the property of the patient or his next of kin authorized. Indeed, under a lien would seem to be incompatible with the motion of treatment which is "free."

It is firmly established that a lien may be created only by a contract, statute, or other fixed rule of law. *See* 51 Am. Jur.2d *Liens* §6, at 147; 53 C.J.S. *Liens* §2, at 833. A patient who accepts free treatment for tuberculosis incurs no contractual obligation, express or implied, to pay for such treatment. Indeed, were a county or hospital to require a patient seeking free treatment under §254.8 to agree to a lien prior to treatment, it would be flouting the statute and such a lien would be void. As indicated, the statute contemplates that treatment be free and accordingly it creates no liens. Nor can it be said that there is any fixed rule of law requiring the creation of a lien in this case. Liens on the property of persons who receive the fruits of the welfare state must be statutorily set forth, e.g., §249.20, 1973 Code of Iowa (Old Age Assistance), §230.25, 1973 Code of Iowa (Mental Illness Treatment), and cannot be inferred from some general moral obligation of such persons to repay a "debt" owed the state. *See In Re Frentress' Estate,* 249 Iowa 738, 89 N.W.2d 367, 369 (1958).

In conclusion, a lien may not be placed on the property of a patient or his next of kin for the cost of treatment for tuberculosis where the patient has received a free treatment certificate under §254.8.

September 16, 1974

STATE OFFICES AND DEPARTMENTS: State Library Commission. Chapter 200, 65th G.A., as amended by H.F. 1399, §§4.1(37)(a), 378.1, 378.10. "Shall" as used in §10 of Chapter 200 conveys a grant of power by the legislature, not a limitation; §10 sets minimum standards with regard to the millage levy for library maintenance purposes; Board of Trustees may sell property which they have acquired by gifts, but cannot purchase additional land. (Beamer to Porter, State Librarian, 9-16-74) #74-9-20

Mr. Barry L. Porter, State Librarian: This correspondence is in reply to your requests to this office for opinions regarding Chapter 200, 65th G.A., 1973 Session, as amended by House File 1399. The first three questions you submitted deal with §10 of this legislation:

"(1) 'Regional Board shall have the authority to require . . .' Is the word 'shall' mandatory, and if the Board feels that this Section is not necessary, may they waive the requirement?

"(2) The community of Fairfield has just had a tax re-evaluation. The public library will receive more money this year than they did last year, but the city council has cut their millage levy. As other communities have a tax re-assessment, how will this affect the Law?

"(3) We understand that some communities are in the process of annexing surrounding territory to their tax base. This will cause a similar problem to that of a tax re-assessment. If and when a tax levy is decreased, how will that affect such intent?"

Generally, where the word "shall" is used in a statute, the presumption is that its use is imperative, and not merely directory. Section 4.1(37)(a) Code of

Iowa, 1973. However, the phrase "shall have authority", has been interpreted by the Texas courts as a grant of power rather than a limitation, where statute there authorized a school board to employ teachers for a period of not exceeding two years. *Fikes v. Sharp,* 112 S.W.2d 774, 777. It is our opinion that the language of §10 of the Act vests discretionary authority in the board.

Section 10 of the statute is quite clear in its provisions. Assuming that the regional board wishes to exercise its discretionary authority, it may require that a governmental subdivision, "maintain any millage levy for library maintenance purposes that is in effect on July 1, 1973, and that commencing July 1, 1977, a public library receiving services under section seven (7) of the Act shall be funded by the local governmental subdivision through a levy of at least one-quarter mill or at least the monetary equivalent of one-quarter mill when all or a portion of the funds are obtained from a source other than taxation." The statute does not attempt to restrict re-evaluation of property, but does set minimum standards with regards to the millage levy.

Thus, while the total dollar amount collected by the local governmental subdivision may change following a tax re-evaluation, the millage levy for support of the regional library program must remain at the minimum set by §10. The same holds true in the case of territory that existing communities annex into their tax base.

In your letter dated July 1, 1973, you requested an opinion on the following two questions:

1. If a public library wishes to buy some property contiguous to their present structure for future expansion of their library facility, should this purchase be made by the library board or by the city?

2. Can the Board of Trustees of a Public Library sell property for which they hold title?

Assuming your questions pertain to public libraries in cities rather than county libraries established under Chapter 358B of the Code, the contiguous property should be purchased by the city rather than the library board. Section 378.1 states:

"Formation—maintenance. Cities and towns may provide for the formation and maintenance of free public libraries open to the use of all inhabitants under proper regulations, and may purchase, erect, or rent buildings or rooms suitable for this purpose . . ."

Clearly, this language allows for the purchase of land by the city for future expansion of the present structure. In view of the fact that public tax monies are to be used for such purchase, it follows that the title must be taken in the name of the tax-levying municipal corporation.

The power of the board of library trustees are set forth in §378.10 of the Code and include:

"2. To have charge, control, and supervision of the public library, its appurtenances and fixtures, and rooms containing the same, directing and controlling all the affairs of such library. * * *

"8. To have exclusive control of the expenditures of all portions of the municipal enterprises fund allocated for library purposes by the council, and

of the expenditure of all monies available by gift or otherwise for the erection of library buildings, . . ."

Neither subsection 2 or 8, nor indeed any of the other subsections to §§378.10 make any reference to the power of the board to purchase additional land. Expressio unius est exclusio alterius.

Where land has been acquired by gift and the title to the property is in the name of the Board of Trustees of the Library, the board may execute a deed for the sale of the property under subsection 9 of §378.10, Code of Iowa, 1973:

"9. To accept gifts of real property, personal property, or mixed property, and devises and bequests, including trust funds; to take the title to said property in the name of said library; to execute deeds and bills of sale for the conveyance of said property; . . ."

Thus, the Board of Trustees can sell property to which they hold title.

September 17, 1974

COUNTIES: County Hospital. Land conveyed to county to be used primarily as a site for a hospital if subsequently determined to be excess for such need may be used by the county for other purposes, including use as a park. (Nolan to Lamborn, Senate Majority Leader, 9-17-74) #74-9-21

The Honorable Clifton C. Lamborn, State Senator: This is written in reply to your letter concerning certain real estate which was conveyed to Jackson County with the following provision:

"It is contemplated by the donors, the Maquoketa Rotary Club, that the premises herein conveyed will be used by the grantees primarily as a site for the erection of the proposed Jackson County, Iowa, Memorial Hospital."

You state:

"In this tract of land there are several acres which are not now used by the hospital and it is not contemplated that they will be in the foreseeable future. This land borders the Maquoketa River and would be suitable for a public park. The question is however as to whether it would be possible to lease or convey that land, with a provision for reversion in the event that it was not used for a park, either to the County Conservation Board or the City of Maquoketa or some other suitable agency for park purposes, in view of the restrictions on the power of the Hospital Trustees as to how they can use or dispose of land, but in view of the fact that the conveyance is to the County rather than to the Trustees, it would seem that the restrictions would not be applicable.

"It was at first thought that the control of this land would be in the Hospital Trustees, however in view of the nature of the conveyance it seems more likely that the control is in the Jackson County Board of Supervisors."

You ask whether this land may be conveyed or leased without consideration or with a nominal consideration, to the Jackson County Conservation Board or some other similar agency, for the purpose of establishing a public park, and if so by whom such conveyance should be made.

Section 332.3, Code of Iowa, 1973, as amended by House File 1067, Acts of the 65th G.A., 1974 Session, states in pertinent part:

"The board of supervisors at any regular meeting shall have power: . . . (6) to represent its county and have the care and management of the property and

business thereof in all cases where no other provision is made . . . (12) to purchase or acquire title or possession by lease or otherwise, for the use of the county, any real estate necessary for county purposes . . . (13) when any real estate, buildings, or other property are no longer needed for the purposes for which the same were acquired by the county, to convert the same to other county purposes or to sell or lease the same. . . ."

In 1968 O.A.G. 414, we discussed property acquired for county hospital purposes where title was held by the board of trustees of the county hospital and we quoted favorably *Phinney v. Montgomery,* 218 Iowa 1240, 257 N.W. 208 (1934), in which the court held that control for operation and management of county hospitals was vested in the county hospital trustees. Here the real estate was conveyed to Jackson County, thus the county supervisors need merely give control over the land to the County Conservation Board by an appropriate resolution. Section 111A.4, Code of Iowa, 1973, states:

"The county conservation board shall have the custody, control and management of all real and personal property . . . acquired by the county . . . and is authorized and empowered: . . . (2) to acquire *in the name of the county* . . . suitable real estate within or without the territorial limits of the county areas of land and water for public museums, parks . . . ." [Emphasis added]

Title would, per statute, remain vested in the county.

The remaining question is whether or not the above-cited provision is sufficient to constitute a reverter clause. In *Leverton v. Laird,* 190 N.W.2d 427 (Iowa, 1971), the Court said:

"Proper regard for the contemplated purpose of the parties must be had; the words used must be given their ordinary and obvious meaning as commonly understood, unless they have acquired a peculiar meaning in the particular relation in which they appear, or unless it appears from the context it was intended to use them in a different sense."

But, the Court went on to say:

"Innumerable precedents hold restrictions on the free use of property are strictly construed against the parties seeking to enforce them, they will not be extended by implication or construction beyond the clear and unambiguous meaning of their terms and doubts will be resolved in favor of the unrestricted use of property."

In *Isley v. Bogart,* 338 F.2d 33 (1964), the Court noted that:

". . . a dedication is a voluntary act and the dedicator can provide for reversion or revestment if he chooses."

And in *Galeb v. Cupertino Sanitary District of Santa Clara County,* 38 Cal. Rptr. 580, 227 Ca. 297 (1964):

"The language of the dedications here contain no express reservations and the secret intentions of the dedicator are of no significance. The rule is that where dedicator has caused an uncertainty as to the location and extent of a public way, an interpretation most favorable to the public and against the dedicator must be adopted."

The U.S. Supreme Court denied certiorari to a lower court decision in *Charlotte Park and Recreation Commission v. Barringer,* 242 N.C. 311, 88 S.E.2d 114 (1955); *cert. den.* 350 U.S. 983, 76 S.Ct. 469, 100 L.Ed. 851 (1956), where part of a tract of land conveyed for development of private home sites was subsequently dedicated by the developers as a public park.

"The reverter provision does not require a reverter . . if the lands of the Revolution Park are used by Negros. Therefore, if Negros will use Bonnie Brae Golf Course (part of said park) title to the lands conveyed by Abbott Realty Company to the plaintiff will not revert to the grantor."

It is, therefore, obvious that unless the words of the conveyance expressly provide for reverter or revestment upon use of the real estate for other than hospital purposes, no such reverter or revestment will occur. In *Housman v. Rudkin,* 268 So.2d 407, Fla., it was held that for purposes of an agricultural zoning law, "primarily for bona fide agricultural purposes" signifies that, as to land which supports diverse activities, agriculture must be the most significant activity and not necessarily the exclusive activity. The grantor's use of the word "primarily" here appears to be merely a precatory expression and did not mandate that the real estate conveyed should be used exclusively or solely for hospital purposes, but rather that the real estate be used mainly for hospital purposes to the extent necessary to support the facilities. Since the hospital was constructed on this land, the purpose expressed in the grant has been fulfilled. Consequently, that portion of the real estate which is unnecessary to support the hospital activities may now be used, conveyed, sold, leased, or otherwise disposed of by the county, in whatever manner it deems most propitous.

September 18, 1974

COUNTIES: Revenue Sharing Funds. Counties lack authority to contribute revenue sharing funds to local fire fighting agencies but "public agencies" may enter contracts for the joint performance of governmental services of mutual benefit under Chapter 28E, Code of Iowa, 1973. (Nolan to Wornson, Cerro Gordo County Attorney, 9-18-74) #74-9-22

Mr. Clayton L. Wornson, Cerro Gordo County Attorney: This is written in response to your request for an Attorney General's opinion on the use of Federal Revenue Sharing Funds by Cerro Gordo county. Your letter states:

"A proposal has been submitted by nine fire fighting units in this County, some of them operated by small municipalities, others operated by townships, and one operated by the City of Mason City, wherein a contribution of $10,000 from County Revenue Sharing Funds would be given to each of the nine fire fighting units to improve either their physical facilities or their equipment.

"There seems to be no question but that the general purpose, to wit, improvement of fire fighting facilities, is one of the 'high priority' expenditures contemplated by the Federal Revenue Sharing Act. The question being raised is whether or not 'County' Revenue Sharing Funds may be devoted to, 1. municipal fire fighting operations, and, 2. township or 'benefited fire districts' fire fighting facilities. These various fire fighting organizations are operated under taxing provisions provided in Chapter 357B of the Code as to 'benefited fire districts;' Chapter 359.43 as to 'township' and Chapter 368.11 governing 'cities and towns'.

"It is requested that you advise, first, whether or not the expenditures of County Revenue Sharing Funds are restricted in the same manner as the expenditure of all other funds acquired by County taxation and, secondly, whether or not such revenue sharing funds could be expended for 'township' fire fighting equipment in view of the specific tax raising methods and limitations set out in Chapter 359.43. And, thirdly, whether County Funds could be expended for fire protection in 'benefited fire districts' in view of the taxing methods provided in Chapter 357B and, fourth, whether or not County

Revenue Sharing Funds could be expended in support of a municipal fire department such as that of the City of Mason City.

"With respect to the Mason City department, it should be kept in mind that said department, under contract, with individuals or a group in a geographic area, does provide fire protection to a number of rural areas of the County!

"Your advice on the above problem will be greatly appreciated."

We find no authority for the county to make a contribution of revenue funds to nine fire-fighting units located in the county. However, this office has advised on several occasions that counties as "public agencies" may cooperate with other public agencies under a Chapter 28E contract to provide governmental services of mutual benefit to both. 1966 O.A.G. 134; 1968 O.A.G. 307; 1970 O.A.G. 563, 571 and 641. Further, in an opinion issued April 4, 1969, 1970 O.A.G. 92, at page 98, we said:

"Section 28E.12 authorizes not only the joint exercise of mutually possessed powers, but also the exercise by one agency of the power of the other in accordance with the contract."

Accordingly, while there appears to be no authority for the county to make mere contributions of such funds, it is possible for the county to contract with various other public agencies in ways of mutual benefit for the performance of governmental services. In this connection, we note that the county has specific authority to provide ambulance service (§332.3(23)); to provide programs benefiting senior citizens, including senior citizen centers, mobile meals and counselling programs (§332.3(26)); as well as numerous other services specifically provided for in other chapters of the Code of Iowa. We, therefore, answer your first question affirmatively. It follows, therefrom, that further answer is not required to your second and third questions.

September 19, 1974

COUNTY BOARD OF SUPERVISORS: Chapters 331, 332 and 334, Code of Iowa 1973. A county board of supervisors does not have authority to delegate its duty to approve claims to a board of directors of a County Health Center established under Chap. 346A.5. (Kelly to Wells, State Representative, 9-19-74) #74-9-23

Honorable James D. Wells, State Representative: This opinion is in response to your request of June 6, 1974, concerning the duties of county auditors. You specifically asked:

"Can the County Auditor legally approve or disapprove claims approved by the Board of Directors of a county agency which has been delegated authority for claims approval by the County Board of Supervisors, such county agency having been established under Chapter 346A, Code of Iowa; and

"Can the County Auditor legally restrict the flow of funds and/or refuse to honor claims which have been so approved by the Board of Directors of such a county agency?

"We would also request clarification of the County Auditor's authority and responsibility with respect to the budgeting processes of such a county agency regarding:

"A. initial approval of annual budget.

"B. ongoing budget management."

Your first two questions raise certain issues that are not directly referred to in your request, but certainly warrant comment by this office. First of all, I cannot find any provision in the Code of Iowa that gives any board of supervisors power to "delegate authority for claims approval," see Chapter 331 and 332, Code of Iowa 1973. Chapter 346A, County Health Center, does provide that a county board of supervisors can ". . . appoint such committees, groups, or operating boards as they may deem necessary and advisable to facilitate the operation and management of such health centers, additions and facilities . . .", however such authorization doesn't go to the approval of claims. Therefore, it is my belief that any such delegation would be improper and contrary to statute, see for eg. *Denison v. Watts,* 66 N.W. 886, 97 Iowa 633 (1896).

The duties of a county auditor are clearly defined in Chapter 333 of the Code. This chapter basically states that the county auditor *shall,* (not may), issue monies pursuant to the direction of the county board of supervisors; he is not empowered to disapprove claims previously approved by the board. In the situation presented by your request, a county auditor would be correct in disapproving or restricting payment for a claim not previously passed upon by the county board of supervisors.

Your last questions seeking clarification of a county auditor's responsibilities concerning "initial approval of annual budgets" and "ongoing budget management" are answered by Chapters 333 and 344 of the Code. A county auditor does not have any authority under the Code to initially approve annual budgets. The auditor's duties have been discussed and defined in earlier opinions from this office and court decisions, see O.A.G., April 1, 1931; O.A.G., November 12, 1941; O.A.G., December 21, 1959; and *Carl R. Miller Tractor Co. et al. v. Hope County Auditor,* 257 N.W. 312 (Iowa 1934).

In regards to budget management, Section 344.7 states:

"On the fifteenth of April, July and October of each year, the county auditor shall furnish to each county office or department, a statement showing the various original appropriations to each office or department, expenditures of the office or department from its different appropriation accounts during the expired portion of the year, together with a statement of the balance of the appropriations for said office remaining unexpended."

This provision provides a basis for "ongoing budget management" as stated in your request and imposes an express duty on the auditor to furnish financial statements to the various county departments and offices.

September 23, 1974

ELECTIONS: Withdrawal of nominations; certification of nominations. Article III, §4, Constitution of Iowa. §§43.73, Code of Iowa, 1973, as amended by §48, Chapter 136, 65th G.A., 1st session (1973) and §13 H.F. 1399, Acts, 65th G.A., 2nd session (1974) and §43.74, as amended by §49, Chapter 136, 65th G.A., 1st session (1973) and §14, H.F. 1399, Acts, 65th G.A., 2nd session (1974), §§43.88, 44.9, 49.51, 49.58 through 49.61 and 49.63, Code of Iowa, 1973. A candidate for election as a state representative who cannot meet the constitutional requirement of 60 days residence in the district before the general election may withdraw his candidacy even though notice of withdrawal may be received by the state commissioner of elections less than 60 days before the election. Certification of nominations received by the state commissioner up to 45 days before the election are valid and the names of the persons nominated should be certified for inclusion on the ballot. (Haesemeyer by Synhorst, Secretary of State, 9-23-74) #74-9-24

Honorable Melvin D. Synhorst, Secretary of State: Reference is made to your letter of September 23, 1974, in which you state:

"The Republican party did not have the names of candidates in the June 4, 1974, primary ballot in the twenty-seventh and twenty-eighth districts. On August 29, 1974, the Republican Central Committee for the twenty-seventh house district certified the name of John Arthur Yates to be placed on the November 5, 1974, general election ballot. (See exhibit A)

"This office certified the name of John Arthur Yates to the Benton and Linn County Auditors on September 10, 1974, to be placed on the General Election ballot as the Republican candidate for the twenty-seventh house district.

"On September 19, 1974, this office received copies of letters marked exhibit B.

"On September 20, 1974, at about 10:30 P.M. the attached certifications marked exhibit C and D were delivered to me at my home.

"The instrument marked exhibit E was delivered to me on September 23, 1974, at 9:28 A.M.

"Your opinion is respectfully requested as to what should be done in this situation. The time element is of vital importance as County Commissioners are ready to print ballots."

Exhibit A attached to your letter is a Certification of Nomination of John Arthur Yates as Republican candidate for State Representative from the twenty-seventh district which as you point out was received in your office on August 29, 1974. Exhibit B consists of two documents, the first of which is a letter dated September 18, 1974, to the Linn County Attorney in which the Auditor states that it has been brought to his attention that Mr. Yates is not a resident of house district 27. The letter then goes on to inquire of the County Attorney as to what his position should be in view of the requirement of Article II, §4 of the Constitution that one of the qualifications of state representative is that at the time of his election the state representative shall have had an actual residence of sixty days in the district he may have been chosen to represent. The second document in Exhibit B is a reply from the County Attorney advising the Auditor not to place the name of Mr. Yates on the ballot for the November 5, 1974, election. Exhibit C is a Certification of Nomination dated September 29, 1974, of John Arthur Yates as Republican candidate for State Representative from the twenty-eighth district. Exhibit D is a Certification of Dorcas Aline Van Alst as Republican candidate for State Representative from the twenty-seventh house district. Like Exhibit C, Exhibit D is dated September 21, 1974. Both Exhibits C and D were delivered to you at 10:30 P.M. on September 21, 1974. Exhibit E is a notarized letter to you from John Arthur Yates expressing his desire that his name be removed as candidate for state representative from the twenty-seventh house district so that his name may be filed for state representative for the twenty-eighth house district.

Section 43.73, Code of Iowa, 1973, as amended by §48, Chapter 136, 65th G.A., First Session (1973) and §13, H.F. 1399, Acts, 65th G.A., Second Session (1974) and §43.74, as amended by §49, Chapter 136, 65th G.A., First Session (1973) and §14, H.F. 1399, Acts, 65th G.A., Second Session (1974) provide respectively:

"43.73 State commissioner to certify nominees. Not less than fifty-five days before the general election the state commissioner shall certify to each

commissioner, under separate party headings, the name of each person nominated as shown by the official canvass made by the executive council, or as certified to him by the proper persons when any person has been nominated by a convention or by a party committee, or by petition, the office to which he is nominated, and the order in which the tickets of the several political parties shall appear on the official ballot.

"43.74 Certificate in case of additional nominations. If, after the foregoing certificate has been forwarded, other authorized nominations are certified to the state commissioner, including nominations to be voted on at any time at a special election, the state commissioner shall at once, in the form provided in section 43.73, certify said nominations to the commissioners with a statement showing the reason therefor. Authorized nominations must be submitted to the state commissioner at least forty-five days prior to the general election."

Section 49.51 provides:

"49.51 Commissioner to control printing. For all elections held under his jurisdiction, the commissioner shall have charge of the printing of ballots in his county, and shall cause to be placed thereon the names of all candidates and questions which have been certified to him by the state commissioner in the order the same appear upon said certificate, together with those of all other candidates and questions to be voted for thereat, whose nominations have been made in conformity with law."

It is evident from the foregoing that the several county auditors lack any authority to cause to be printed on the ballot in their respective counties the names of any candidates other than those which are certified to them by the Secretary of State or to remove the names of any candidates which have been certified to them by the Secretary of State.

As required by the last sentence of §43.74, authorized nominations must be submitted to the State Commissioner at least forty-five days prior to the general election. Thus, the Certification of Nomination of John Arthur Yates for State Representative from the twenty-eighth house district and Dorcas Aline Van Alst as State Representative from the twenty-seventh house district appear to have been timely filed with the Secretary of State.

Section 44.9 provides in relevant part:

"Any candidate named under this chapter or chapter 43 may withdraw his nomination by a written request, signed and acknowledged by him before any officer empowered to take acknowledgment of deeds. Such withdrawal must be filed as follows:

"1. In the office of the state commissioner, at least sixty days before the day of election. * * *"

Thus, it is questionable whether the withdrawal of John Arthur Yates as candidate from the twenty-seventh district (Exhibit E) was filed in time. Nevertheless, since Mr. Yates, if elected from the twenty-seventh district, could not qualify for the office or serve in the general assembly because of the constitutional requirement of sixty days residence in the district which he has not met, it is our opinion that effect should be given to his withdrawal. To do otherwise would effectively disfranchise the voters who might go to the polls on election day and cast their ballots in the twenty-seventth district for a candidate who is already disqualified from holding the office. While not addressing themselves directly to the situation you present, some support for this

position may be drawn from §43.88, and §§49.58 through 49.60. Section 43.88 provides in part:

"43.88 Certification of nominations. Nominations made by state, district, and county conventions, shall, under the name, place of residence, and post-office address of the nominee, and the office to which he is nominated, and the name of the political party making the nomination, be forthwith certified to the proper officer by the chairman and secretary of the convention, or by the committee, as the case may be, *and if such certificate is received in time,* the names of such nominees shall be printed on the official ballot the same as if the nomination had been made in the primary election. * * *" (Emphasis added)

Sections 49.58 through 49.61 contemplate the substitution of names of candidates on the ballots through the printing of new ballots or affixing pasters or writing or stamping a new name on the ballot even after the ballots have been delivered to the precinct election officials. These sections indicate that the legislature evidently had it in its contemplation that there might be last minute changes in the ballot which would have to be made albeit that such eleventh hour changes would appear to be inconsistent with the requirement of §43.74 that authorized nominations must be submitted to the state commissioner of elections at least forty-five days prior to the general election and the requirement of §§49.63 and 53.11 that absentee ballots be made available to persons applying for the same as early as forty days before the election.

In conclusion, it is our opinion that effect should be given to withdrawal of John Arthur Yates as candidate for state representative on the Republican ticket from the twenty-seventh house district (Exhibit E) and that you as State Commissioner of Elections should accept the Certifications of Nomination of John Arthur Yates from the twenty-eighth house district and Dorcas Aline Van Alst from the twenty-seventh district (Exhibits C and D) and certify the names of these individuals to the appropriate county auditors for inclusion on the ballot for the November 5, 1974, general election.

September 24, 1974

ELECTIONS: Name mispelled on certification of nomination, printing of ballot, correction of errors. §49.63, Code of Iowa, 1973. Where a certification of nomination made to the Secretary of State by the candidate's own party incorrectly spells his first name as "Elden" instead of "Eldon", the correct spelling, the candidate is not entitled as a matter of right to have the error corrected and ballots reprinted carrying the correct spelling. However, where there is time, the county commissioner of elections may in his discretion cause the correction of a mistake in the printing of the ballots. (Turner to Synhorst, Secretary of State, 9-24-75) #74-9-25

The Honorable Melvin Synhorst, Secretary of State: You have requested an opinion of the attorney general as to whether a candidate certified by the Democratic Party for the 96th House legislative seat, whose first name is "Eldon", but whose party certified him as "Elden" may, in effect, "stop the presses" or require the reprinting of ballots with the correct spelling in five different counties of his legislative district on that account after the Secretary of State as Commissioner of Elections has certified his name identically as certified to him by the political party.

In my opinion, the candidate is not entitled to such a correction as a matter of right. The doctrine of *idem sonans,* meaning "sounding the same or alike; having the same sound," applies. The term is applied to names which are sub-

stantially the same, though slightly varied in the spelling, as for instance "Lawrence" and "Lawrance."

"Two names are said to be 'idem sonates' if the attentive ear finds difficulty in distinguishing them when pronounced, or if common and long-continued usage has by corruption or abbreviation made them identical in pronunciation. *State v. Griffle,* 118 Mo. 188, 23 S.W. 878. The rule of 'idem sonans' is that absolute accuracy in spelling names is not required in a legal document or proceedings either civil or criminal; that if the name, as spelled in the document, though different from the correct spelling thereof, conveys to the ear, when pronounced according to the commonly accepted methods, a sound practically identical with the correct name as commonly pronounced, the name thus given is a sufficient identification of the individual referred to, and no advantage can be taken of the clerical error. *State v. Hattaway,* 180 La. 12, 156 So. 159. But the doctrine of 'idem sonans' has been much enlarged by modern decisions, to conform to the growing rule that a variance, to be material, must be such as has misled the opposite party to his prejudice. *State v. White,* 34 S.C. 59, 12 S.E. 661, 27 Am.St.Rep. 783; *Thompson v. State,* 58 Ga.App. 679, 199 S.E. 787, 788." Black's Law Dictionary, Fourth Edition.

In conveyancing, §558.6, Code of Iowa, 1973, provides:

"*Christian names—variation—effect.* When there is a difference between the christian names or initials in which title is taken, and the christian names or initials of the grantor in a succeeding conveyance, and the surnames in both instances are written the same or sound the same, such conveyances or the record thereof shall be presumptive evidence that the surname in the several conveyances and instruments refers to the same person."

Similarly, it has been repeatedly held by our courts that an original notice commencing a legal action is not defective, and the rule of idem sonans applies, where, for instance, "Dean Firkins" is addressed "Dean Ferkins" therein. *Webb v. Ferkins,* 1940, 227 Iowa 1157, 290 N.W. 112.

§49.63, Code of Iowa, 1973, provides:

"*Time of printing—inspection and correction.* Ballots shall be printed and in the possession of the commissioner in time to enable him to furnish ballots to absent voters as provided by sections 53.8 and 53.11. The printed ballots shall be subject to the inspection of candidates and their agents. If mistakes are discovered, they shall be corrected without delay, in the manner provided in this chapter."

Thus, although no other provision seems to have been made "in this chapter" for correcting mistakes, if there is time, the county commissioner of elections may, in the sound exercise of his discretion, direct that a mistake be corrected in the printing of the ballot. In this instance, if any mistake does in fact exist, it is that of the party in certifying the name incorrectly rather than that of the commissioner.

It is extremely unlikely—no, it is impossible—that anyone desiring to vote for "Eldon" would be misled because his name is spelled "Elden."

September 26, 1974

GAMBLING: Dedication of Profits: Chapter 153, Acts of the 65th General Assembly, 1973 Session. The net profits of a game of skill or chance may be dedicated to a city or town for the maintenance of a fire department and as such constitute a "public use" of the funds as directed by §153.7(1). (Coleman to Shelton, Lucas County Attorney, 9-26-74) #74-9-26

Mr. William L. Shelton, Lucas County Attorney: You have requested an opinion from the Attorney General concerning the following question:

"Under Section 7 of Senate File 108 the net receipts of games of skill and chance must be dedicated to contestants and to educational, civic, public, charitable, or patriotic or religious uses in this state. The local Eagles club is desirous of awarding their profits from their games to the local volunteer fire department organized and operated by the City of Chariton. * * *

"We would, therefore, appreciate a statement from your office as to whether the Chariton Volunteer Fire Department will qualify as a public use as used in the referred to Section 7 of Senate File 108."

Section 7(1) Chapter 153, Acts of the 65th General Assembly, 1973 Session, provides in pertinent part:

"The net receipts of the game are dedicated to the awarding of prizes to contestants and to educational, *civic, public,* charitable, patriotic or religious uses in this state. 'Educational, *civic, public,* charitable, partriotic, or religious uses' means uses benefiting a society for the prevention of cruelty to animals or animal rescue league or *uses benefiting an indefinite number of persons either by* bringing them under the influence of education or religion or *relieving them from disease, suffering,* or constraint, *or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government but do not include the erection, acquisition, improvement, maintenance, or repair of real, personal or mixed property unless it is used exclusively for one or more of the uses stated."* (Emphasis added).

"Public" is defined in *Webster's New World Dictionary* as "of, belonging to, or concerning the people as a whole; of or by the community at large," and "for the use or benefit of all; especially supported by government funds." You indicate in your letter that the volunteer fire department is organized and operated by the City of Chariton — a governmental entity.

In *Johnson v. Peak,* 407 S.W.2d 692, 693 (Kentucky, 1966) the Supreme Court of Kentucky commented on the use of public funds in establishing a town fire department, additionally the court succinctly addressed itself to the community's interest in having a fire department when it stated:

". . . In the first place, the statute provides that the county fire protection shall be * * * 'for the purpose of protecting the property of the county * * *.'

"Such property would include the courthouse and jail, within the corporate limits of Lexington. *Moreover, the citizens of Lexington have a vital interest in the suppression of fires originating in the heavily built-up suburban areas abutting hard on the city's borders. These are public purposes . . . ."* (Emphasis added)

Similar sentiment has been expressed with regard to "public purposes" and "public uses" by the vast majority of court jurisdictions in this nation. In *Kearney v. City of Schenectady,* 325 N.Y.S.2d 278, 280 (New York, 1971), it was held:

"A public purpose or public use may generally be defined as a purpose or use necessary for the common good and general welfare of the people of the municipality." See also: *Sun Printing and Publishing Ass'n. v. Mayor, etc., of New York,* 46 N.E. 499, 152 N.Y. 257.

In *City of Pipestone v. Madsen,* 178 N.W.2d 594, 599 (Minnesota, 1970) the Minnesota Supreme Court declared:

". . . *public purpose . . . mean(s) such an activity as will serve as a benefit to the community as a body and which, at the same time, is directly related to the functions of government."* See citations. (Emphasis added)

And, in *Clifford v. City of Cheyenne,* 487 P.2d 1325, 1329 (Wyoming, 1971) the Wyoming Supreme Court in contemplating the question of what constitutes a "public use" or "public purpose" stated:

"Generally speaking, however, it has for its objective the promotion of public health, safety, morals, security, prosperity, contentment, and the general welfare of the community." See citations. (Emphasis added)

It is our opinion that the dedication of the net profits obtained by the Eagles Club of Chariton in conducting games of skill and chance to the Chariton Fire Department would be a "public use" within the meaning of the statute. One of the general powers held by the cities and towns within this state is the ". . . power to provide for the protection of life and property against fire and to establish, house, equip, staff, uniform and maintain a fire department." See, §368.11, Code of Iowa, 1973. Certainly, the dedication of funds to the Chariton Fire Department not only constitutes a "public use" of the money but undoubtedly also works for "lessening the burden of government." Moreover, the fire department serves as a benefit to the community as a body and in the words of *City of Pipestone v. Madsen,* supra, "is directly related to the function of government."

September 26, 1974

UNEMPLOYMENT COMPENSATION JUDICIAL MAGISTRATES: §§96.2, 96.7a(4), 96.17(17)(g)(1), 602.50, 96.7(8), Code of Iowa, 1973. Judicial Magistrates are entitled to unemployment benefit, under state unemployment insurance statutes. The state is obligated to pay these benefits. Beamer to Selden, 9-26-74) #74-9-27

Marvin R. Selden, Jr., State Comptroller: This opinion is in reference to your request in which you ask:

"Are the Judicial Magistrates covered under State Unemployment Insurance statutes, and is the State obligated to pay the taxes?"

The purpose of the Iowa Employment Security Act is set forth in Section 96.2, 1973 Code of Iowa. It provides in part as follows:

"The achievement of social security requires protection against this greatest hazard (involuntary unemployment) of our economic life. This can be provided by encouraging employers to provide more stable employment and by a systematic accumulation of funds during periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance."

The purpose clause of Chapter 96 supports a conclusion that the act is to receive a liberal or broad construction in favor of those claiming the benefits thereof. According to the great weight of authority the beneficient provisions of an unemployment compensation act should receive such a construction. 81 C.J.S. *Social Security and Public Welfare,* p. 96. However, liberality of construction does not mean that the court is at liberty to adopt a construction wholly beyond the limits of the plain legislative intent. *McCarty v. Iowa Employment Security Commission,* 1956, 247 Iowa 760, 76 N.W.2d 201. Nor does it permit such a construction as will broaden or enlarge the act so as to include the giving of benefits to persons never intended to be included or to those whom the legislature specifically has determined should not receive such benefits. *Blakely v. Review Board of Ind. Employment Sec. Division,* 120 Ind. App. 357, 90 N.E.2d 353.

An examination of Chapter 96 reveals that state employment is specifically covered under the Act. Section 7a(4) provides as follows:

"Services performed after December 31, 1971, by an individual in the employ of this state or any of its wholly owned instrumentalities."

The exemptions to coverage under Chapter 96 are set forth in 96.17(7)(g). District court judges are not covered under this Chapter because they are considered by Employment Security as "elected officials" under the authority of Section 46.21, 1973 Code of Iowa. Section 96.17(7)(g)(1) provides that the term employment does not include:

"Services performed in the employ of this state by an elected official or service performed in the employ of any political subdivision of this state or any instrumentality of its political subdivisions."

Without deciding whether district court judges are in fact "elected officials", it is clear that judicial magistrates are appointed rather than elected.

Section 602.50, 1973 Code of Iowa, provides:

"During April, 1973, and in April of the year in which magistrates' terms expire, the judicial magistrate appointing commission shall, by majority vote, *appoint Iowa magistrates* in such number as provided in section 602.57." [Emphasis ours]

The statutory intent of the Employment Security Act is to provide coverage to as many individuals as is possible within the framework of the Act. From the usual aids of statutory construction and the clear and plain meaning of the words themselves, it is evident that judicial magistrates are covered under the state unemployment insurance program. There is no evidence that the legislature intended to exclude this group of state employees from coverage under any section of Chapter 96.

In answer to the second part of your question inasmuch as judicial magistrates are covered under state unemployment insurance, the state is obligated to pay these taxes. Section 96.7(8), 1973 Code of Iowa, "Financing benefits paid to state employees" sets forth the procedure to be followed in determining the state's payments.

September 30, 1974

CITIES AND TOWNS: Authority to place stop signs at railroad crossings—§§321.343, 321.255, 321.253, 1973 Code of Iowa. Cities have authority to place stop signs upon city streets and railroad crossings. (Schroeder to Reiter, Marion County Attorney, 9-30-74) #74-9-28

Mr. Warren A. Reiter, Marion County Attorney: With the clarification of your question originally proposed May 31, 1974, I now understand your request to be:

"Do cities have authority to place stop signs at railroad crossings with city streets?"

For the purposes of this discussion, I assume: 1. Highway for the purposes of Chapter 321 of the Code is used interchangeably with the word, "street". Both are defined the same by §321.1(48); 2. City streets pertain solely to those highways or streets solely or exclusively within the jurisdiction of the city which are not constructed, maintained, or within the control of any other "highway authority".

Section 321.342 of the Code, 1973, provides:

"The state highway commission with reference to primary highways and local authorities with reference to other highways under their jurisdiction are each hereby authorized to designate particularly dangerous highway grade crossings of railroads and to erect stop signs thereat. When such stop signs are erected the driver of any vehicle shall stop within fifty feet but not less than ten feet from the nearest track of such grade crossing and shall proceed only upon exercising due care."

Cities, therefore, do have authority to place stop signs at such railroad crossings with streets within the city's jurisdiction and control.

The only restrictions upon such local authorities in regard to placement of such stop signs is pursuant to §321.255; they must conform to the manual on uniform traffic control devices for streets and highways, adopted by the state highway commission, pursuant to §321.252.

The standards for stop signs are found in Part IIB of the *Manual on Uniform Traffic Control Devices for Streets and Highways* which may be obtained from the Iowa State Highway Commission, Traffic and Safety Division.

If you have other questions in this regard, please contact this office so that we may be of further assistance.

September 30, 1974

SOVEREIGNTY JURISDICTION: §1.4, Code of Iowa, 1973, and Public Law 93-82, §302, 38 U.S.C. 5007. The State of Iowa can only accept relinquished concurrent jurisdiction from the Federal Government by legislative action. (Kelly to Schweiker, Deputy Secretary of State, 9-30-74) #74-9-29

J. Herman Schweiker, Deputy Secretary of State: This opinion is in reply to your request of July 26, 1974, regarding the method of retrocession of jurisdiction of certain Veteran Administration hospital lands in Knoxville, Iowa.

A review of the pertinent facts is necessary for a full understanding of this problem. Our records indicate that 188.8 acres of the Knoxville land was acquired by the Federal government from the State of Iowa in 1922, 1.19 acres from a railroad company in 1938, and 36 additional acres in 1940. In 1922, when the 188.8 acres were taken over by the Veterans Administration, the following statute was in effect in Iowa:

"That exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby ceded to the United States, for all purposes except the service upon such sites of all civil and criminal process of the courts of this state; but the jurisdiction to ceded shall continue no longer than the said United States shall own such lands." Section 4C, Code of Iowa (1902).

This provision clearly grants the Federal government exclusive jurisdiction over such lands. In 1924 the Iowa Legislature amended the above enactment; the amendment stated:

"AN ACT to amend, revise, and codify sections four (4) to eight (8), inclusive, and forty-nine hundred sixty-two (4962) of the compiled Code of Iowa, relating to the acquisition by the United States of lands in this state.

"Be it Enacted by the General Assembly of the State of Iowa:

"That sections four (4) to eight (8), inclusive, and forty-nine hundred sixty-two (4962) of the compiled Code of Iowa are amended, revised, and codified to read as follows:

"Section 1. Acquisition of lands by the United States. The United States of America may acquire by condemnation or otherwise for any of its uses or purposes any real estate in this state, and may exercise exclusive jurisdiction over its holding. This state reserves, when not in conflict with the constitution of the United States or any law enacted in pursuance thereof, the right of service on real estate held by the United States of any notice or process authorized by its laws; and reserves jurisdiction, except when used for naval or military purposes, over all offenses committed thereon against its laws and regulations and ordinances adopted in pursuance thereof. Such real estate shall be exempt from all taxation including special assessments, while held by the United States." Chapter 213, Laws of the 40th G.A., Special Session (1924).

The 1924 amendment reserved concurrent jurisdiction in all lands ceded to the Federal government by the State of Iowa, except on military or naval bases. However, this amendment applied prospectively and not retroactively. "Statutes framed in general terms ordinarily apply to cases and subjects within their terms subsequently arising, and, unless plainly indicating to the contrary, are to be construed prospectively, especially where substantive rights are involved." See for example, *Manilla Community School Dist. v. Halverson,* 251 Iowa 496, 101 N.W.2d 705 (1960), and 82 C.J.S., *statutes* §319. Therefore, any and all lands granted to the Federal government prior to 1924 are still under "exclusive" Federal jurisdiction.

The United States Congress in 1973 passed legislation authorizing the Veteran's Administration to relinquish "exclusive" jurisdiction and establish "concurrent" jurisdiction of any lands under its control, see Pub. L. 93-82, Title III, §302(1), Aug. 2, 1973, 87 Stat. 195. This enactment further provided:

"Such partial relinquishment of legislative jurisdiction shall be initiated by filing a notice thereof with the Governor of the State concerned or in such other manner as may be prescribed by the laws of such State, and shall take effect upon acceptance by such State," Id. . . .

It is our opinion that in order to effectuate the retrocession of the Knoxville jurisdiction to the State of Iowa our Legislature will have to pass appropriate remedial legislation. This opinion is founded upon the fact that Iowa originally ceded exclusive jurisdiction to the Federal government by statute and it is only logical that the return of such jurisdiction be accepted by statute. A similar situation arose when the State of Iowa acquired civil jurisdiction over the Sac and Fox Indian Settlements in 1967. The reacquisition of jurisdiction by the State in that instance was also accomplished by statute, see §1.12 Code of Iowa (1973) and Acts of the 62nd General Assembly, Chap. 79 §1 (1967). A review of the laws of this state does not reveal any provision that would permit the acceptance of jurisdiction of these lands by the Governor, the Executive Council or any other body of the State. The acceptance of such jurisdiction will have to be made by express Legislative mandate.

October 1, 1974

LIQUOR, BEER & CIGARETTES: Employees of the division on alcoholism. §9(6), S.F. 1354, 65th G.A., Second Session (1974); §§19A.3, 135.6 and 135.11, 1973 Code of Iowa. Employees of the division on alcoholism are subject to the state merit system and to the appointing

authority of the director of the division on alcoholism. (Coriden to Pawlewski, Commissioner, Department of Health, 10-1-74) #74-10-1

Norman L. Pawlewski, Commissioner, State Department of Health: You have requested a ruling and clarification of §§8 and 9 of Senate File 1354, enacted by the 65th General Assembly, Second Session. This Act establishes a division on alcoholism and the Iowa Commission on Alcoholism.

You asked:

"Are the employees of the division on alcoholism as selected by the director [of the division on alcoholism] in accordance with the provisions of Section 9(6) of the Act, subject to the state merit system as provided by Chapter 19A of the Code and to the appointing authority of the Commissioner of Health in the same manner and with the same relationship to the Department of Health as employees of the various other divisions of the Department?"

Section 19A.3, Code of Iowa, states that the merit system shall apply to all employees of the state government with certain exceptions, none of which are applicable to the employees of the division on alcoholism. Therefore, it is clear that the employees of the division on alcoholism are subject to the state merit system as provided by Chapter 19A of the Iowa Code.

Sections 135.6 and 135.11, Code of Iowa, gives the Commissioner of Health the authority to "establish and maintain such divisions in the department as are necessary for the proper enforcement of the laws administered by it," and to "employ such assistants and employees as may be authorized by law . . . ." The establishment of the division on alcoholism, however, was specifically provided for by statute, and §9 of Senate File 1354, which establishes the division on alcoholism, gives the director of the division on alcoholism the power to "employ staff necessary to carry out the duties assigned to him." This being so, it seems clear from the statute that the legislative intent was to have the employees of the division be subject to the appointing authority of the director rather than the Commissioner of Health.

October 1, 1974

TAXATION: Suspended taxes for old age assistance recipients. §427.9, as amended by §25, Chapter 186, 65th G.A.; §§1 and 29, Chapter 186, 65th G.A.; §§427.11 and 427.12; §§4.1 and 4.13, 1973 Code of Iowa. Counties retain the same right to collect taxes suspended its old age assistance recipients, prior to January 1, 1974, as it previously had. (Williams to Kelley, Mills County Attorney, 10-1-74) #74-10-2

Mr. Michael E. Kelley, Mills County Attorney: You have requested an opinion of the Attorney General as to the following matter:

"The Mills County Treasurer has requested an opinion concerning the interpretation of Section 29 of Chapter 186 of the laws of the 65th G.A., 1973 Session, which states that 'nothing in this Act shall be construed to make any person liable for the payment of property taxes which were suspended under section four hundred twenty-seven point nine (427.9) of the Code at any time prior to the effective date of this Act.'

"Her question precisely is whether she should continue to collect property taxes which were suspended on properties upon which old age assistance liens have now been voided under Section 11 of the same chapter. The new Section 29 does not state clearly whether property taxes have been suspended or voided.

"The treasurer's procedure in the past has been to collect suspended taxes upon the sale or disposal of the subject property and she is now uncertain as to whether this is a proper procedure to follow."

Prior to the effective date of Chapter 186, 65th G.A., January 1, 1974, Chapter 249, 1973 Code of Iowa provided old age assistance to the elderly, and their taxes were suspended pursuant to §427.9, 1973 Code of Iowa.

Section 1, Chapter 186, 65th G.A., repealed the old age assistance, Chapter 249, and in Section 25 of said Chapter 186, §427.9 was amended to continue suspending taxes for the type of assistance which replaced Old Age Assistance, namely, Federal Supplemental Security Income.

Said amendment to Section 427.9 as it appears in Section 25, 186, 65th G.A., reads as follows (deleted words in brackets and new words italicized) to-wit:

"SEC. 25. Section four hundred twenty-seven point nine (427.9), Code 1973, is amended to read as follows:

"427.9 Suspension of taxes. Whenever a person [has been issued a certificate of old age assistance and is receiving monthly or quarterly payments of assistance from the old age assistance fund] *is a recipient of federal supplementary security income or state supplementary assistance, as defined in section two (2) of this Act, or is a resident of a health care facility, as defined by section one hundred thirty-five C point one (135C.1) of the Code, which is receiving payment from the department of social services for his care,* such person shall be deemed to be unable to contribute to the public revenue. The [director of the division of child and family services of the department] *commissioner* of social services shall thereupon notify the board of supervisors, of the county in which such assisted person owns property, of the aforesaid fact, giving a statement of property, real and personal, owned, possessed, or upon which said person is paying taxes as a purchaser under contract. It shall then be the duty of the board of supervisors so notified, without the filing of a petition and statement as specified in section 427.8, to order the county treasurer to suspend the collection of all the taxes assessed against said property and remaining unpaid by such person of contractually payable by him, for such time as such person shall remain the owner or contractually prospective owner of such property, and during the period such person receives [monthly or quarterly payments of] assistance [from the old age assistance fund] *as described in this section."*

It should be noted from the above, that the legislature suspended the taxes for persons receiving this substituted type of assistance only while the person was owner of the property or continued to receive said substituted assistance — i.e. The legislature re-enacted that part of §427.9 to provide the same rights to those recipients and the counties as previously prevailed under the old age assistance program.

It also should be noted that the legislature made no change in Section 427.12, which provides that the suspended taxes be a lien on the real estate nor in Section 427.11 which provides for satisfaction of the suspended taxes upon sale of the real estate or in certain instances upon the death of the owner. It did not delete the provisions relating to payment of taxes suspended on property of old age assistance to recipients prior to the effective date of Chapter 186, 65th G.A. In Section 427.11, we read:

". . . except that no interest on taxes shall be charged against the property or estate of a person receiving or having received monthly or quarterly payments

of old age assistance, and shall be enforceable against the property or part thereof which does not pass to such spouse or minor."

You then specifically inquire as to the meaning of Section 29, Chapter 186, 65th G.A., which reads:

"SEC. 29. Nothing in this Act shall be construed to make any person liable for the payment of property taxes which were suspended under section four hundred twenty-seven point nine (427.9) of the Code at any time prior to the effective date of this Act."

As will be observed, both of the above quoted portions of the statutes refer to the respective obligations and rights of the recipients and the county, relating to suspension and to the payment of real estate taxes suspended for an old age assistance recipient prior to the effective date of Chapter 186.

There is nothing in Chapter 186, 65th G.A., including section 25 and 29, therefore, which indicates the legislature intended to repeal sections 427.11 and section 427.12, 1973 Code of Iowa. In the *Llewellyn v. Iowa State Commerce Commission,* 200 N.W.2d 881 (1972), we read:

"Repeal by implication is not favored and will not be so interpreted unless absolutely necessary or clearly mandated." [Citations omitted].

By leaving certain portions of the pertinent law unchanged, section 427.11, 1973 Code of Iowa, such portions have the same meaning and effect they had before the amendment to section 427.9, 1973 Code of Iowa, and the enactment of section 29, Chapter 189, 65th G.A. In *Spencer Pub. Co. v. City of Spencer,* 92 N.W.2d 633, 250 Iowa 47 at p. 53, we read:

". . . But we have also recently said that where an amendment leaves certain portions of the original Act unchanged, such portions are continued in force, with the same meaning and effect they had before the amendment. *Ferguson v. Brick,* 248 Iowa 839, 843, 82 N.W.2d 849, 851, and citations therein."

As further authority for the decision reached by this office, we cite Chapter 4.1, 1973 Code of Iowa, which specifically preserves the accrued rights and incurred liabilities when a statute is amended or repealed. Sections 4.1 and 4.13, 1973 Code of Iowa, reads as follows:

"4.1 Rules. . . .

"1. Repeal — effect of. The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, and duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed."

Section 4.13, subparagraphs 1 and 2 read as follows:

"4.13 General savings provision. The reenactment, revision, amendment, or repeal of 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;"

Thus, when the legislature in Chapter 189, Acts of the 65th G.A. in Section 1, repealed the Old Age Assistance Chapter 249, 1973 Code of Iowa, and substituted the federal SSI program in Section 25, Chapter 186 and enacted sec-

tion 29, Chapter 186, relating to payment of taxes for those previously receiving old age assistance, it permitted them to continue to enjoy the tax-exempt status until the occurrence to the events set forth in said section 25 of Chapter 189 or in section 427.11, 1973 Code of Iowa; and, the legislature, by leaving section 427.11 and section 427.12, 1973 Code of Iowa, in tact, permits the county to continue to satisfy its tax liens on such real estate, upon the happening of such events.

October 2, 1974

CITIES AND TOWNS: Municipal Hospital Trustees — §69.2, Chapter 380, Code of Iowa, 1973. There are no residency requirements in the Code for municipal hospital trustees. (Blumberg to Whitehead, Jasper County Attorney, 10-2-74) #74-10-3

Mr. Kenneth L. Whitehead, Jasper County Attorney: We are in receipt of your opinion request of September 12, 1974, regarding residency requirements for municipal hospital trustees. You specifically asked:

"1. Must a trustee of a municipal hospital organized and operating under Chapter 380 reside within the municipal limits at the time of his or her election?

"2. If a duly elected trustee (a resident of the municipality at the time of his or her election) thereafter moves outside the city limits — but still in the same county and state — can he or she continue to serve for the remainder of the term for which he or she was elected?

"You may assume that the city ordinance has no residence requirements for trustees of the city hospital."

Chapter 380 of the Code provides for the election of municipal hospital trustees. We can find no requirement in that Chapter for the municipal hospital trustees to be residents of the municipality. Generally, such requirements are established by the Legislature. See, for example, sections 386B.6, 398.8 and 399.14 of the Code, which sections provide that the trustees of those public utilities be selected from among the resident voters of that municipality.

In addition, we should look at §69.2, which provides in part that every civil office shall be vacant when the incumbent ceases to be a resident of the city, town or ward for which he was elected or appointed. We believe that section only applies to those situations where a statute requires residency for a particular position. In support thereof, see *Rehmel v. Board,* 1915, 172 Iowa 455, 154 N.W. 596. There, the plaintiff sought to restrain the payment of salaries to deputy sheriffs because they were not residents of the county. Section 69.2 was cited by the plaintiff as authority. The Supreme Court apparently rejected this argument in holding that there was no law prohibiting the sheriff from appointing non-residents as deputies.

We are of the opinion that there are no residency requirements for municipal hospital trustees.

October 3, 1974

MINORS: Minority affected by marriage. §§232.2(4), 599.1, Code of Iowa, 1973, as amended by Chapter 140, Acts, 65th G.A., §§18, 19, 49 (1973). That minors attain majority upon marriage refers only to the removal of those

civil disabilities normally imposed upon minors and does not pertain to criminal statutes. (Nolan to Peterson, Montgomery County Attorney, 10-3-74) #74-10-4

John K. Peterson, Montgomery County Attorney: Reference your letter of October 29, 1973, in which you request an Attorney General's opinion as to whether a married person under 18 years of age is to be considered an adult for purposes of Chapter 232 of the Code. Section 232.2(4), as amended reads,

"'Minor' or 'child' means a person less than eighteen years of age . . . ."

Section 232.2(5) reads,

"'Adult' means a person eighteen years of age or older."

Chapter 232 deals in general with neglected, dependent and delinquent children, and allows for special court treatment of such children. Chapter 599, which deals with minors, defines the period of minority as extending to age eighteen ". . . but all minors attain their majority by marriage." §599.1, Code of Iowa, 1973.

In *Richardson v. Browning,* 18 F.2d 1008 (D.C. Cir. 1927) the Court said:

"Sec. 1126 of the District of Columbia Code provides:

"Sec. 1126. When Guardianship Ceases. — The natural guardianship or the appointive guardianship of the person aforesaid shall cease in the case of a male infant when he is twenty-one years of age, and in the case of a female infant when she is eighteen years of age or marries.

"In view of this statute, it becomes material to inquire whether, upon the marriage of the petitioner, all custody over her person by the Children's Board of Guardians and the National Training School for Girls ceased. As we have seen, the custody of her person was not by virtue of any criminal or punitive process, but was one existing solely, according to the theory of the law, for her welfare and benefit. In other words, organized society was attempting by a species of guardianship to do for her what under normal conditions the natural parents do for a child.

"The question is one not devoid of difficulties, and one upon which the authorities are not entirely harmonious. However, we believe the weight of authority favors the view that marriage of a female child, in itself, does not automatically terminate the control of delinquent or dependent children in cases like that now before us."

The Iowa Court declared the same result in *McPherson v. Day,* 162 Iowa 251, 144 N.W. 4. The Minnesota Court recognized in *In re Davidson's Will,* 223 Minn. 268, 26 N.W.2d 223 (1947) the difference between the disabilities of minority and the privileges of minority. "*Majority* is the age at which the disabilities of infancy are removed. These disabilities, which are in fact personal privileges conferred on infants by the law of their domicile, constitute limitations on the legal capacity of infants, not for the defeat of their rights, but to shield and protect them from the acts or their own improvidence, as well as from the acts of others." That court held later that a person may be a minor for certain purposes, e.g., for criminal and juvenile jurisdiction, yet have removed the disabilities on right to contract or devise. "The age of legal capacity is wholly a matter of legislative regulation and the disabilities of infancy may be removed for certain purposes at an earlier age than for others."; *In re Adoption of Anderson,* 235 Minn. 192, 50 N.W.2d 278 (1951).

That majority privileges may be retained while certain disabilities normally appended thereto may be removed was recognized in *City of Des Moines v. Reisman,* 248 Iowa 821, 83 N.W.2d 197 (1957); and in *In re Lundy,* 82 Wash. 148, 143 P. 805: "The statute referred to . . . in removing the disabilities of minority does not use the words 'for all purposes' which we are asked to read into it. The statute merely removes the common law disabilities of minorities. It was never intended to prohibit a classification of minors for the purpose of legislation, nor to limit the meaning 'minor' in acts relating the minors as a class without that exception."

See generally 43 C.J.S. *Infants,* §19 (1945): "The disabilities of infants are really privileges which the law gives them and which they may exercise for their own benefit, the object of the law being to secure infants from damaging themselves or their property . . . ."

A person who is under 18 and married is still entitled to the protection or guardianship of the state, and the fact of marriage does not ipso facto thrust that person into majority for all purposes. Rather, marriage removes only those disabilities connected with minority which would impair that person's ability to operate a home and family. Thus, it is our opinion that a married person under 18 is entitled to make decisions about his general welfare, in matters affecting his life, but that the protections of Chapter 232 may nevertheless be afforded him should such a necessity ever arise.

October 4, 1974

TAX REDEMPTION: Sufficiency of Service. §447.12, Code of Iowa, 1973. The affidavit of service of notice of expiration of redemption time for land sold to satisfy taxes, if made by the holder of the certificate of sale, must state that the holder personally made service or that his attorney or agent did so under his direction. (Nolan to McEniry, Assistant Polk County Attorney, 10-4-74) #74-10-5

Matthew McEniry, Assistant Polk County Attorney: In your letter of February 22, 1974, you asked whether under §447.12 of the Code the director of the Polk County Zoning Commission is authorized to make the affidavit of service which has been served by one of his agents or whether the return of service has to be made by the agent himself. Section 447.12, Code of Iowa, 1973, states:

"Service shall be complete only after an affidavit has been filed with the treasurer, showing the making of the service, the manner thereof, the time when and the place where made, and under whose direction the same was made; such affidavit to be made by the holder of the certificate or by his agent or attorney, and in either of the latter cases stating that such affiant is the agent or attorney, as the case may be, of the holder of such certificate; . . . ."

In the case of *Geil v. Babb,* 214 Iowa 263, 242 N.W. 34 (1932), the Court said:

"[T]he affidavit in question of Osborn recited that he caused notice to be served personally on the tenants in possession, . . . but, as he did not make the service himself, this statement was not sufficient without further showing that Foss Davis, who made the service, was the agent or attorney of the tax purchaser Babb."

This case was cited favorably in *Galleger v. Duhigg,* 218 Iowa 521, 255 N.W. 867 (1934).

It must be pointed out that the director of the Polk County Zoning Commission has no authority as such to act as an agent for Polk County in serving notice of expiration of redemption time on land sold to satisfy taxes. However, the director also acts in the capacity of Manager of Real Estate of Polk County, and as such is specifically authorized yearly, in writing, by the Polk County Auditor to serve notice of redemption time. Although under Chapter 569 of our Code the county board of supervisors controls and manages all county property, Chapter 447 states the county auditor shall be the person who shall sign the notice of the expiration of redemption time. Thus, while the county board of supervisors may be the holder of certificate of title to land sold at tax sale, the county auditor is, by statute, made agent for the county board of supervisors.

Accordingly, if the Manager of Real Estate of Polk County is the affiant of service under §447.12 of the Code, he must state that he, as agent of Polk County, has personally served the notice, or has caused another duly constituted agent of Polk County to personally make the service.

October 4, 1974

STATE OFFICERS AND DEPARTMENTS: Board of Examiners for Hearing Aid Dealers — H.F. 708, Acts of the 65th G.A., Second Session. Members of the initial board need not be licensed until January 1, 1975. They may not devise their own examination to give themselves for licensure. (Blumberg to Pawlewski, Commissioner of Public Health, 10-4-74) #74-10-6

Mr. Norman L. Pawlewski, Commissioner of Health: We have received your opinion request of October 2, 1974, regarding H.F. 708, Acts of the 65th General Assembly. You specifically asked:

"Question: Are the three hearing aid dealers who are members of the initial board required to pass an examination?

"Question: Are the hearing aid dealer members of the initial board required to be licensed before they may participate in administering examinations for other applicants?

"Question: Can the board members who are hearing aid dealers prepare their own examination to take themselves for their own license?

"Question: If the answer to the previous question is no, can the two members of the board representing the general public select a previously prepared test from a national organization or another state?

"Question: Can the initial test be administered by the public members to the three hearing aid dealers and the other applicants at the same time?

"Question: If a member of the initial board is licensed in another state, is he required to pass an examination in Iowa or maybe wait for a determination by the board as to whether he can be licensed in Iowa by reciprocity?"

We will answer your first three questions together.

House File 708 is an Act relating to licensing and regulation of hearing aid dealers. A board is established in §2 to administer the Act. Section 28 provides that the provisions of H.F. 708 shall take effect on January 1, 1975, except that the initial board shall be appointed and commence its duties on July 1, 1974. Section 2 sets forth the requirements to be on the board. Those for the three

hearing aid dealers include being a licensed hearing aid dealer, being actively employed as one, and having been actively employed as one for at least five years preceding the appointment, two of which shall have been in Iowa. However, hearing aid dealers appointed to the initial board "shall have not less than five years experience and shall fulfill the qualifications relating to experience for licensure as provided in this Act." It is obvious from a reading of the above that the hearing aid dealers on the initial board need not be licensed at the time of their appointment. They only need to be actively engaged as a hearing aid dealer, and have been so for the five preceding years, two of which in Iowa. This board has been set up to administer the first hearing aid dealer examinations in Iowa. As such, they could not possibly be licensed at the time of their appointment.

However, this does not mean that they need not be licensed at all during their tenure on the board. One of the qualifications is that they "shall be actively employed as a hearing aid dealer." After January 1, 1975, they may not be a hearing aid dealer without possessing a license. Section 18. Thus, in order to be actively engaged as a hearing aid dealer after January 1, 1975, and thereby qualify for a position on the board, they must be licensed. Therefore, although they need not be licensed on July 1, 1974, to be a member of the board, they must be licensed after January 1, 1975, in order to remain on the board.

Pursuant to §4 of the Act, the board has the duty to prepare an examination to be given to all applicants. Accordingly, the hearing aid dealers on this board wish to devise an examination for themselves to qualify for licensure. This would not be a proper procedure. The members of any board should not write an examination to give themselves and then pass on for their own licensure. Such would be a conflict of interest. It is our understanding that a national test exists which is devised and graded by an outfit in Michigan. We strongly suggest that the board adopt this test initially so that the hearing aid dealers who are members can take it without any conflict existing. After the initial examination the board may then adopt another test for future examinations.

Your next two questions deal with this problem. Section 5 of the Act provides that the two public members of the board may participate in administering and grading the initial examination. We do not believe, however, that those two members may adopt, on their own, a test to give to the other three members. Section 4 provides that the board shall adopt a test, and we believe this to mean the entire board, not just a minority portion of it. We see nothing prohibiting the two public members from administering the examination to the other members. Nor do we find any prohibition against the hearing aid dealers on the board taking an examination prior to the initial one, so that they may help administer the initial one. This does not mean that those board members must be licensed before they can give the initial examination. Again, they need not be licensed until January 1, 1975.

Your last question concerns a current board member who is licensed in another state. You wish to know whether he would be required to pass the Iowa examination or wait to see if there will be reciprocity. He will not have to be licensed until January 1, 1975. To comply with the requirement he can take and pass an examination, or be accepted for licensure by reciprocity if the board decides to accept licensure from that state. The requirements for reciprocity are set forth in §14 of the Act and provide that the requirements for licensure in another state be equivalent to or higher than those provided in the

Act. If the state in question does not meet those requirements, the board member would have to take an examination. If it does meet the requirements, the board may grant reciprocity without examination. We suggest that the board member in question refrain from taking part in any such decision.

Accordingly, we are of the opinion that the hearing aid dealers on the initial board need not be licensed until after January 1, 1975. They may not devise an examination to give themselves for licensure. The two public members of the board may administer an examination to them prior to the initial examination. Finally, the board may issue a license to one of its members by way of reciprocity if the requirements of §14 of the Act are met.

October 4, 1974

STATE DEPARTMENT: General Services. §21.4, Code of Iowa, 1973, as amended by S.F. 1139 Acts, 65th G.A., 1974 Session. Motor vehicle dispatcher is authorized to grant approval for a state employee to use his personal automobiles on state business in excess of 6,000 miles per year. (Nolan to Juhl, State Vehicle Dispatcher, 10-4-74) #74-10-7

Mr. Milford L. Juhl, State Vehicle Dispatcher: Your question has been presented for an attorney general's opinion as to whether the State Vehicle Dispatcher has authority to approve use of private vehicles on state business in addition to his authority to delegate 6,000-mile use of private cars to officials of the state and department heads.

Section 21.4, 1973 Code of Iowa, as amended by Senate File 1139, Acts of the 65th General Assembly, 1974 Session, provides:

"No state officer or employee shall use any state-owned motor vehicle for his own personal private use, nor shall he be compensated for driving his own motor vehicle except if such is done on state business with the approval of the state vehicle dispatcher, and in such case he shall receive fifteen cents per mile. A statutory provision stipulating necessary mileage, travel, or actual expenses reimbursement to a state officer shall be construed to fall under this fifteen cents limitation unless specifically provided otherwise. Any peace officer as defined in section seven hundred forty-eight point three (748.3) of the Code who is required to use his private vehicle in the performance of his official duties shall receive reimbursement for mileage expense at the rate of fifteen cents per mile. However, the state vehicle dispatcher may delegate authority to officials of the state, and department heads, for the use of private vehicles on state business up to six thousand miles per year. When a state motor vehicle has been assigned to a state officer or employee he shall not collect mileage for the use of his personal vehicle unless the state vehicle assigned to him is not usable."

In a memorandum issued by your office on July 11, 1974, to all state departments, boards and commissions, it is stated:

"Authority is hereby delegated by the State Vehicle Dispatcher to Officials of the State and Department Heads, to authorize use of privately owned vehicles on official State business up to six thousand (6000) miles per year. When any one individual reaches the six thousand (6000) mile limitation on the period July 1 through June 30 arrangement must be made for an alternate means of transportation.

"The six thousand (6000) mile limitation is Statutory and no provision is made in the Code to authorize any exception. However, this Section of the Code does not apply to elected Officers of the State, Judges of the District

Court, Judges of the Supreme Court, or Officials and Employees of the State whose mileage is paid by other than State agencies."

It is the opinion of this office that Code §21.4 does authorize the state vehicle dispatcher to grant approval for the use of private vehicles by state employees after such employees have reached the 6,000 mile maximum general delegation covered by your July 11, 1974, memorandum. Normally, this will occur when state vehicles are not otherwise available in the state car pool for assignment to such state officer or employee. The stature does not prohibit the use of a private vehicle for state business in excess of 6,000 miles. Rather, it imposes this mileage figure as a ceiling for blanket delegation of approval by the state vehicle dispatcher. When this mileage figure has been reached, it then becomes necessary for the department head to request state vehicle dispatcher for the assignment of a vehicle from the motor pool, or for the specific approval of the continued use of the private vehicle for the employee of the department concerned. We understand the term "an alternate means of transportation" as used in your memorandum to include such requests.

The state vehicle dispatcher does not have authority to make a determination as to the reasonableness of a departmental request for approval of transportation for an employee in excess of 6,000 miles. Approval of a request for continued use of a motor vehicle not owned by the state would be in order when there are not sufficient vehicles in the state pool to assign to the department submitting such request.

October 4, 1974

POLICEMEN AND FIREMEN: Pension Benefits. Chapters 410 and 411, Code of Iowa, 1973, and Art. III, Amend. 2, Iowa Constitution. Pension fund contributions collected pursuant to Chapter 410 may be transferred to another pension fund established under Chapter 411 when a city converts to civil service. However, sufficient monies must be left in the Chapter 410 pension fund to pay benefits to those employees who retired prior to the Chapter 411 change-over (Kelly to Freeman, State Representative, 10-4-74) #74-10-8

The Honorable Dennis L. Freeman, State Representative: This opinion is in response to your request dated August 5, 1974, regarding Chapter 410 pension funds. In your letter you stated:

"In about 1958, the City of Storm Lake established a Firemen and Policemen's Pension Fund pursuant to Chapter 410 of the Code of Iowa. All policemen and firemen contributed to this 410 fund until *January 1, 1974.* At that time, a pension fund was properly established pursuant to Chapter 411, Code of Iowa. There is about $60,000.00 in the 410 fund. The question, simply stated, is: 'What should be done with the funds in the 410 fund?' For example, should the money be returned to those who contributed to the fund? Or, does the fund remain intact, per chapter 240, Acts of the 65th G.A., 1st session?"

Unfortunately, there aren't any statutory provisions that specifically deal with this particular problem. However, §411.3 of the Code of Iowa (1973) provides that policemen and firemen who come under Chapter 411, ". . . shall not be required to make contributions under any other pension or retirement system of city, county or state of Iowa, anything to the contrary notwithstanding."

In light of this language, it's obvious that policemen and firemen presently employed by the City of Storm Lake who were previously under Chapter 410,

only have to contribute to the Chapter 411 pension fund. In regards to the contributions previously made by those persons presently employed as firemen and policemen and the city under Chapter 410, this office believes that such monies can be transferred to the pension fund established pursuant to Chapter 411. But, we also feel that the city should maintain enough money in the Chapter 410 fund to satisfy all benefits of those persons who retired prior to the January 1, 1974, change-over date. The authority for the transfer to the 411 fund and the maintenance of the 410 fund can be founded upon Iowa's Home Rule Act, which basically provides that cities may, unless expressly limited, and if not inconsistent with another statute, determine its local affairs and government. See, Article III, Amendment 2, Iowa Constitution. There are no prohibitions for such action within Chapters 410, 411 or other chapters of the Code of Iowa.

October 8, 1974

ENVIRONMENTAL PROTECTION: State Sewage Works Construction Fund Grants — Chapter 76, Acts of the 65th G.A., 1973 Session: S.F. 1378, Acts of the 65th G.A., 1974 Session; The Department of Environmental Quality is authorized to contract for grants with communities eligible under the 1973 enactment; such contracts are intended by the legislature to reflect 5% of the eligible project costs, and priorities for funding are in the order of enactment. (Davis to Obr, Director of the Water Quality Division, Department of Environmental Quality, 10-8-74) #74-10-9

Mr. Joseph E. Obr, Director, Water Quality Management Division, Department of Environmental Quality: You have requested an opinion of the Attorney General relating to construction of Senate File 1378 enacted by the 65th General Assembly, 1974 Session, which amended Chapter 76 of the Acts of the 65th General Assembly, 1973 Session, which appropriates funds for state grants for waste water treatment works. You asked in essence:

"1. Can the Department of Environmental Quality enter into contracts for five percent (5%) grant funds with those communities that were eligible under Section 1, subsection 2 of Chapter 76 of the legislation passed by the 1973 Session of the 65th General Assembly?

"2. Should the Department of Environmental Quality enter into contracts for five percent (5%) state matching grants to those communities listed in Senate File 1378 as passed by the second session of the 65th General Assembly in those dollar amounts contained in that legislation, or should those contracts be for five percent (5%) of the total eligible cost of the project?

"3. If the answer to question number 2 is that the Department should contract for the total eligible cost rather than the amount shown in Senate File 1378, it is likely that the grant amount will differ significantly from those amounts shown in Senate File 1378 and that the total amount appropriated will not be sufficient to fully fund all communities eligible under the legislation. How should the money be allocated in the contract?"

Subsection 2, Section 1, Chapter 76, Laws of the 65th G.A., 1973 Session, reads as follows: * * *

"2. For paying to those municipalities which were eligible for a fifty-five percent grant under the federal Water Pollution Control Act Amendments of 1961, seventy-five (75) stat. two hundred four (204) for which priorities were established by the Iowa Water Pollution Control Commission prior to October 18, 1972, and are eligible for seventy-five percent grants under the

federal Water Pollution Control Act Amendments of 1972 eighty-six (86) stat. eight hundred sixteen (816), an amount equal to five percent of the amount approved as the estimated cost of the project by the Iowa Water Pollution Control Commission prior to October 18, 1972: . . .

(1973-74)	(1974-75)
(Fiscal Year)	(Fiscal Year)
$3,226,520	$___0___"

Senate File 1378 as enacted by the 65th General Assembly, 1974 Session, reads, in pertinent part, as follows:

"Section 1. Acts of the Sixty-fifth General Assembly, 1973 Session, chapter seventy-six (76), section one (1), subsection two (2), is amended to read as follows: (Deleted words in brackets, added words in italics)

"2. For paying to those municipalities which [were eligible for a fifty-five percent grant under the federal Water Pollution Control Act Amendments of 1961, seventy-five (75) stat. two hundred four (204) for which priorities were established by the Iowa water pollution control commission prior to October 18, 1972 and] are eligible for seventy-five percent grants under the federal Water Pollution Control Act Amendments of 1972 eighty-six (86) stat. eight hundred sixteen (816), an amount equal to five percent of the amount approved as the [estimated] *eligible* cost of the project by the Iowa water [pollution control] *quality* commission [prior to October 18, 1972]: . . .

[$3,226,520] 6,157,870 $___0___

"Section 2. It is the intent of the general assemby that the increased appropriation provided for in section one (1) of this Act which is in addition to the appropriation provided for in Acts of the Sixty-fifth General Assembly, 1973 Session, chapter seventy-six (76), section one (1), subsection two (2) shall be used to pay five percent of the eligible costs of the construction of the sewage treatment works for the following city, town, sanitary district or other public agencies:

"*Public Agency*

1. Alden ---------- $ 13,420

* * *

65. Williamsburg---------- 11,940

"Section 3. It is the intent of the general assembly that the state will continue to provide an amount equal to five percent of the estimated cost of eligible sewage treatment works, however each individual sewage treatment works must be approved item by item by future general assemblies.

"Section 4. (Publication Clause)"

Senate File 1378, Section 1, changes completely the criteria enacted by the previous Session of the General Assembly for grants and enacts a larger appropriation. In Section 2 is calls the "increased appropriation" an "addition" to the previous appropriation and then lists the municipalities entitled to receive grants under the appropriation, without listing those municipalities for whom the 1973 Session of the Legislature had appropriated funds for five percent grants. It then requires in Section 3 that "each individual sewage treatment work must be approved item by item by future general assemblies."

These manifest inconsistencies and ambiguities must be resolved if the intent of the Legislature is to be reached and implemented. The Iowa Supreme Court has held:

"An amended act is ordinarily to be construed as if the original statute has been repealed, and a new and independent act in the amended form has been adopted in its stead; . . ."

Benschoter v. Hakes, 1943, 232 Iowa 1354, 1359, 8 N.W.2d 481, 485; *Chappell v. Board of Directors of Independent School District of City of Keokuk, Lee County,* 1950 241 Iowa 230, 39 N.W.2d 628.

Here, however, the reference to the previously enacted appropriation takes interpretation of this statute out of the "ordinary" classification and into the type of statutory construction considered by the Iowa Court in 1848 in *Noble v. State,* 1 Greene 325, where it was stated:

"The intention of the legislature is the leading, and indeed the only object to be inquired into by a court in construing legislative enactments; and it must be conceded, that the first and most direct means in arriving at that intention, is in the application and meaning of the language used. But when the language in different parts of an act conflicts or is inconsistent with the leading object of the enactment, can there be a better or safer rule than to place that construction upon it which will reconcile and harmonize with the prevailing intention? Where the object of the lawmakers may be collected from prior existing laws, and from the expressed language of many other sections, as in the act before us, we may be justified in giving a construction contrary to the literal application of the words. It frequently becomes the duty of courts, in giving effect to the manifest intention of a statute, to restrain, enlarge, or qualify the ordinary and literal meaning of the words used. *Burgett v. Burgett,* 1 Ham., 469; 4 Bac. Abt., pp. 38, 45, 50.

"When, as in this case, the language of a part of one section of an act is in conflict with both the language and leading design as expressed in several other sections, we can see no other safe path than to follow the express words of the leading and prevailing portions."

This early philosophy of statutory construction has been more recently confirmed by the Iowa Supreme Court as follows:

"It is well known, as well as a recently recognized rule, that the manifest intention of the legislature will prevail over the literal import of the words used. *Dingman v. City of Council Bluffs, Iowa,* 90 N.W.2d 742. Words standing alone, as well as technical definitions and rules of grammatical construction, are often inconclusive."

Spencer Publishing Company v. City of Spencer, 1958, 250 Iowa 47, 92 N.W.2d 633.

"This court is not bound by literal construction. See *State v. Gish,* 168 Iowa 70, 78, 150 N.W. 37, 39 Ann. Cas. 1917 B, 135, where the rule is stated:

"'The purpose, of course, of statutory construction is to ascertain and declare legislative intent as expressed in the statute. It has often been held, however, that where a literal construction of a statute leads to absurdity or to manifest injustice or oppression, the court will not be bound by literal terms, but will seek a construction consistent with a sense of justice, if possible, and will presume such to have been the intent of legislature'." *Lamb v. Kroeger,* 1943, 233 Iowa 730, 736, 8 N.W.2d 405.

"Avoidance of unreasonable or absurd consequences is one of several rules of construction courts apply only in cases of ambiguity. (Citations omitted)"

Kruck v. Needles, 1966, 259 Iowa 470, 478, 144 N.W.2d 296.

We, therefore, determine that the Department of Environmental Quality is authorized by Senate File 1378, Acts of the 65th General Assembly, 1974 Session, to enter into contracts for five percent grant funds with those communities that were eligible for such grants under the legislation passed as Chapter 76 of the Acts of the 65th General Assembly, 1973 Session.

To hold otherwise would cause unreasonable consequences to result from mere lack of linguistic skill. The manifest of the legislature, as shown by the wording and the arithmetical difference between the $6,157,870 and the total of the suggested amounts for each municipality (see below), was to fund those listed entities in addition to those previously qualifying under the 1973 act.

As to your second question, Senate File 1378 states, in Section 2, "It is the intent of the General Assembly that the increased appropriation . . . shall be used to pay five percent of the eligible cost of the construction of the sewage treatment works for the following city, town, sanitary district or other public agencies: . . ."

We are of the opinion that the intent of the General Assembly as expressed therein (to pay five percent of the eligible cost) takes precedence over the dollar amount set out as to each municipality since the statute by its language does not limit the grant to those municipalities to the amount therein enumerated. The figures set out opposite those communities are surplusage and the contract amount should be at the five percent of eligible cost level.

As to your third question, there has, by these two enactments of the General Assembly, been established two classes of grant recipients. The legislative determination was that those projects eligible under subsection 2 of Section 1 of Chapter 76, Acts of the 65th General Assembly, 1973 Session, before amendment should have first priority and those enumerated municipalities in Senate File 1378, Acts of the 65th General Assembly, 1974 Session, should have secondary priority and as each of the enumerated municipalities in Senate File 1378 has equal priority, grants should be made to them on a pro rata basis according to the availability of funds, after funding the grants to the Chapter 76 municipalities.

October 8, 1974

CITIES AND TOWNS: Residency Requirements for Civil Service Employees — §365.17, Code of Iowa, 1973. That part of §365.17 which permits cities to set maximum distances beyond their corporate limits where civil service employees may live is constitutional. (Blumberg to Hansen, State Senator, 10-8-74) #74-10-10

The Honorable Willard Hansen, State Senator: We are in receipt of your opinion request of August 5, 1974, regarding §365.17 of the 1973 Code of Iowa. Your specifically asked whether the residency requirements of the last paragraph of that section are constitutional. The pertinent part of that section provides that cities may set reasonable maximum distances outside the corporate limits of the city that policemen, firemen and other critical municipal employees may live.

This section was obviously promulgated under the police power for the health, safety and welfare of the public. Generally, the legislature is given wide discretion in defining limits of classes in its statutes, and if the statutory classification is reasonable and operates equally upon all within the class, said classification is valid. *Brown Enterprises, Inc. v. Fulton,* 192 N.W.2d 773 (Iowa 1971). Statutes regularly enacted will be accorded a strong presumption of constitutionality, and the party attacking the statutes must prove their unconstitutionality beyond a reasonable doubt. *Brown Enterprises, Inc. v. Fulton,* supra; *Lewis Consolidated School District v. Johnson,* 1964, 256 Iowa 236, 127 N.W.2d 118. If the constitutionality is merely doubtful or fairly debatable, courts will not interfere. *Burlington and Summit Apartments v. Manolato,* 1943, 233 Iowa 15, 7 N.W.2d 26. It must be shown that the statute clearly, palpably, and without doubt infringes upon the Constitution, and in so doing, every reasonable doubt must be resolved in favor of constitutionality. *Lee Enterprises, Inc. v. Iowa State Tax Comm'n,* 162 N.W.2d 730 (Iowa 1968). We must adhere to these decisions.

There is no showing that this statute is unreasonable, arbitrary, capricious, or that it does not apply equally to all within the affected class, i.e. municipal employees under civil service. The reasonableness of it is shown by the fact that when a city needs the services of these employees, for instance, in case of an emergency, it will be ablt to contact the employees and have them available for service in as short a time as possible. The farther a person lives from the city the more difficult it is to be available when needed.

The affected portion of the statute appears to meet the requirements of reasonableness and equal application. Accordingly, we are of the opinion that allowing cities to set maximum distances outside their limits where civil service employees may live is constitutional.

October 8, 1974

STATE OFFICERS AND DEPARTMENTS: Board of Nursing. §§147.10, 147.11 and 147.55, Code of Iowa, 1973. A Registered or Licensed Practical Nurse who fails to renew his or her license and lets same lapse, may not practice his or her profession during the time that said license has lapsed. The Board of Nursing may require examination for reinstatement or lapsed licenses. (Blumberg to Illes, Director, Iowa Board of Nursing, 10-8-74) #74-10-11

Mr. Lynne M. Illes, Executive Director, Iowa Board of Nursing: We are in receipt of your opinion request of September 19, 1974, regarding renewal of licenses for Registered and Licensed Practical Nurses. You specifically asked:

"1. Under the present law are Registered Nurses and Practical Nurses who have not renewed or reinstated their licenses, in fact, practicing nursing without a license?

"2. If the answer to the above question is in the negative:

"a. Would there be grounds for suspension or revocation if these individuals fail to renew their licenses?

"b. Does the Board have discretionary authority to set requirements or conditions by which a license may be reinstated other than by merely paying back renewal fees since the law uses the words '. . . may be reinstated without examination upon recommendation of the examining board for his profession . . .'?"

Section 147.10 of the Code provides in pertinent part:

"Every license to practice a profession shall expire on the thirtieth day of June following the date of issuance of such license, and shall be renewed annually upon application by the licensee, without examination. Application for such renewal shall be made in writing to the department accompanied by the legal fee at least thirty days prior to the expiration of such license. Every renewal shall be displayed in connection with the original license. Every year the department shall notify each licensee by mail of the expiration of his license."

If the licensee fails to renew on time, §147.11 controls:

"Any licensee who allows his license to lapse by failing to renew the same, as provided in section 147.10, may be reinstated without examination upon recommendation of the examining board for his profession and upon payment of the renewal fees then due."

We can find no direct interpretations of §147.11.

In *State v. Otterholt,* 1944, 234 Iowa 1286, 15 N.W.2d 529, the Department of Health moved to revoke a chiropractor's license. The practitioner had allowed his annual license to lapse and had not applied to have it reinstated. The lower court dismissed the proceedings as moot since the license in question had lapsed. The Supreme Court reversed, holding that a mere failure to renew was not the same as a revocation. It cited *Gilchrist v. Bierring,* 1944, 234 Iowa 899, 14 N.W.2d 724, for the proposition that once a license is issued, a licensee is entitled as a matter of right, to have the license renewed. The Court stated, citing *Gilchrist* that there is a marked difference between a license to practice a profession and a mere renewal of that license (234 Iowa at 1291):

"'This is because a dentist, doctor, lawyer, or the member of any other profession, does not devote the years of study and preparation necessary to qualify as a practitioner merely that he may be accorded the right to practice for one year. When he qualifies for the practice, he does so *for life.* That right cannot be taken from him except by due process of law'."

Thus, the failure to renew annually is not the same as a revocation of that license. However, there is a time period between the date of expiration and the date of reinstatement where the practitioner does not have a valid license. "The mere failure to renew annually does not lessen the value of that license *except for the lapsed period before the renewal."* (emphasis added). *State v. Otterholt,* 234 Iowa at 1291.

We believe the intent of the Legislature in mandating annual licenses and the above statement in *Otterholt* is that an individual must have a license to practice a profession, and that said license allows such practice only for the time period that it is valid and in force. Thus, a practitioner may not practice his or her profession during the period that the license has lapsed. This is not the same as a revocation since the practitioner has voluntarily placed himself or herself in the predicament, and because there appears to be some right to reinstatement. To hold otherwise would be to render the provisions requiring a license useless.

You made your next question determinative on a negative answer to the first. However, we deem it necessary that it be discussed to some extent. You first want to know whether the failure to renew is a ground for suspension or revocation of a license. In *State v. Otterholt,* supra, it was held that a licensee,

subject to certain regulations, possesses a valuable privilege which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing. See also, *Gilchrist v. Bierring,* supra, which held that the State cannot, by issuing only annual licenses, ingeniously thwart those precious rights. There, it was also held that the right to earn a living is among the greatest of human rights, and, when lawfully pursued, cannot be denied.

Your question also goes deeper with respect to those individuals who continue to practice after their licenses have lapsed.

Section 147.55 sets forth the grounds for revocation or suspension of a license. They include fraud in procurement of the license; incompetency; immoral, unprofessional or dishonorable conduct; habitual intoxication or drug addiction; conviction of an offense involving turpitude; fraud in representations as to skill; untruthful statements in advertising; unlawful distribution of intoxicants or drugs; practicing while knowingly having a contagious disease; and willful or repeated violations of the Public Health Title.

Whether or not the mere failure to renew or the practice of a profession after the license has expired, without renewal, are sufficient grounds for revocation or suspension of the license are determinative upon the facts of each individual case. The facts of any one case may fall within "willful or repeated violation of the Public Health Title" or "unprofessional conduct" of §147.55. We are not prepared at this time to indicate which hypothetical fact situations may be sufficient grounds.

The second part of your last question asks whether the Board has any authority to set requirements or conditions by which a licensee may be reinstated other than by merely paying back renewal fees. You are specifically referring to that part of §147.11 which states that any licensee "may be reinstated without examination upon recommendation of the examining board for his profession . . . ." A reading of that part of the section appears to show that it is discretionary with the examining board whether the licensee will be reinstated without examination. In *Otterholt,* the Court stated that the practitioner was still the owner of the license, and "*may* be reinstated and continue the practice of his profession without examination, subject, as always, to the supervisory power under which he previously exercised it . . . ." (emphasis added). (234 Iowa at 1291). We interpret §147.11 and the *Otterholt* case to mean that the examining board may require an examination for reinstatement.

Accordingly, we are of the opinion that a Registered or Licensed Practical Nurse who allows his or her license to lapse and fails to renew it for any period of time may not practice nursing as a Registered or Licensed Practical Nurse during that period of time that the license has lapsed. The Board of Nursing may require examinations for reinstatement of a license when the license has lapsed.

October 11, 1974

LABOR RELATIONS: SUPERVISORY EMPLOYEES: Senate File 531, Acts of 65th General Assembly, 1974 Session. Police captains, lieutenants, and sergeants are supervisory employees within the definition of §4(2) of the Public Employment Relations Act, if their duties involve the use of independent judgment in the direction of other public employees, and are therefore excluded from the provisions of the Act. (Coleman to Dutton, Black Hawk County Attorney, 10-11-74) #74-10-12

Mr. David J. Dutton, Black Hawk County Attorney: You have requested an opinion from the Attorney General concerning the following question:

"We are writing as to Section 4 of Senate File #531, Exclusions, under the Public Employee's Relation Act.

"In our department we have Captains, Lieutenants and Sergeants, who at one time or another act in a supervisory capacity. In most cases a Sergeant has the authority to recommend disciplinary action against a man to the higher command. They are also responsible in directing men who are working on the street in one capacity or another.

"We would appreciate an opinion as to just who would be excluded under this section of the new act."

Senate File 531, 1974 Session, 65th General Assembly, known as the "Public Employment Relations Act," was enacted to:

". . . promote harmonious and cooperative relationships between government and its employees by permitting public employees to organize and bargain collectively; to protect the citizens of this state by assuring effective and orderly operations of government in providing for their health, safety, and welfare; to prohibit and prevent all strikes by public employees; and to protect the rights of public employees to join or refuse to join, and to participate in or refuse to participate in, employee organizations."

Within the scope of this Act are both "public employers" and "public employees." The former includes as per S.F. 531, §3(1), "the State of Iowa, its boards, commissions, agencies, departments, and its political subdivisions including school districts and other special purpose districts." A "public employee" is defined as "any individual employed by a public employer, except individuals exempted under the provisions of section four (4) of this Act." [S.F. 531, §3(3)].

The "public employee" exclusion which affects police officers is that found in Section 4(2) of the Act:

"Representatives of a public employer, including the administrative officer, director, or chief executive officer of a public employer or major division thereof as well as his deputy, first assistant, and any *supervisory employees.*

"*Supervisory employee means any individual having authority* in the interest of the public employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other public employees, or the responsibility to *direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.* All school superintendents, assistant superintendents, principals, and assistant principals shall be deemed to be supervisory employees." (emphasis added).

Section 4(2) of S.F. 531 is virtually identical to the Labor-Management Relations Act, 29 USCA 151(11), in its definition as to what constitutes a "supervisor," and this act has been examined repeatedly by federal courts in determining the prerequisites and standards for "supervisory" status. These cases assist greatly in providing the criteria for reaching a resolution to your question as to whether police captains, lieutenants, and sergeants who fulfill supervisory duties at various times, come within the provision of S.F. 531 as being exempt employees or "supervisory employees" and thus excluded from the provisions of the Act.

In *National Labor Relations Board v. Roselon Southern, Inc.* 382 F.2d 245, 247 (6th Cir. 1967), that court was called upon to determine what exercise of power was necessary to classify one as a "supervisor" within the meaning of 29 U.S.C.A., Section 152(11). In reaching its conclusion, the court stated:

"The criteria set forth in the statute are to be read in the disjunctive and if the instructors perform any one of the functions set forth in the statute, they meet the test of a supervisor. Ohio Power Co. v. N.L.R.B., 176 F.2d 385, 11 A.L.R.2d 243 (C.A. 6, 1949); Eastern Greyhound Lines v. N.L.R.B., 337 F.2d 84 (C.A. 6, 1964). *It is not necessary that the employee is required to regularly and routinely exercise the powers set forth in the statute. It is the existence of the power which determines whether or not an employee is a supervisor.* Ohio Power Co. v. N.L.R.B., 176 F.2d 385 (C.A. 6, 1949) supra." (emphasis added).

Additionally, the court went on to analyze the powers which the person in *N.L.R.B. v. Roselon,* supra, exercised and stated:

"The previously mentioned duties of Miss Beaty show that she had the power *to inspect the quality of work* of the machine operators, *train new employees* and give a *report on their progress.* As a result of her own judgment *she could issue warning slips,* she *had the authority to discipline any of her workers, and in fact reported one operator for disciplinary action. This was certainly supervisory conduct within the meaning of the Act.* See N.L.R.B. v. Beaner Meadow Creamery, Inc., 215 F.2d 247 (C.A. 3, 1954); and Eastern Greyhound Lines v. N.L.R.B., 337 F.2d 84 (C.A. 6, 1964), supra." (emphasis added).

Similarly, in *N.L.R.B. v. Fullerton Publishing Company,* 283 F.2d 545, 548 (C.A. 9th, 1960) it was stated:

". . . In dealing with the statutory term 'supervisor' it is well settled that *an employee must be classified as a supervisor if he exercises any one of the powers set forth in . . . the act.* N.L.R.B. v. Edward G. Budd Manufacturing Co., 6 Cir., 1948, 169 F.2d 571, certiorari denied Fireman's Ass'n. of Amer. v. Edward G. Budd Mfg. Co., 1949, 335 U.S. 908, 69 S.Ct. 411, 93 L.Ed. 441; Ohio Power Company v. N.L.R.B., 6 Cir., 1949, 176 F.2d 385, 11 A.L.R.2d 243, certiorari denied 149, 338 U.S. 899, 70 S.Ct. 249, 94 L.Ed. 553." (emphasis added).

In *National Labor Relations Board v. Big Three Welding Equipment Company,* 359 F.2d 77, 80-81, (C.A. 5th, 1966), that deciding court held a dispatcher of company trucks was a "supervisor" within the meaning of the act when it was determined that the dispatcher had the duty to "get work out of the men"; "determine what route a man took"; "decided when two truckers were available which would go"; "assigned drivers to load and unload trucks"; "balanced the overtime between drivers", and "assigned extra duties."

Conversely, the various court jurisdictions around the United States have constantly distinguished between "supervisors" and "lead personnel." A "lead man" or "straw boss" is one who for all intents and purposes exercises no independent judgment but merely directs performance of routine jobs and is one through whom management sends its orders. It is more clerical in nature than supervisory. See, *Keener Rubber, Inc. v. National Labor Relations Board,* 326 F.2d 968 (C.A. 6th Cir. 1964) cert. denied, 377 U.S. 934, 84 S.Ct. 1337, 12 L.Ed.2d 297; *National Labor Relations Board v. Houston Natural Gas Corp.,* 478 F.2d 467, 469 (C.A. 5th, 1973) and citations.

It is our opinion, threfore, that if captains, lieutenants, and sergeants of the Waterloo Police Department have any one of the various supervisory powers listed in S.F. 531, §4(2), although not often exercised, they come within the exemptions of the Act, and so long as they are invested with the authority to direct other public employees or to recommend actions with regard to them, using their "independent judgment", that such persons are "supervisors" within the terms of the Act and are therefore excluded from its provisions. If they do not possess these powers they are "employees".

This opinion does not rule out the fact that police departments throughout the State of Iowa have different constructions, with the officers in each, although holding the same title, performing different duties. Theoretically a police captain, lieutenant, or sergeant in Waterloo could have his counter-part in Des Moines in rank and pay, and yet be a "supervisor" whereas the Des Moines' officer would be an "employee". The opposite is equally true. Consequently, each case must be decided on an individual basis, taking into account the duties, responsibilities, control over personnel, and use of independent judgment.

October 14, 1974

CITIES AND TOWNS: Regional Housing Authorities — Chapter 28E and §403A.9, Code of Iowa, 1973. The agreement creating the Southern Iowa Regional Housing Authority complies with the applicable statutory provisions. (Blumberg to Stewart, Decatur County Attorney, 10-14-74) #74-10-13

Robert C. Stewart, Decatur County Attorney: We have received your opinion request of October 1, 1974, regarding a Chapter 28E Agreement. Several counties and municipalities in southern Iowa have set up the Southern Iowa Regional Housing Authority (SIRHA) pursuant to Chapters 403A and 28E of the Code. We understand that in order to be eligible for federal assistance, you need an opinion from this office as to the legality of SIRHA.

Section 403A.9 permits two or more municipalities (which include counties by definition in §403A.2) to join or cooperate with one another in the exercise of any or all of the powers conferred by Chapter 403A. If, as in this case, a separate entity is created, the provisions of Chapter 28E must be followed.

Sections 28E.3 and 28E.4 allow for joint exercise of powers. Section 28E.4 further provides that there must be appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved. Section 28E.5 sets forth the requirements of an Agreement if a separate entity is created. Such an agreement must specify its duration; the precise organization, composition and nature of the separate entity together with the powers delegated thereto; its purposes; the manner of financing it; permissible methods to be employed in accomplishing the termination of the agreement; and, any other necessary and proper matters.

The material furnished to us shows that each county and city involved passed resolutions declaring a need for a Regional Housing Authority, granting approval to enter into the agreement, and designating someone to act for the county or city by signing said agreement. That complies with §28E.4.

The compliance with §28E.5 is as follows. The duration of the Agreement is stated in Articles II and IV. The organization, composition and nature of the

entity and its powers are found in Articles I, III and VII. The purposes of the entity are stated in Article I. Financing and budgeting provisions are set forth in Articles V and VII. Finally, the permissible methods of termination are found in Article IV.

Based upon the above findings, we are of the opinion that the Agreement for the Southern Iowa Regional Housing Authority meets the requirements of Chapter 28E, and that the entity created is legal pursuant to §403A.9 and §28E.4.

October 14, 1974

STATE OFFICERS AND DEPARTMENTS: Department of Agriculture — Toilet and Lavatory facilities in food establishments — §§159.5(10), 170.16 and 170.17, Code of Iowa, 1973; Rule 15.10(1), January, 1974 Supplement to I.D.R. 7. Requirements of toilet facilities and lavatories with hot and cold running water apply upon all establishments within the purview of Chapter 170 of the Code. (Blumberg to Gallagher, State Senator, 10-14-74) #74-10-14

The Honorable James V. Gallagher, State Senator: We are in receipt of your opinion request of August 21, 1974, regarding statutes and rules and regulations of the Department of Agriculture. The facts, as stated in your letter, are as follows. There exists, in Buchanan County, an old store named Shady Grove, which is frequented by people in the area, and used by them as a gathering place. There is a gas pump, a display of antiques, and bottled beer along with other foods such as sandwiches which are sold there for consumption on the premises. It appears that the State Department of Agriculture has inspected the facility and determined that separate toilet facilities for men and women, along with hot and cold running water in separate lavatories, are necessary to comply with State law. The establishment currently has only one toilet facility and no running water. You are asking whether there is any exception that would allow this establishment to continue operating as it has been without having to meet all of these requirements.

Section 170.16 of the Code provides that all food establishments shall have toilet rooms, and in places serving beer or alcoholic beverages, separate toilet facilities for men and women shall be provided. Section 170.17 provides for lavatories in all food establishments to be in or adjacent to toilet rooms with running water. Rule 15.10(1), found on page seven (7) of the January, 1974, Supplement to the Iowa Departmental Rules, promulgated pursuant to §159.5(10) of the Code, provides that the lavatories shall be equipped with hot and cold running water. We can find no exceptions to these statutes and rules within Chapter 170.

The laws were promulgated to insure that the users of these facilities would encounter clean and sanitary conditions. They apply equally to all. Although they may seem harsh at times when looked at under circumstances with this type of establishment, they are promulgated for the health, safety and welfare of the public and must, of necessity, apply equally to all establishments which fall within the categories set forth in Chapter 170. In order to be in compliance with the law, the owner of this establishment must either put in the required improvements or refrain from selling beer and other foods to be consumed on the premises.

Accordingly, we are of the opinion that the above cited statutes and rules do apply to this establishment in question, and must be followed for compliance with the law.

October 14, 1974

LICENSES: Continuing Education Requirements, S.F. 277, 65th G.A., 1974 Session. Only the Board of Accountancy Examiners should prescribe a continuing education program as a requisite to the retention of a license. (Haesemeyer to Egenes, State Representative, 10-14-74) #74-10-15

Honorable Sonja Egenes, State Representative: You requested an Attorney General's opinion on the subject of continuing education programs for occupational licensees, and stated:

"During the hearings of the Professional and Occupational Licensing Study Committee, it has become apparent that many of the licensing boards are uncertain as to whether Senate File 277 gave them the authority to establish by rule continuing education requirements for license renewal. Therefore the Committee has by motion directed me to request an attorney general's opinion as to which licensing boards do now have authority to establish continuing education requirements."

We have been unable to find any litigation or treatise on the subject of continuing education programs as requisite to license retention. However, it is the generally accepted rule that a state may impose regulations reasonably necessary to the protection of the general public or persons dealing with the licensee, provided that: such regulations are not unduly burdensome, *Sallsbury v. Equitable Purchasing Co.*, 177 Ky. 348, 197 S.W. 813 (1917); are not applied in an arbitrary or capricious manner, *Larr v. Digman,* 317 Mich. 121, 26 N.W.2d 872 (1947); *Braddock v. State,* 127 Ga.App. 513, 194 S.E.2d 317 (1972); see generally, 53 C.J.S. *Licenses,* §42(e) (1950); and subject to the exception that a regulation may not excise or abrogate constitutional rights of the licensee, *Frost v. R.R. Comm.*, 271 U.S. 583 (1926); *Finch v. U.S.*, 102 U.S. 269 (1880); *District of Columbia v. Lee,* 35 App. D.C. 341 (1910).

Nonetheless, S.F. 277, Acts, 65th G.A., Second Session (1974) was enacted for the specific purpose of mandating just exactly what principles should be followed and what procedures should be adopted by the various occupational licensing boards. Section 1 states:

"The following principles shall be used by the general assembly in determining whether a procedure should be established and the type of procedure which should be established for the state licenser of an occupation or profession:

"1. The state shall engage in licensing procedures for those professions and occupations where it believes it can assure an objective and measurable level of competence concerning the public health, safety, and well being which other sources cannot effectively provide.

"2. The examining board shall pursue a meaningful examination and enforcement procedure which upholds the level of competency of the licensee to insure that public interest is protected."

While throughout the Act each licensing board is given the power to tax a fee for the license, revoke or suspend the license for misconduct of the licensee, and renew the license upon timely application by the licensee, there is only one

place in the Act where the legislature has specifically provided for continuing education requirements. Section 32 of the Act, which amends Chapter 116, Code, 1973, states in the fourth new section:

"The board shall prescribe continuing education requirements, subject to approval under the provisions of chapter 17A of the Code, for all certified public accountants holding certificates and all other certified public accountants working under certificates to engage in the practice of public accounting in this state, and compliance by certified public accountants shall be a condition to the renewal of a certificate to practice under section 116.13 of the Code."

Nowhere else in the Act is an analogous provision as to continuing education as a prerequisite to license renewal to be found. *In all* other cases, renewal is conditioned only upon timely application and payment of the specified fee. As mentioned above, the Act provides for revocation or suspension of the license upon failure of the licensee to comport with the board's rules of conduct, and it is our opinion that by forbearing from imposing continuing education requirements upon these occupations the legislature evidenced its intent to rely upon such revocation and suspension procedures for policing of these occupations.

It is appropriate too to consider the viability of an argument that this statute violates the due process clause of the Fourteenth Amendment by imposing certain restrictions and conditions upon one class of licensees while not imposing the same upon other classes of licensees. It may be suggested, arguendo, that there is no reason why accountants should be required to hone and refine their competency periodically while other comparable professionals, e.g. doctors, lawyers, engineers, are not saddled with a similar burden. Of course, the general rule is that it is within the state's police power to make reasonable classifications in its licensing legislation and that this authority extends to the imposition of licensing requirements. See generally, 51 Am.Jur.2d *Licenses and Permits*, §27 (1970) and there are numerous arguments which the legislature could adduce in support of its imposition of a continuing education requirement only upon accounting licensees, e.g., that defects in accounting practice might not be noticed as readily as would defects in the work of other licensees; or that accounting practices are in such a state of flux that it is in the best interest of this state and its citizens to ensure that accounting licensees are continually apprised of changes in current accounting methods.

Accordingly, it is our opinion that the legislature has expressed its intent that only accountants be subjected to continuing education requirements by the accountancy board, and that other occupational licensing boards may not impose continuing educational requirements unless and until such time as the legislature expressly authorizes them to do so. This is not to say, however, that the Supreme Court under its inherent power to regulate the practice of law could not prescribe a continuing education requirement for attorneys. It is also our opinion that this legislation is constitutionally acceptable, and that no due process argument would lie against the requirements imposed therein.

October 14, 1974

HIGHWAYS; COUNTIES AND COUNTY OFFICERS: Plowing snowmobile routes — §§321G.9(4), 309.67, 1973 Code of Iowa; H.F. 1199, §§3, 4, Acts of the 65th G.A., 2nd Sess.; S.F. 1062, §5, Acts of the 65th G.A., 2nd Sess. A county does not have a duty to plow a secondary road designated as

a snowmobile route and could not be held liable for injuries sustained as a result of a failure to plow such a route. (Haskins to Peckosh, Jackson County Attorney, 10-14-74) #74-10-16

Thomas F. Peckosh, Jackson County Attorney: You have requested our opinion on the following matter:

"Section 321G.9 has been amended by providing that a county, after an evaluation of traffic conditions on all county highways, shall designate certain roadways within the county which snowmobiles may be operated on.

"The concern that has arisen in Jackson County is that if the individual county decides to designate certain roadways for this purpose and decides to leave some of them unmaintained during the winter season so there will be a place for snowmobiling, are they breeching their obligation to maintain said roadways so as to render themselves liable in a personal injury suit should somebody become hurt because the snow and ice has not been removed from the roadway.

"It seems quite clear that the counties have the right to maintain the designated roadways and blade the roads immediately after a snowfall, but do they have the discretion to not maintain and plow these roads?"

Essentially, you are asking whether a county must plow a road designated as a snowmobile route.

Under §321G.9(4), 1973 Code of Iowa, as amended by H.F. 1199, §§3, 4, Acts of the 65th G.A., 2nd Sess., a county may designate certain parts of the county highways as snowmobile routes. The section also authorizes snowmobiles to be operated on the portion of county roadways that are not plowed during the snow season and not maintained or utilized for the operation of conventional motor vehicles. The amended §321G.9(4) states in relevant part:

"4. A registered snowmobile may be operated under the following conditions: * * *

b. On that portion of county roadways that have not been plowed during the snow season and not maintained or utilized for the operation of conventional motor vehicles. * * *

"d. On the roadways of that portion of county highways designated by the county board of supervisors for such use during a specified period. The county board of supervisors shall evaluate the traffic conditions on all county roadways and designate roadways on which snowmobiles may be operated for the specific period without unduly interferring with or constituting an undue hazard to conventional motor vehicle traffic. Signs warning of the operation of snowmobiles on the roadway shall be placed and maintained on the portions of highway thus designated during the period specified for such operation."

The term "county highways" apparently refers to secondary roads, as those are the roads over which the county boards of supervisors exercise jurisdiction and control. *See* S.F. 1062, §5, Acts of the 65th G.A., 2nd Sess.

The effect of the amended §321G.9(4) is that a county need not plow secondary roads designated as snowmobile routes. The fact that the legislature provided that the counties may designate certain roads as snowmobile routes together with the fact that it allowed snowmobiles to be operated on county roads not plowed during the snow season and not maintained or utilized for the operation of conventional motor vehicles forces us to conclude that it

meant to lift from the counties' shoulders any duty to plow roads designated as snowmobile routes.

Ordinarily, the county is required to remove "impediments", presumably including snow, from secondary roads. *See* §309.67, 1973 Code of Iowa. However, the amended §321G.9(4) implicitly creates an exception for roads designated as snowmobile routes. This is not to say, however, that a county cannot plow a road designated as a snowmobile route if it wishes to do so. Rather, it is to say only that having once designated the road as such, it need not plow it. In all cases, §321G.9(4) dictates that signs warning motorists of the snowmobiles be erected on the designated roads.

In sum, we believe that a county does not have a duty to plow a secondary road designated as a snowmobile route and could not be held liable for injuries sustained as a result of a failure to plow such a road.

October 22, 1974

SNOWMOBILES — County Boards of Supervisors — County Highways; Designation of, on which snowmobiles may be operated during specified period. 1973 Code of Iowa, §321G.2(4) as amended by House File 1199, Acts of the 65th G.A. All county highways are to be evaluated by County Boards of Supervisors. Under Chapter 4, 1973 Code of Iowa, the term "evaluate" is interpreted to be left to the discretion of the respective County Boards. Exercise of discretion by such Boards should be reasonable and prudent and demonstrate use of "common sense". §321G.22 limits liability of counties for designation of county highways on which snowmobiles may be operated. (Tangeman to Flores, Buena Vista County Attorney, 10-22-74) #74-10-17

Mr. Daniel T. Flores, Buena Vista County Attorney: Your letter of September 26, 1974, asks certain questions regarding §4 of House File #1199, Acts of the 65th G.A., which is an amendment of §321G.9(4), 1973 Code of Iowa. Your letter refers to §321G.2(4) but the quoted section is actually §321G.9(4).

Said §4 of House File #1199 provides as follows:

"On the roadways of that portion of county highways designated by the county board of supervisors for such use during a specified period. The county board of supervisors shall evaluate the traffic conditions on all county highways and designate roadways on which snowmobiles may be operated for the specified period without unduly interfering with or constituting an undue hazard to conventional motor vehicle traffic. Signs warning of the operation of snowmobiles on the roadway shall be placed and maintained on the portions of highway thus designated during the period specified for such operation."

"On the roadway or shoulder when necessary to cross a bridge or culvert, or avoid an obstruction which makes it impossible to travel on the portion of the highway not intended for motor vehicles, if the snowmobile is brought to a complete stop before entering onto the roadway or shoulder and the driver yields the right-of-way to any approaching vehicle on the roadway."

Your questions are contained in the following paragraphs of your letter which I have numbered 1 through 6.

1. "The word 'shall' has often been held to be mandatory. Must the Board of Supervisors eveluate [sic] the traffic conditions on *ALL* county highways? As you know, each county has many highways and many miles of highways."

2. "The Board is not clear, nor are the county engineer or myself, as to how traffic conditions are intended to be 'evaluated'. There are many factors such as sight distance over hills or around curves and buildings on corners. Some obstructions to view are found close to corners such as groves. What set of recognized standards can be applied to evaluate traffic? All existing standards known evaluate motor vehicle vs. motor vehicle on the highways. Snowmobiles may travel just as fast and be less visible to a motorist."

3. "The Board will obviously not even give any consideration to heavily traveled highways for this purpose, but the Board needs to know if proper 'evaluation' equals something like 'common sense'. Does the Board need to evaluate all highways even if it would be a forgone]sic] conclusion that snowmobiles would not be permitted thereon. Certainly it would be a useless act. How must the Board best document its 'evaluation' to comply with the law."

4. "The second problem arises over the words, 'without *unduly* interfering with or constituting any *undue hazard* to conventional motor vehicles', the whole quotation appears to be very vague. The words 'unduly' and 'undue' do not have any technical meaning and appear to be what I would call language requiring the Board to exercise its own judgment. But again, what must that judgment be based on — common sense, predicability of one or more accidents, guilt feelings, etc.?"

5. "Additionally, signs must be placed warning of the operation of snowmobiles on the road. Where shall the signs be placed? Is there any authorized sign for this? Do the signs need to specify the period such road is open? I assume that the color and size might be on some standard sign of a warning nature."

6. "Lastly, what is the liability of the county for accidents that might happen. I can see a motorist bringing the county into court for a snowmobile and car collision, and I can see the opposite happening so that out of one single car snowmobile accident the county may be exposed double [sic] liability."

My answers to the questions are presented by taking the paragraphs one by one, identifying them by the appropriate number assigned to the quoted paragraphs from your letter.

1. "All" county highways are to be evaluated. The statute 1973 Code of Iowa, 321G.9(4) as amended provides that. See 2 and 3 below regarding the meaning of "evaluate".

2. Since the statute does not provide any specific definition of the term "evaluate" and since it provides neither evaluation standards nor criteria by which to establish such standards I conclude, by applying the rules of construction in Chapter 4, 1973 Code of Iowa, and more specifically by applying §4.6 that the legislative intent is to impose on the several Boards of Supervisors of the Iowa counties the duty to establish or designate snowmobile roads for specified periods of the year but that the standards of evaluation used by said Boards in selecting the said snowmobile roads are discretionary with the said Boards.

3. Your suggestion of the use of the term "common sense" as descriptive of the rationale to be applied by the said Boards is accurate in my opinion and should be supported by the terms "reasonable" and "prudent". With regard to the Boards' documentation of their evaluations I am of the opinion that this too has been left, by the legislature, to the discretion of the said Boards.

4. The questions in this paragraph should be answered by application of the answers contained in the preceding two paragraphs.

5. The County engineers should receive information from the State Highway Commission regarding the preparation and placement of signs.

6. The intent of the legislature with regard to liability to be incurred by counties and other political subdivisions by reason of adherence to the provisions of Chapter 321, 1973 Code of Iowa as amended, is set forth in §321G.22. However it appears that that section contemplates, by its terms, use of ditches and right of way areas adjoining "roadways" rather than the roadways themselves. Willful or malicious failure to exercise due care and diligence in the said "evaluations" might offer a ground for attempting to impose liability on a political subdivision but this appears remote. Avoidance of liability would be best accomplished by conscientious adherence to the principles of "common sense" and "reasonableness" and "prudence" referred to above, in the designation of the snowmobile routes in compliance with the requirements of the said statute.

October 23, 1974

STATE OFFICERS AND DEPARTMENTS: Board of Nursing — 42 U.S.C. 291; 42 U.S.C. 2000e-2; §§147.55, 147.56 and 601A.7, Code of Iowa, 1973. As a general rule, a member of a hospital staff, which includes nurses, should not be discharged, nor shall a hospital refuse to hire a person because such person or staff member has a religious or moral objection to abortions. (Turner to Illes, Director, Iowa Board of Nursing, 10-23-74) #74-10-18

Mrs. Lynne M. Illes, Executive Director, Iowa Board of Nursing: You have requested an opinion of the Attorney General with respect to the following:

"1. Does participation in the performance of an abortion in these health institutions [hospitals] by either a Registered Nurse or Licensed Practical Nurse constitute a violation of the Code of Iowa?

"2. Does a health institution whose policies permit the performance of abortions have the right to discharge from employment a licensee who refuses to participate?

"3. May a health institution establish pre-employment policies requiring participation by Registered Nurses and Licensed Practical Nurses in the performance of abortions."

Your first question involves §§147.55(3) and 147.56(6), Code of Iowa, 1973, which provide that a license may be revoked for unprofessional conduct, and that "unprofessional conduct" includes "[p]rocurement or aiding or abetting in the procurement of a criminal abortion." In *Roe v. Wade,* 1973, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, and *Doe v. Bolton,* 1973, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, the criminal abortion statutes of Texas and Georgia were struck down as being unconstitutional. Thereafter, and in light of *Wade and Bolton,* the Federal District Court for the Southern District of Iowa, sitting as a three judge panel, struck down the Iowa criminal abortion statute. *Doe v. Turner,* 1973, 361 F. Supp. 1288. Thus at the present time there can be no criminal abortion in Iowa and §147.56(6) is unenforceable. However, this does not mean that it can never have application again. If the Legislature enacts an abortion law consistent with the guidelines set forth in *Wade* and *Bolton,* there can be criminal abortion in limited circumstances as to which

§147.56(6) will be applicable. As things presently stand, however, participation in the performance of an abortion by Registered or Licensed Practical Nurses is not a violation of the Code. It should be pointed out that a substitute for §147.55(3) and the repeal of §147.56 become effective on July 1, 1975. See §§87, 198 and 201, Ch. 1086, Acts of the 65th G.A. (1974).

Your second and third questions are not so easily answered. There are two rights involved according to *Wade* and *Bolton:* The right of the public to request and receive abortions under certain guidelines (right to privacy under the Ninth Amendment to the Constitution of the U.S.); and the rights of those wishing not to perform, or assist in the performance of, abortions based upon religious or moral beliefs (freedom of religion under the First Amendment). Added to these are certain problems arising because of the differences between and among private and public hospitals.

Many states have passed statutes providing in one form or another that physicians, nurses and other hospital employees may refuse to participate in abortions and such a refusal shall not be the basis for any disciplinary or recriminatory action against them. Some states also prescribe by statute that any such objections or refusals shall not be the basis for discrimination in hiring. Not all of these states specify that the refusals and objections be based upon religious or moral convictions. See, e.g. Del. Code Ann., tit. 24, §179(a); Fla. Stat. Ann. §458.22 (Supp. 1973); Ga. Code Ann §26-1202(e) (1973); Hawaii Rev. Stat. Ch. 768; Idaho Laws, Ch. 197 §11 (1973); Indiana Code §16-10 (1973); La. Rev. Stat. §40-1299.31 (1973); Md. Ann. Code art. 43, §138; Mass. Gen. Laws, Ch. 112, §12i (1973); Nev. Rev. Stat. Ch. 632 (1973 Nev. Laws 1059); N.M. Stat. §40A-5-1; N.Y. Laws Ch. 1098, §79-3; N.C. Gen. Stat. §14-45.1(e); N.D. Code 23-16-14 (1973); Ore. Rev. Stat. §435. 485; S.C. Code §16-89; 1973 S.D. Laws page 313, §§7, 8; Utah Code §76-7-306 (1973); Va. Code §18-1-62-2; Rev. Code of Wash. §9-02.080; Wyo. Stat. §§6-77-16, -17, -18 (1973).

In *Doe v. Bolton,* supra, the Court made reference to that part of the Georgia Code which provided:

"Nothing in this Chapter shall require a hospital or other medical facility or physician to admit any patient under the provisions hereof for the purpose of performing an abortion. In addition, any person who shall state in writing an objection to any abortion or all abortions on moral or religious grounds shall not be required to participate in procedures which will result in such abortion, and the refusal of such person to participate therein, shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person. The written objection shall remain in effect until such person shall revoke it or terminate his association with the facility with which it is filed."

It was stated in *Doe v. Bolton* that the above section permitted a hospital not to admit a patient for an abortion, and further, that a physician or other employee has the right to refrain from participating in an abortion procedure. "These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital." 93 S.Ct. at 750. The Court did not declare that portion of the Georgia law to be unconstitutional.

A somewhat different result was reached with reference to Utah's statute, which provided:

"(1) A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion

has been authorized, who shall state an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person, nor shall any moral or religious scruples or objections to abortions be the grounds for any discrimination in hiring in this state.

"(2) Nothing in this part shall require a hospital to admit any patient under the provisions hereof for the purpose of having an abortion.

"(3) Nothing in this part shall require a private hospital to admit any patient under the provisions hereof for the purpose of having an abortion.

"(4) Nothing in this part shall require a denominational hospital to admit any patient under the provisions hereof for the purpose of having an abortion."

In *Doe v. Rampton,* 366 F.Supp. 189 (D. Utah 1973), a three judge panel declared Utah's statutes on abortion unconstitutional. One judge specifically held that the above quoted section was unconstitutional because it was broad enough to make an abortion impossible to obtain. A second judge found that the above quoted section, at least in part, was constitutional, but that it could not be severed from the rest of the Act, and therefore it too must fall. The third judge also felt that the above section was constitutional, but held that it should be severed from the rest and allowed to remain, citing *Doe v. Bolton.* He held that Utah Code §§76-7-306(1) and 306(4) do nothing more than protect the conscience of the individual and the prerogative of the denominational hospitals, and are therefore constitutional. 366 F. Supp. at 204.

An Amendment (Public Law 93-45, adopted June 18, 1973) to the Hill-Burton Act, 42 U.S.C. 291, (which provides for federal funds to hospitals) provides in part:

"(b) The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require —

(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or

(2) such entity to —

(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

"(c) No entity which receives a grant, contract loan, or loan guarantee under the Public Health Service Act, the Community Mental Centers Act, or the

Developmental Disabilities Services and Facilities Construction Act after the date of enactment of this Act may —

(1) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(2) discriminate in the extension of staff or other privileges to any physician or other health care personnel, because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions."

In addition, 42 U.S.C. 2000e-2 provides in part:

"(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Section 601A.7, 1973 Code of Iowa, provides, in part:

"1. It shall be an unfair or discriminatory practice for any:

(a) Person to refuse to hire . . . to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion or disability or such applicant or employee . . ."

As an example of the applicability of 42 U.S.C. 2000e-2, see *Riley v. Bendix Corporation,* 464 F.2d 1113 (5th Cir. 1972). In this case action was brought pursuant to 42 U.S.C. 2000e-2 because plaintiff's employment had been terminated for his failure to work on his Sabbath. The Court held that such was discriminatory and in violation of the Civil Rights Act because the employer had not made *reasonable accommodations* to the religious needs of employees. Examples of such accommodations were given as a transfer to another shift or an arrangement with another employee to take plaintiff's position on the day involved.

There is a difference between public and private hospitals in terms of the availability of facilities for abortions. In *Doe v. Bellin Memorial Hospital,* 479 F.2d 756 (7th Cir. 1973), a doctor and pregnant woman brought an action against a private hospital to enjoin it from denying the use of its facilities for abortions. The hospital had received Hill-Burton funds. Referring to *Wade, Bolton, Hathaway v. Worchester City Hospital,* 475 F.2d 701 (1st Cir. 1973), and *Klein v. Nassau County Medical Center,* 347 F. Supp. 496 (E.D. N.Y. 1972), the Court held (479 F.2d at 759-760):

"The rationale of those cases is, however, inapplicable to private institutions. There is no constitutional objection to the decision by a purely

private hospital that it will not permit its facilities to be used for the performance of abortions. We think it is also clear that if a state is completely neutral on the question whether private hospitals shall perform abortions, the state may expressly authorize such hospitals to answer that question for themselves.

"The Georgia abortion statute which was reviewed in detail in Doe v. Bolton, supra, contained such a provision. The Supreme Court did not expressly pass on the validity of that provision, but since it was attacked in one of the amicus briefs, and since the court reviewed the entire statute in such detail, it is reasonable to infer that it considered such authorization unobjectionable. . . .

"Thus we assume that there is no constitutional objection to a state statute or policy which leaves a private hospital free to decide for itself whether or not it will admit abortion patients or to determine the conditions on which such patients will be accepted."

The Court then rejected the arguments that the hospital became public upon receipt of Hill-Burton funds and that it operated under color of state law. Because it did not operate under color of state law, the Bill of Rights, through the Fourteenth Amendment, did not apply as it had in *Wade* and *Bolton*. See, 18 St. Louis L. J. 455-459 (1974). If the Constitutional provisions of *Wade* and *Bolton* do not apply to the hospital, we cannot see how they could apply to the hospital's personnel.

Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir. 1974), concerns the same type of actions as in *Bellin* except that the hospital was public. The Court held that a public hospital must make its existing facilities available for abortions. This does not mean that a public hospital must furnish facilities for abortions if none previously existed. Because this was a public hospital it came under color of state law, and the constitutional provisions of *Wade* and *Bolton* were applicable. See also, *Hathaway v. Worchester City Hospital,* supra. Thus, the constitutional rights of freedom of religion and due process apply to the personnel. See e.g., *Meredith v. Allen County War Memorial Hospital Commission,* 397 F.2d 33 (6th Cir. 1968), wherein it was held that the dismissal of a physician from a public hospital (operating under color of state law) was in violation of due process and equal protection.

The physicians in *Nyberg* alleged as grounds for standing that they could not be arbitrarily deprived of an opportunity to perform abortions which might account for a portion of their livelihood. The Court accepted standing on this basis. It appears to us that the right to earn a living is implicit within the ruling. If one has a right to perform abortions to earn a living, should not one also have a right to refuse to perform abortions on religious or moral grounds? We are inclined to say yes. Whether it be freedom of religion, due process, right to privacy or a right to earn a living, one right should not be disregarded completely in favor of another. It appears that a balance must be struck if there is some conflict.

Hospitals receiving Hill-Burton funds may not discharge or refuse to hire a physician, nurse or other employee because of a refusal to perform abortions based upon religious or moral grounds. Private hospitals that do not receive such funds have more latitude in employment practices. However, the discharge of or refusal to hire an employee based upon a religious or moral objection to abortions may, depending on the facts of each case, be a violation of

that employee's civil rights under either 42 U.S.C. 2000e-2 or the Iowa Civil Rights Act.

Public hospitals should not discharge or refuse to hire employees who have religious or moral objections to abortions. Because they are public hospitals, they operate under color of state law. Such a discharge or refusal to hire could amount to an unconstitutional interference with the free exercise of religion, or a denial of due process and equal protection, in addition to a violation of 42 U.S.C. 2000e-2 and the Iowa Civil Rights Act. The regulations of merit employment and civil service might also be violated where a governmentally owned hospital is involved.

Whether the hospital be public or private, the employer must make reasonable accommodations to the religious needs of the employees. This is a general rule, and the facts of each case will obviously control. There are, or course, some situations where the individual need not be hired or should be discharged. The right of an employee not to perform an abortion cannot be extended so far as to leave a hospital in a position where it has no employees who will perform an abortion when a woman requests one. The result would thwart the effect of *Wade* and Bolton. Where the hospital is left without employees who will perform abortions, it can take such steps, including discharge or selective hiring of employees, if all else fails, as will permit it to meet its constitutional obligations to women who desire abortions. However, in all cases hospitals should, whenever possible, attempt to accommodate the desires of those requesting abortions without discharging existing employees who have religious or moral scruples against abortions. For example, an employee who refuses to perform abortions might simply be transferred to another position where he or she would not be called upon to perform abortions rather than be discharged. This would satisfy the "reasonable accommodations" requirement of the civil rights laws. Likewise, in the hiring of employees individual moral or religious beliefs should be taken into account when assigning positions, and qualified employees who have such religious or moral beliefs should not be refused employment if reasonable accommodations can be made for them. In no event, however, may a hospital receiving Hill-Burton funds discharge or refuse to hire employees because of their religious or moral views on abortion.

The rights of the woman requesting the abortion and those of the staff that object to abortions on religious or moral grounds must be balanced to give effect to both, if possible. The hospital in this state should keep this in mind when hiring or discharging employees because of their beliefs on abortion.

October 25, 1974

TAX: Food Sales Exemption. §422.43, Code of Iowa, 1973; §422.45, Code of Iowa, 1973, as amended by S.F. 1055, Acts, 65th G.A., §2 (1974 Session). For purposes of exemption from sales tax, the eligibility of the food under the Federal Food Stamp Program is the determinative factor, and the eligibility of the retailer from which the foods are purchased is an irrelevant consideration. (Haesemeyer to Harlan, Administrative Assistant, Department of Agriculture, 10-25-74) #74-10-19

James I. Harlan, Administrative Assistant, Department of Agriculture: In your letter of October 14, 1974, you requested an Attorney General's opinion on the following questions:

"1. If honey is not purchased from a *place of business* eligible to deal in food stamps are the sales subject to sales tax?

"2. If honey is sold at the Iowa State Fair is it subject to sales tax?

"3. Isn't the food item, rather than the place of sales, the determinative factor in deciding if the sales are to be taxed?"

Section 422.43 of the Code imposes a 3% retail sales tax upon gross:

". . . receipts from all sales of tangible personal property, consisting of all goods, wares, or merchandise, except as otherwise provided in this division . . . ."

Section 422.45 provides specific exemptions to said tax, and S.F. 1055, Acts, 65th G.A., §2 (1974 Session) adds a new exemption as follows:

"Gross receipts from the sale of all foods for human consumption which are eligible for purchase with food coupons issued by the United States Department of Agriculture pursuant to regulations in effect on July 1, 1974, regardless of whether the retailer from which the foods are purchased is participating in the food stamp program. . . ."

7, Code of Federal Regulations, Agriculture, §270.2(f) (1974) for purposes of the federal food stamp program defines eligible food as follows:

"'Eligible food' means any food or food product for human consumption except alcoholic beverages and tobacco . . . ."

Honey, therefore, is an eligible food for purposes of the federal food stamp program; since §2 of S.F. 1055 makes no reference to eligible retailers, and since it specifically makes irrelevant the status of the retailer as participant or non-participant in the federal food stamp program, it is unnecessary for us to speculate as to whether or not the Iowa State Fair would be eligible to participate in the federal food stamp program.

Accordingly: (1) If honey is not purchased from a place of business eligible to deal in food stamps the sale is nevertheless exempt from sales tax. (2) If honey is sold at the Iowa State Fair it is not subject to sales tax. (3) The status of the food item as defined by the federal regulations, rather than the eligibility of the place of sales as defined by such regulations, is the determinative factor in deciding whether or not the sales are to be taxed.

October 28, 1974

BANKING: Automated Tellers — Code §524.1202 authorizes Superintendent to determine whether automated teller in close proximity to bank's principal office is an integral part of such place of business or a bank office. (Nolan to Hall, Deputy Superintendent of Banking, 10-28-74) #74-10-20

Mr. Howard K. Hall, Deputy Superintendent, Department of Banking: You have requested an opinion as to whether proposed use of an automated teller system to be placed in a skyway connecting the new Ruan Financial Center with a city-owned parking garage located directly across the street at 7th and Grand in Des Moines, Iowa, could be considered an integral part of Bankers Trust Company, which will lease the quarters connected to this skyway. The skyway will be owned by the Ruan Financial Center.

Code §524.1202 of the 1973 Code of Iowa authorizes the Superintendent to find that such a facility located in the proximity of a state bank's principal place of business is an integral part of the principal place of business and not a bank office.

October 29, 1974

STATE OFFICERS AND DEPARTMENTS: Vietnam War Bonus — Ch. 64, 1st Regular Session, 65th G.A., §§633.535, 633.536, 633.537, Code of Iowa, 1971. The surviving son is entitled to Vietnam Service Compensation to which his father would otherwise be entitled if his mother, the surviving widow, feloniously took the life of his father. (Robinson to Kauffman, Executive Secretary, Vietnam Service Compensation Board, 10-29-74) #74-10-21

Mr. Ray J. Kauffman, Executive Secretary, Vietnam Service Compensation Board:

Re: Ivan Lee Nading, deceased Vietnam Veteran and the application of Kenneth Nading, Guardian and Conservator of David Douglas Nading, surviving son.

The above application presents the following legal question:

Is the surviving son entitled to Vietnam Service Compensation, to which his father would otherwise be entitled if his mother, the surviving widow, feloniously took the life of his father?

Our answer is in the affirmative. This question has never been presented to the Iowa Supreme Court and thus is a proper one for an Attorney General Opinion.

The pertinent portion of the fifth paragraph of Section 2, Ch. 64, Acts of 65th G.A., 1973 Session, is as follows:

"The surviving widow or widower, child or children, mother, father, or person standing in loco parentis, in the order named and none other, of any deceased person, shall be paid the compensation that such deceased person would be entitled to under this Act, if living."

Sections 633.535, 633.536, 633.537, Code of Iowa, 1971, provide as follows:

"No person who feloniously takes or causes or procures another to take the life of another shall inherit from such person, or receive any interest in the estate of the decedent as surviving spouse, or take by devise or legacy from him, any portion of his estate."

"No beneficiary of any policy of insurance or certificate of membership issued by any benevolent association or organization, payable upon the death or disability of any person, who feloniously takes or causes or procures to be taken the life upon which such policy or certificate is issued, or who feloniously cause or procures a disability of such person, shall take the proceeds of such policy or certificate."

"In every instance mentioned in sections 633.535 and 633.536, all benefits that would accrue to any such person upon the death or disability of the person whose life is thus taken or who is thus disabled shall be distributed to the other persons who would take under the will of the decedent or according to the rules of intestate succession, as the case may be."

I have examined the Beneficiary's Application for Vietnam Service Compensation of Kenneth Nading, Guardian and Conservator of David Douglas Nading, surviving son of Ivan Lee Nading. An examination was also made of the original court files in the District Court of the State of Iowa In and For Polk County in the following cases:

In the Matter of the Estate of: Ivan L. Nading — Probate No. 65318.

In the Matter of the Conservatorship of: David Douglas Nading — Probate No. 66646.

David Douglas Nading, by his Guardian and Next Friend, Kenneth Nading, Plaintiff vs. Donald Watkins, Jr.; Sally Watkins; Carylann Nading; Iona L. Nading and Kenneth Nading, Individually Defendants — Equity No. CE1-030 (Habeas Corpus).

The examination of these files reveal that Major Ivan Lee Nading is deceased. He and Carylann Nading are the natural parents of David Douglas Nading. Major Ivan Lee Nading died on or about September 25, 1971, while on active duty in the Armed Services. On April 19, 1972, Carylann Nading was convicted upon her plea of not guilty by a jury verdict of guilty of the offense of unlawfully killing Ivan Lee Nading by forcibly striking and stabbing him with a knife or other sharp instrument in violation of Title 18, U.S. Code, sections 1112 and 7. These files also show that Kenneth Nading is the duly appointed Guardian of David Douglas Nading. Both Kenneth Nading and Richard Nading are Co-Conservators of David Douglas Nading. The absolute care, custody and control of David Douglas Nading is with Kenneth Nading and Iona L. Nading.

A determination of the facts and the law as presented in this claim is not as easy as may first appear. Sometimes vested rights in real estate are protected in situations which involve the feloniously causing of death. See *Acquisition of Property By Murder of a Cotenant,* 37 Iowa L. Rev. 582 (1952). These facts, of course, do not present a real estate question. Also, no benefits or rights to a Vietnam War Bonus had accrued on September 25, 1971, which was the date of death of Major Nading. *Borden v. World War II Service Compensation Board et al.,* 1952, 243 Iowa 892, 54 N.W.2d 496. When the Act was subsequently passed authorizing a Vietnam War Bonus, the question then became whether or not a surviving son would be entitled to the same ahead of his mother, if the mother caused his fathers death. The public policy of this state as stated in Sections 633.535 to 633.537, supra, is strong and it is sound. While these sections deal primarily with inheritance and life insurance situations, they also are broad enough to include the facts presented by this claim. The claim on behalf of the surviving son should be paid.

October 29, 1974

STATE OFFICERS AND DEPARTMENTS: Vital Statistics — §1, Ch. 1139, Acts of the 65th G.A. (1974); §144.43, Code of Iowa, 1973. Section 144.43 of the Code has been amended to provide that the confidentiality requirements of that section do not apply to vital statistics sixty-five years old or older, with the exception of births out of wedlock and fetal deaths. (Blumberg to Pawlewski, Commissioner of Public Health, 10-29-74) #74-10-22

Norman L. Pawlewski, Commissioner of Public Health: We have received your request of October 24, 1974, asking for a clarification of our opinion to you on March 29, 1974, because of a change in the law.

Section 1, Ch. 1139, Acts of the 65th General Assembly (1974) amended §144.43 of the Code. Said amendment provides that the confidentiality requirements of that section shall not apply to vital statistics that are sixty-five years old or older. The only exceptions to that are births out of wedlock and fetal deaths.

Accordingly, our opinion of March 29, 1974, is modified to the extent that vital statistics which are sixty-five years old or older, with the above exceptions, may be made accessible to the public.

October 29, 1974

STATE DEPARTMENTS: Banking. §524.1202(2). Superintendent may accept application for a fourth bank office in an urban complex of 200,000 population where at date of application the bank also has an office established in a town which may at some future date be joined by annexation to the boundaries of the urban complex. (Nolan to Hall, Deputy Superintendent of Banking, 10-29-74) #74-10-23

Mr. Howard K. Hall, Deputy Superintendent, Department of Banking: This is written in response to your request for an opinion on the matter of the application of Bankers Trust Company for approval of a bank office to be established in the south part of the city of Des Moines. In your letter, you state that Bankers Trust Company now operates three bank offices within the Des Moines urban complex. The bank also operates a bank office at Grimes, Iowa.

Section 524.1202 of the 1973 Code of Iowa provides:

"Location of offices. The location of any new bank office, or any change of location of a previously established bank office, shall be subject to the approval of the superintendent. No state bank shall establish a bank office outside the boundaries of the counties contiguous to or cornering upon the county in which the principal place of business of the state bank is located.

"1. Except as otherwise provided in subsection 2 of this section, no state bank shall establish a bank office in a municipal corporation or unincorporated area in which there is already an established state or national bank or office, however the subsequent chartering and establishment of any state or national bank, through the opening of its principal place of business within the municipal corporation where the bank office is located, shall not affect the right of the bank office to continue in operation in that municipal corporation.

"2. A state bank located in a municipal corporation may establish not more than two bank offices within the boundaries of the municipal corporation, each of which shall have adequate off-street parking as determined by the superintendent, and may also have facilities to serve pedestrian customers. A state bank located in a municipal corporation, or in an urban complex composed of two or more Iowa municipal corporations each of which is contiguous to or corners upon at least one of the other municipal corporations within the complex, having a population of over fifty thousand according to the most recent federal census may establish two such offices within the boundaries of the municipal corporation or urban complex; if the municipal corporation or urban complex has a population of over one hundred thousand but not over two hundred thousand, the state bank may establish three such offices within the boundaries of the municipal corporation or urban complex; if the municipal corporation or urban complex has a population of over two hundred thousand, the state bank may establish four such offices within the boundaries of the municipal corporation or urban complex. Such a facility located in the proximity of a state bank's principal place of business may be found by the superintendent to be an integral part of the principal place of business, and not a bank office within the meaning of this section."

Assuming that sometime in the foreseeable future, the city limits of the towns of Grimes and Urbandale will be contiguous, thus bringing the town of Grimes into the Des Moines urban complex, you ask:

"1) Should the Superintendent of Banking accept an application from Bankers Trust Company for permission to establish what could be the bank's fifth bank office within the Des Moines urban complex if and when Grimes becomes a part of the Des Moines urban complex?

"2) If the Superintendent accepts such an application and approves it and Grimes subsequently becomes a part of the Des Moines urban complex, would Bankers Trust Company be required to close or otherwise dispose of one of the five bank offices it would then have within the Des Moines urban complex?"

It is the view of this office that the language of §524.1202(2) which states that a state bank "may establish four such offices within the boundaries of the municipal corporation or urban complex" clearly authorizes the superintendent to accept applications for such bank offices in cases where, at the date of the application, the statutory limit upon the number of offices has not yet been reached.

The statute does not contain a "grandfather clause". Therefore, in the event that a bank already has established the maximum number of offices allowed by statute for an urban complex, and through subsequent annexation of territory, the urban complex is extended to include other cities in which its bank offices have already been established, further legalizing legislation would be indicated.

October 31, 1974

HIGHWAYS: Motor vehicle fees and fuel taxes, use for abandoned vehicles. Persons or organizations that collected junk cars under OPP program that were not compensated prior to program being held unconstitutional are not entitled to compensation. Compensation paid to persons or organization prior to program being held unconstitutional cannot be recovered. (Voorhees to Hutchins, State Representative, 10-31-74) #74-10-24

Mr. C. W. Bill Hutchins, State Representative: Reference is made to your letter of September 18, 1974, wherein you asked several questions concerning our opinion of August 23, 1974. That opinion held invalid a statute that purported to allow road use tax funds to be used for the removal of abandoned vehicles from areas other than highway right of way. (See Voorhees to Holden, State Representative, 8-23-74; #74-8-18). Specifically, you asked:

"In that the State of Iowa did set precedent by paying certain organizations previous to the date of the opinion, I hereby request an opinion as to whether organizations who had junk cars collected prior to the above mentioned opinion but had not been compensated would be entitled to compensation and if not, would not those organizations who received compensation be subject to suit for repayment of compensation received.

"Furthermore, I am requesting an opinion as to what contractual obligation the State has on this matter in that certain organizations did proceed in good faith on the instructions of a State Agency."

The law recognizes that, in certain instances, persons may acquire rights under a statute that cannot be divested, even if the statute is repealed. However, such vested rights must be fixed or established — something more than a mere expectation, based on an anticipated continuance of present law. Cf. *Andrew v. U.S. Bank*, 205 Iowa 883, 213 N.W. 551 (1928); *Leach v. Commercial Savings Bank*, 205 Iowa 1154, 213 N.W. 517 (1928); *Herrick v. Cherokee County*, 199 Iowa 519, 202 N.W. 252 (1925). Further, vested rights can arise only under a

valid statute. Where a statute is held invalid, vested rights cannot accrue. *B & H Investments, Inc. v. City of Coralville,* 209 N.W.2d 115 (Iowa 1973).

It would appear that persons or organizations collecting junk cars had no fixed or established interest, but merely an expectation that the state would continue to pay compensation under the program. Even if an interest sufficient to create a vested right had been acquired, a vested right could not accrue because the statute was invalid. Accordingly, it is our opinion that persons or organizations that had junk cars collected but had not been compensated are not entitled to compensation.

The question of whether monies expended under an unconstitutional statute can be subsequently recovered has been faced several times by the Supreme Court of Tennessee. Specifically, the Court was faced with the question of whether salaries that were paid to certain county officials under an unconstitutional statute could be recovered. In *Bayless v. Knox,* 199 Tenn. 268, 286 S.W.2d 579 (1955); *State v. Hobbs,* 194 Tenn. 323, 250 S.W.2d 549 (1952) and *Roberts v. Roane Co.,* 160 Tenn. 109, 23 S.W. 239 (1929), the court held that the salaries could not be recovered in a suit against the officials. The Court's reasoning is stated in *State v. Hobbs,* supra, at 330 of 194 Tenn., and 553 of 250 S.W.2d:

". . . While a citizen is presumed to know the law he is not presumed to know that a statute, which the Supreme Court presumes to be constitutional, is unconstitutional. * * *

". . . and what no one could know prior to the determination by some judicial tribunal that the law was unconstitutional. * * *

". . . But it is recognized that parties may so deal with each other upon the faith of such a statute that neither may invoke the aid of the courts to undo what they themselves have done."

We feel that these cases state the rule that should be applied to the instant question. It is therefore our opinion that persons or organizations that received compensation would not be subject to suit for repayment.

November 1, 1974

SCHOOLS: Area education agency. An employee of an area community college is not prohibited from serving on the area education agency board if such person is otherwise qualified. (Nolan to Smith, Harrison County Attorney, 11-1-74) #74-11-1

Mr. Charles L. Smith, III, Harrison County Attorney: Your letter of September 26, 1974 requesting an attorney general's opinion has been received. Your letter involves an interpretation of §10, paragraph 2 of Senate File 1163, recently enacted by the 65th General Assembly, 1974 Session.

This statute, in pertinent part, provides:

"Area education agency directors shall be elected from director districts which are conterminous with the director districts for the election of members of the merged area board under chapter two hundred eight A (208A) of the Code.

"The board of directors of the area education agency shall be elected at director district conventions attended by members of the boards of directors of the local school districts located within the director district.

"A convention shall be held not later than September 20, 1974 and the date shall be determined by the county superintendent of the county school system or joint county system which has the largest public school enrollment in the director district. The location of each director district convention shall be determined by the county superintendent who determines the date of the director district convention, and the location shall be at a school facility located within the director district. . . . A single member shall be elected from each director district. The member of the area education agency board to be elected at the director district convention may be a member of a local school district board of directors and shall be an elector and a resident of the director district, *other than school district employees.*" [emphasis added]

You have asked whether two employees of the Southwest Iowa Community College are considered "school district employees" who would be ineligible to serve on the board of directors of the area education agency.

It is the opinion of this office that the school districts referred to in the statute cited are the local school districts provided for by Chapter 274, Code of Iowa, 1973, and not the merged areas which constitute the boundaries for area schools as provided in Chapter 280A of the Code. Therefore, an employee of the area community college is not prohibited from serving on the area education agency board if such person is otherwise qualified.

However, the possibility of conflict of interest would arise in the event that the board attempted to enter into any contract with the area community college for services of its employees who are also members of this board.

November 5, 1974

LIQUOR, BEER, AND CIGARETTES: Giving away beer. Section 123.132, 1973 Code of Iowa. It is not illegal for a class "C" Beer Permit holder to give away beer for consumption on the licensed premises, or for private citizens or organizations who do not hold beer permits to give away beer at functions where an admission fee is charged, or a donation is requested. (Coriden to Gallagher, Director, Iowa Beer and Liquor Control Department, 11-5-74) #74-11-2

Mr. Rolland A. Gallagher, Director, Iowa Beer & Liquor Control Dept.: You have requested an opinion on the following:

"The Code of Iowa, Section 123.132 allows a class "C" beer permittee to sell beer for off premises consumption in original containers only.

1. Does Section 123.132 allow a class "C" permittee to give away beer, by the individual drink, to be consumed on the premises? This would be a promotional act by the permittee.

2. Can a private citizen, or an organization, not holding a beer permit, give away beer at functions where an admission fee is charged, or a donation is requested?"

Nothing in the Code prohibits a class "C" Beer Permittee from giving away beer by the individual drink for consumption on the premises. Section 123.132 limits only the type of sales of beer which may be made. It seems clear, then, that it is legal for a beer permittee to give away beer as a promotional act.

Likewise nothing in the Code prohibits a private citizen or an organization from giving away beer without a beer permit at functions where an admission fee is charged, or a donation is requested. Thus, the answer to your second question must also be in the affirmative.

November 5, 1974

STATE OFFICERS AND DEPARTMENTS: Division on Alcoholism. Senate File 1354, §§3, 7, 8, 9 and 12, 65th G.A., Second Session. Senate File 1354 establishes an independent division on alcoholism not subject to the superior authority of the Commissioner of Health. (Coriden to Griffin, State Senator, 11-5-74) #74-11-3

The Honorable James W. Griffin, Sr., State Senator: You have requested an opinion interpreting Senate File 1354, 65th General Assembly, Second Session. Basically, you would like to know which state agency has the authority to administer the provisions of Senate File 1354 and whether that agency is an independent one or whether it is subject to the control of the Commissioner of Health.

Section 3 of Senate File 1354 establishes:

". . . within the state department of health a division on alcoholism which shall develop, implement, and administer a comprehensive alcoholism program pursuant to sections one (1) through thirty-three (33) of this Act."

Section 7 of the Act states that:

"The commission shall:

"1. Act as the sole agency to allocate state, federal, and private funds which are appropriated or granted to, or solicited by the division.

"2. Approve the comprehensive alcoholism program developed by the division pursuant to sections one (1) through thirty-three (33) of this Act.

"3. Establish policies governing the performance of the division in the discharge of any duties imposed on it by law.

"4. Establish policies governing the performance of the director in the discharge of his duties.

"5. Advise or make recommendations to the governor and the general assembly relative to alcoholism treatment programs in this state.

"6. Promulgate rules necessary to carry out the provisions of this Act, subject to review in accordance with the provisions of chapter seventeen A (17A) of the Code.

"7. Investigate the work of the division, and for this purpose it shall have access at any time to all books, papers, documents, and records of the division.

"8. Submit to the governor an annual report covering the activities of the division."

Finally, §9 authorizes the director of the Division on Alcoholism to:

"1. Plan, establish, and maintain treatment programs as necessary or desirable with the approval of the commission.

"2. Make contracts necessary or incidental to the performance of his duties and the execution of his powers, including contracts with public and private agencies, organizations, and individuals to pay them for services rendered or furnished to alcoholics or intoxicated persons.

"3. Solicit and accept for use any gift of money or property made by will or otherwise, and any grant of money, services, or property from the federal government, the state, or any political subdivision thereof or any private

source, and do all things necessary to cooperate with the federal government or any of its agencies and the commission in making an application for any grant.

"4. Coordinate the activities of the division and cooperate with alcoholism programs in this and other states, and make contracts and other joint or cooperative arrangements with state, local, or private agencies in this and other states for the treatment of alcoholics and intoxicated persons and for the common advancement of alcoholism programs.

"5. Keep records and engage in research and the gathering of relevant statistics.

"6. Employ staff necessary to carry out the duties assigned to him.

"7. Do other acts and things necessary or convenient to execute the authority expressly granted to him."

Certainly, it would appear from the above-quoted sections of the law that the legislature has given the Commission on Alcoholism and the director of the Division of Alcoholism ample authority to administer the provisions of Senate File 1354.

The question then remains whether that authority is an independent one or whether it is subject to the superior authority of the Commissioner of Health. It might be argued that since the Division on Alcoholism was established as a division "within the state department of health," it would, like other divisions of that department, be under the control of the Commissioner. However, administrative offices and agencies derive their powers and authority from the legislature, 73 C.J.S., *Public Administrative Bodies and Procedure,* §49, at 368; 63 Am.Jur.2d, *Public Officers and Employees,* §263, at 782, and

"[t]he powers and duties of particular administrative officers and agencies as against other officers and agencies are determined by the organic and statutory provisions which grant them their powers and define their duties, and, where specific powers and duties are restricted to, or vested in, a specific officer or body, others are prohibited from carrying out or exercising them." 73 C.J.S., supra, §53, at 375.

In the instant case, as was noted in a recent Attorney General's Opinion (Coriden to Pawlewski, October 1, 1974) the Division on Alcoholism can be distinguished from other divisions in the Department of Health because it was specifically created by an act of the legislature whereas the other divisions of the department were established by the Commissioner under the authority vested in him by §135.6, 1973 Code of Iowa. Further, the only powers specifically granted to the Commissioner by Senate File 1354 are the power under §8 to approve the director appointed by the Alcoholism Commission and the power under §12 to approve the director's division of the state into regional areas for the development of treatment programs. It appears, therefore, that the authority given the Division on Alcoholism is an independent one not subject to the control of the Commissioner of Health and that the Commissioner has no authority to dictate to or override the decisions of the Commission.

November 7, 1974

HIGHWAYS, SECONDARY ROADS: Snowmobiles. §307.5 and §321.252, 1973 Code of Iowa and §321G.9(4) as amended by §4 of House File 1199, Acts of the 65th G.A., 1973 Code of Iowa. Highway Commission has duty

and authority to advise counties concerning snowmobile signs. County board of supervisors limited in designating snowmobile routes to roadways on which snowmobiles may be operated "without unduly interferring with or constituting an undue hazard to conventional motor vehicle traffic." (Tangeman to Shafer, Allamakee County Attorney, 11-7-74) #74-11-4

Mr. John W. Shafer, Allamakee County Attorney: This is in response to your recent inquiry regarding snowmobile route signs. Your inquiry is contained substantially in the following two paragraphs of your letter, which we quote:

"Our county board of supervisors is considering the possibility of opening all county roads to use by snowmobiles and subjecting them to vehicular traffic regulations. The engineers office has requested that I contact you with regard to the number or frequency of snowmobile signs which would be necessary in the event the entire county road system were open to snowmobile traffic. If the directive from the highway commission is followed county wide, this would involve a large expenditure of funds for snowmobile signs if these would be required for each direction of travel at each intersection."

"I would like to obtain your opinion with regard to the minimum number of signs to be necessary to be erected in the event the entire county road system is open to snowmobile traffic."

The duty and authority of the Highway Commission concerning signs is contained generally in several of the subsections of §307.5, 1973 Code of Iowa and more specifically in §321.252.

The Highway Commission has communicated to the county engineers, by a memorandum dated September 27, 1974, its opinion regarding placement of snowmobile signs, as required by Chapter 321G, 1973 Code of Iowa, as amended by §4 of House File #1199, Acts of the 65th G.A., which amends §321G.9(4). It is suggested in the memorandum that the minimum number of signs to be erected would be "one for each direction of travel along the snowmobile route at each intersection".

The following are several reasons which occur to us as justification for following the directions of the memo.

1. There are a number of primary highways in Allamakee County which, of course, will not be snowmobile routes and there would be confusion for operators in distinguishing between the two classes of highways.

2. Most of the other counties in the State will have a limited number of snowmobile highways in their counties and residents of those counties would be confused by the procedure in Allamakee County. The advantages of consistency in application of the law throughout the State are obvious.

3. Since a directive does exist indicating the signing procedure to be followed, it would seem that accidents which might arise between a conventional vehicle and a snowmobile or between two snowmobiles, might offer opportunity for a tort claim against the county based on inadequate signing if such directive were not followed.

I wish to note finally, with regard to your statement that "Our county board of supervisors is considering the possibility of opening all county roads to use by snowmobiles and subjecting them to vehicular traffic regulations." the new law at §321G.9(4) as amended by House File #1199, Acts of the 65th

G.A., charging the several county boards with the duty of designating roadways on which snowmobiles may be operated requires the designation of roads where snowmobiles may be operated "without unduly interferring with or constituting an undue hazard to conventional motor vehicle traffic". Although there are no specific evaluation standards stated in the new law there is nevertheless the broad general requirement that the county board of supervisors shall designate roadways on which snowmobiles may be operated "without unduly interferring with or constituting an undue hazard to conventional motor vehicle traffic". I would question whether the traffic conditions in any county in Iowa are such that any county board could open all county roads to the use of snowmobiles without "unduly interferring with or constituting an undue hazard to conventional motor vehicle traffic" at some point on those county roads. Taking the entire Chapter 321G, 1973 Code of Iowa, in to consideration and construing it from the "four corners" so to speak, it is apparent that such a wholesale opening of county roads to snowmobiles is not contemplated.

November 7, 1974

TAXATION: Tax Sale: §§427.9, 427.12, 445.23, 445.24, 445.25, 446.7, 446.9, 446.29, 447.9, 447.12, and 448.1, Code of Iowa, 1973. A tax sale for delinquent property taxes discharges all tax liens upon the property, including liens for suspended property taxes due and unpaid, notwithstanding that the county treasurer failed to include such suspended taxes in the sale, and the purchasers are entitled to a treasurer's deed to such property pursuant to §448.1. In the event that the treasurer did not issue a certificate or receipt as contemplated by §§445.23 and 445.24, the treasurer could not sustain any liability under §445.25. (Griger to Anderson, Washington County Attorney, 11-7-74) #74-11-5

Mr. Tracy Anderson, Washington County Attorney: You have requested an opinion of the Attorney General on a series of questions involving a tax sale. The factual background you presented is as follows:

For the years 1956 through 1967, property taxes of an old-age assistance recipient were suspended upon a parcel of property in Washington County pursuant to §427.9, Code of Iowa. Eligibility for such suspension ceased for the 1968 taxes, payable in 1969. Neither the 1968 taxes nor the prior suspended taxes were paid and, pursuant to §446.9, Code of Iowa, the property was advertised for annual tax sale by the Washington County Treasurer as follows:

"1968 taxes — Varneys S.D. South 266′ of E 90′ Lot 6, Block 2. $62.32 tax delinquent, interest $2.80 and cost $.75."

The suspended taxes for the prior years were not mentioned in the notice of tax sale.

On December 1, 1969, the property was purchased at tax sale, conducted pursuant to §446.7, Code of Iowa, for $62.32 plus interest and costs and the buyers received a certificate of purchase in accordance with §446.29, Code of Iowa. This certificate did not mention the suspended taxes.

The buyers have paid the taxes upon the property for years subsequent to 1968. The buyers claim no actual knowledge of the suspended taxes until approximately 18 months to two years after the tax sale. The treasurer claims he told one of the buyers about the suspended taxes in the spring of 1970.

On May 28, 1974, under authority of §447.9, Code of Iowa, 1973, the treasurer filed Notices of Expiration of Right of Redemption and the Affidavit of Service was filed with the treasurer pursuant to §447.12, Code of Iowa, 1973. The right of redemption expired and the buyers returned the Certificate of Purchase to the Treasurer together with a check for $3.00, pursuant to §448.1, Code of Iowa, 1973, and demanded a deed to the property. The treasurer has refused to make out and deliver such deed on the ground that the suspended taxes remain a lien upon the property. In this regard, you present six questions as follows:

"1) Must the Treasurer make out a deed and deliver it to the purchasers?

2) If the Treasurer must make out and deliver a deed can he note the unpaid suspended taxes on the deed?

3) If he makes out and delivers a deed, will a lien for the suspended taxes survive and constitute a valid lien on the property?

4) Does the survival of the lien depend on whether or not it is noted on the tax deed?

5) If the lien is cut off, is the Treasurer liable under I.C.A. 445.25?

6) If the lien is not cut off, is the Treasurer liable to the purchaser under I.C.A. 445.25?"

Your first four questions depend, for resolution upon the proper interpretation of the relevant language of §446.7 of the 1973 Code which has provided as follows since 1941:

"Annually, on the first Monday in December the treasurer shall offer at his office at public sale all lands, town lots, or other real property on which taxes of any description for the preceding year or years are delinquent, which sale shall be made for the total amount of taxes, interest, and costs due and unpaid thereon, including all prior suspended taxes, provided, however, that no property, against which the county holds a tax sale certificate, shall be offered or sold. No interest or penalty on suspended taxes shall be included in the sale price, except that six percent interest per annum from the date of suspension shall be included as to taxes suspended under the provisions of section 427.8."

Those provisions of §446.7 concerning suspended taxes were enacted by the legislature in 1941. See Chapter 254, Acts of 49th General Assembly. In regard to the interpretation of such language in §446.7 relating to suspended taxes, the Attorney General opined in 1942 O.A.G. 55, 56:

"It is, therefore, our further opinion that the legislative intent behind the enactment of Senate File 310 was to permit the county treasurer to sell property at tax sale for all taxes due on said property including those suspended by reason of the owner of the property receiving old age assistance, but only after the death of such property owner or after the time when he stopped receiving old age assistance."

From your letter, it is our understanding that for the years 1968 through 1971, old age assistance was not paid to the property owner. Therefore, at the annual tax sale conducted by the treasurer in 1969, the treasurer was required to sell the property for all delinquent taxes and prior suspended taxes. It would further appear that if the tax sale of the property freed it in the hands of the buyers from all liens for delinquent taxes for prior years, notwithstanding that

no mention was made of said prior delinquent taxes, the same rule would apply in regard to a tax sale for delinquent taxes where no mention was made of prior suspended taxes on property no longer eligible for such suspension.

In *Bowman v. Eckstein,* 1877, 46 Iowa 583, the county treasurer sold property for delinquent 1869 taxes only, notwithstanding that the taxes for the years subsequent to 1859 had not been paid either. The tax sale purchasers assigned their interest to the property owner-taxpayers who attempted to obtain a treasurer's deed. The Court held that such an assignment constituted a redemption by the taxpayers so as to require them to pay *all* delinquent taxes, interest, penalties, and costs, not only the 1869 taxes. However, the court significantly stated at 46 Iowa 585:

"Counsel for appellants urge that the sale of the land for taxes frees it in the hands of the purchaser from any and all liens thereon for delinquent taxes for prior years . . . * * *

"The rule contended for by appellants would obtain if a stranger to the original title were now presenting this certificate and demanding a deed."

In *Hough v. Easley,* 1877, 47 Iowa 330, property was sold for delinquent taxes for the years 1864 and 1865, but not for the delinquent 1860 and 1861 taxes. The court held that the sale divested the property of the lien for the 1860 and 1861 taxes. The court stated at 47 Iowa 331-2 in construing what is now §446.7 of the Code pertaining to delinquent taxes:

"The sale discharges, is in payment of, all taxes — not of taxes for which the land is sold, but of *all* taxes due and unpaid. We know of no rule of interpretation which will permit us to restrict the language and apply it exclusively to the taxes of the years for which the land is sold, or to such taxes as may be set out in the advertisement or other tax sale proceedings. We have nothing to do with the policy of the statute, but its reason and object, when interpreted according to its plain meaning, are not difficult to discover." (emphasis supplied by the court).

The above-quoted language was set forth, with approval by the court in *In Re Estate of Hager,* 1931, 212 Iowa 851, 235 N.W. 563 at 212 Iowa 866.

Applying the aforementioned principles of law, it is clear that the tax sale for the 1968 taxes discharged all taxes due and unpaid, including the prior suspended taxes which were due and unpaid. Consequently, based upon the factual situation presented, the treasurer is required to make out a deed and deliver it to the buyers and enter an appropriate satisfaction of the suspended taxes pursuant to §427.12 of the Code. Thus, the answer to your first question is yes, the answers to your second and third questions are no, and the answer to your fourth question is no since the lien for unpaid suspended taxes was discharged.

With reference to your fifth and sixth questions, §445.23, Code of Iowa, 1973, provides:

"The county treasurer, when requested to do so by anyone having an interest therein, shall certify in writing the entire amount of taxes and assessments due upon any parcel of real estate, together with all sales of the same for unpaid taxes or assessments shown by the books or records in his office, with the amount required for redemption from the same, if still redeemable, if he is paid or tendered his fees for such certificate at the rate of one dollar for the first parcel in each township, town, or city, and twenty cents

for each subsequent parcel in the same township, town, or city, and in computing such fees each description in the tax list shall be reckoned a parcel."

Section 445.24, Code of Iowa, 1973, provides:

"Such certificate, with the treasurer's receipt showing the payment of all the taxes therein specified, and the auditor's certificate of redemption from the tax sales therein mentioned, shall be conclusive evidence for all purposes, and against all persons, that the parcel of real estate in said certificate and receipt described was, at the date thereof, free and clear of all taxes and assessments, and sales for taxes or assessments, except sales whereon the time of redemption had already expired and the tax purchaser had received his deed."

Section 445.25, Code of Iowa, 1973, provides:

"For any loss resulting to the county, or any subdivision thereof, or to any tax purchaser, or taxpayer, from an error in said certificate or receipt, the treasurer and his sureties shall be liable on his official bond."

These statutes relate to the same subject matter and must be construed together, *Northern Natural Gas Company v. Forst,* 1973, Iowa, 205 N.W.2d 692. Thus, it is clear that for §445.25 to be applicable, the treasurer must have issued a certificate and receipt as provided for in §§445.23 and 445.24, upon request of someone having an interest as provided therein. From the factual situation which you presented in your opinion request, no such certificate or receipt was issued by the treasurer nor was any requested. Consequently, it is the opinion of this office that §445.25 of the Code is not applicable and, accordingly, the treasurer has no liability thereunder.

November 7, 1974

ENVIRONMENTAL PROTECTION: Soil Conservation District Commissioners — residence qualifications — §§69.2 and 467A.6, Code of Iowa, 1973. Change of residence of a soil conservation district commissioner from the voting precinct from which he was elected to a voting precinct in which another commissioner resides creates no automatic vacancy in the office of either commissioner but does create a disability which, if circumstances remain unchanged, will make the commissioner whose term expires first ineligible for reelection. (C. Peterson to Greiner, Director, Department of Soil Conservation, 11-7-74) #74-11-6

Mr. William H. Greiner, Director, Department of Soil Conservation: Reference is made to your request for an opinion as to whether a vacancy occurs in the office of soil conservation district commissioners when one commissioner moves from the voting precinct in which he resided at his election into a precinct in which another commissioner then resides.

The general statute governing vacancies in civil offices is Chapter 69, Code 1973, which, with respect to residence requirements, provides:

"69.2 Every civil office shall be vacant upon the happening of either of the following events: * * *

"3. The incumbent ceasing to be a resident of the state, district, county, township, city, town or ward by or for which he was elected or appointed, or in which the duties of his office are to be performed."

No vacancy is created under this statute since soil district commissioners are not elected "by or for" a given voting precinct and the duties of his office are performed within the entire district.

We note that the office of soil district commissioner is a wholly statutory office and the qualifications thereof are contained in Section 467A.6, Code of Iowa, 1973, in the following terms:

"467A.6 Appointment, qualifications and tenure of commissioners. The governing body of the district shall consist of five commissioners, elected as provided in section 467A.5, no more than one of whom shall be a resident of any one voting precinct established pursuant to chapter 49. Any person shall be eligible to the office of commissioner who is a qualified elector and resides within the jurisdiction of the district . . ."

The Iowa Supreme Court, in *State v. Huegle,* 1907, 135 Iowa 100, 112 N.W. 234, stated:

"It is within the exclusive province of the Legislature to fix the qualifications for public office, and the courts have no concern therewith except to see that the statutes are observed. . . . Moreover, the Legislature, in the absence of constitutional prohibition, may at pleasure alter or add to the qualifications for office. . . . And an office created by statute may be abolished, the term increased, or diminished, the manner of filling it changed by will of the Legislature at any time even during the term for which the then incumbent was elected or appointed. It may also declare the office vacant, or abolish the office by leaving it devoid of duties. . . ."

State v. Boyles, 1925, 199 Iowa 398, 202 N.W. 92, involved the move by one member of a county board of supervisors from the township from which elected to another township in which another member resided. The pertinent statute provided that "No member shall be elected who is a resident of the same township with either of the members holding over." In its opinion, the Court stated:

"We cannot enlarge the terms of the statute. The time fixed by the legislature for determining qualification was, for some reason, the time of the election, and not the time for taking the office. The prohibition which the legislature saw fit to fix is against the election of one from the same township as a member of the board of supervisors 'holding over.' The legislature evidently was of the opinion that the man who was elected as a member of the board of supervisors from a certain township would continue his residence in said township during his term of office; and no provision was made in the statute in regard to the situation where a man elected from one township became a resident of another township before the time when he should qualify as a member of the board of supervisors. Appellant's contention is that, under the facts stated, Adamson, who was elected the same day as appellee, but who took office one year before the term of appellee began, was, as to appellee, 'holding over,' within the meaning of this statute, at the time appellee's term began. As before stated, the legislature fixed the time to determine the qualification of members of the board of supervisors as of the date of the election. That is the language of the statute, and no reference to the time of taking office is made therein. * * *

"Appellant argues, with much force and plausibility, that the purpose of the legislature was to prevent two persons from being members of the board of supervisors who were residents of the same township. If this be deemed to have been the purpose of the legislature, the statute is not free from ambiguity and inconsistency in expressing such purpose. It is not so written."

In an opinion of this office rendered April 8, 1957, (1958 OAG 73) we advised that removal of residence by a member of the board of review from the township from which he was appointed to a township in which another

member of the board resides creates no automatic vacancy although a disability is thereby created which, if circumstances remain unchanged, would prevent reappointment of the member whose term expired first. As to qualifications, the pertinent statute (§442.1, Code 1954) provided that "The board as selected shall include at least one farmer, one registered real estate broker, and at least one person experienced in the building and construction field . . . No two members of the board of review shall be citizens of the same town or township . . ." We concluded that the physical proximity of these provisions gave rise to an inference that the words "as selected" related to the residence as well as occupation requirements. Necessarily therefore the qualifications relate to eligibility for selection or appointment and attach at the time thereof rather than continuing throughout the term.

We are, therefore, of the opinion that change of residence by a soil district commissioner from the voting precinct from which he was elected to voting precinct in which another commissioner resides creates no automatic vacancy in the office of either commissioner but does create a disability which, if circumstances remain unchanged, would make the commissioner whose term expired first ineligible for reelection.

November 7, 1974

COURTS: Clerk of District Court. Clerk of district court lacks authority to make time deposits or invest funds presently held in a checking account. (Nolan to Rodenburg, Pottawattamie County Attorney, 11-7-74) #74-11-7

Lyle A. Rodenburg, Pottawattamie County Attorney: Your letter of October 5, 1974, has been received. Therein you asked an opinion on:

"Our Clerks of Court in the State of Iowa handle considerable amounts of money in what they call a Trust and Tender Account. The funds in this account are derived from cash bail bonds and pre-paid probate, and other fees. Our clerk's present balance in Pottawattamie County is approximately $169,000.00, which he has been maintaining in a checking account. It is my understanding he would have an average balance from approximately $150,000.00, other things remaining equal.

"The question presented is whether or not the clerk may lawfully place these moneys in a Certificate of Deposit or interest bearing account under the existing law.

"The second question presented is, in the event the clerk is entitled to invest these funds, in what fund would the interest proceeds be assigned?"

Section 606.16, Code of Iowa, 1973, provides:

"He shall, on the first Monday in January and July of each year, pay into the county treasury, for the use of the county, all other fees not belonging to his office, in his hands at the date of preceding payment and still unclaimed."

Code Section 453.1, as amended by §28, Chapter 282, Laws of the 65th G.A., 1973 Session, appears to control in this instance and provides in pertinent part:

"All funds held in the hands of the following officers . . . shall be deposited in banks as are first approved by the appropriate governing body as indicated: . . . clerk of the district court . . . by the board of supervisors; . . . provided, however, that the treasurer . . . of each political subdivision shall invest all funds not needed for current operating expenses in time

certificates of deposit in banks listed as approved depositories pursuant to this chapter or in investments permitted by section four hundred fifty-two point ten (452.10) of the Code . . . ."

The statute set out above designates the county treasurer the officer having responsibility for the investment of county funds not needed for current operating expenses. The doctrine expressio unius exclusio alterius applies. Accordingly, it is the opinion of this office that the Clerk of Court lacks power to make time deposits or other investments of funds in his hands.

November 13, 1974

LIQUOR, BEER & CIGARETTES: Authority to purchase real estate for the purposes of establishing retail liquor stores. Sections 123.20 (2)(3) and 123.23, 1973 Code of Iowa. The Director of the Iowa Beer and Liquor Control Department does not have the authority to purchase real estate for the purpose of establishing retail liquor stores. (Coriden to Gallagher, Director, 11-13-74) #74-11-8

Mr. R. A. Gallagher, Director, Iowa Beer & Liquor Control Department: You have requested an interpretation of Section 123.20(3), 1973 Code of Iowa, which gives the Director of the Iowa Beer and Liquor Control Department the power "(t)o rent, lease, or equip any building or any land necessary to carry out the provisions of this chapter." Your question was:

". . . whether or not, under the present laws, the director or the Department has authority to purchase real estate for purposes such as the establishment of a retail store."

We are of the opinion that, at present, no such authority exists.

Section 123.20(2), 1973 Code of Iowa, gives the director the power "to establish, maintain, or discontinue state liquor stores . . . ," and Section 123.23, Code of Iowa, states that:

"(t)he department shall establish and maintain . . ., a state liquor store or stores for storage and sale of alcoholic liquor . . . ."

The word "establish" has, at times, been interpreted to be synonymous with the word "purchase", *Royal v. City of Des Moines,* 191 N.W. 377, 383, 195 Iowa 23, 38; see also, 30A C.J.S., *Establish,* at 1030, and therefore, one could argue that the use of the word "establish" in these Sections gives the director the power to purchase property.

However, the use of the term "establish" is extremely general and variable:

". . . and its meaning depends on the connection in which it is used, the subject to which it is applied, and the circumstances in which it is employed," 30A C.J.S., supra, at 1027.

In the instant case, Sections 120.20(2) and 123.23 must be read together with Section 123.20(3), for as the Iowa Supreme Court pointed out in *Olson v. District Court,* 55 N.W.2d 339, 340, 243 Iowa 1211,___(1952):

"In construing an act or connected statutes, the sections thereof should be considered together in the light of their relation to the whole."

Consequently, it seems clear that the words "rent" and "lease" in Section 123.20(3) act as a restriction on the term "establish" as it is used in Sections 123.20(2) and 123.23, and the director and the Department are precluded un-

der present law from purchasing real property for the purpose of establishing a retail liquor store.

November 13, 1974

IPERS: Chapters 97B, 442 and 444. School districts and counties may levy taxes in excess of the limitations of Chapters 442 and 444 in order to meet their obligations under the Iowa Public Employees Retirement System, Chapter 97B. (Kelly to Curtis, State Senator, 11-13-74) #74-11-9

Warren E. Curtis, State Senator: This opinion is in response to your request dated October 10, 1974, regarding employer contributions into the Iowa Public Employee's Retirement System, IPERS. Your request stated:

"Section 97B.9, subsection 3, of the *Code of Iowa* (1973) authorizes and directs political subdivisions to levy taxes sufficient to meet their obligations of any tax is needed.

"Cities in the Municipal Code (Acts of the Sixty-fourth General Assembly, 1972 Session, Chapter 1088, section 87, subsection 1) are authorized to establish a trust and agency fund for purposes including pension and related employee benefit funds. The trust and agency fund does not have a stated limitation as does the city general fund.

"School districts and counties pay the costs of IPERS from their general funds which are limited under chapter 442 of the Code, as amended by Chapter 258 of the Acts of the Sixty-fifth General Assembly, 1973 Session, and House File 1121, Sixty-fifth General Assembly, 1974 Session, and section 444.9 of the Code, respectively.

"The Committee's question is whether the provisions of section 97B.9 allow separate additional levies by school districts and counties for IPERS contributions notwithstanding the limitations on their general funds stated in chapters 442 and 449 of the Code."

It should first be noted that laws creating pension rights are to be liberally construed with the view of promoting the objects of the Legislature, see for eg. *Flake v. Bennett,* 261 Iowa 1005, 756 N.W.2d 849 (1968) and *Rockenfield v. Kuhl,* 242 Iowa 213, 46 N.W.2d 17 (1951).

Section 97B.9, subsection 3, provides:

"Every political subdivision is hereby authorized and *directed* to levy a tax sufficient to meet its obligations under the provisions of this chapter if any tax is needed." [Emphasis mine]

The language and mandate in the Legislative construction of Chapter 97B is clearly expressed in this provision. Once again we are faced with a special statute, Chapter 97B, conflicting with some general legislation, Chapters 442 and 444. Our high court has consistently held that when a general statute is in conflict with a specific statute, the latter generally prevails, whether enacted before or after the general stature. *Llewellyn v. Iowa State Commerce Commission,* 200 N.W.2d 881 (Iowa 1972). See also §4.7, Code of Iowa, 1973.

In this particular instance, it is this Office's opinion that the IPERS statute has precedent over the tax levy provisions. Our opinion is bolstered by the judiciary's liberal enforcement of our State pension laws. See, *Johnson v. City of Red Oak,* 197 N.W.2d 584 (Iowa 1972). Therefore, sufficient funds may be acquired through tax levies to meet county and school IPERS' obligations

even though such levies conflict with the limitations found in Chapters 442 and 444 of the Code of Iowa 1973.

November 18, 1974

STATE FAIR BOARD: Purchasing. §§19B.3(1), 173.16, 173.17, Code of Iowa, 1973; Chapter 121, Acts, 65th G.A., §20, 1973. The Department of General Services centralized purchasing and vehicle dispatcher procedures apply to the State Fair Board. (Haesemeyer to McCausland, Director, Department of General Services, 11-18-74) #74-11-10

Mr. Stanley L. McCausland, Director, Department of General Services: You have requested an attorney general's opinion with respect to the following:

"1. Is the State Fair Board 'exempted by law' from the General Services' centralized purchasisng and vehicle dispatchers' procedures?

"2. If they are not exempt, to what extent are they subject to the rules, regulations, and procedures established by the centralized purchasing and vehicle dispatchers' divisions?"

Section 19B.3(1), Code of Iowa, 1973, states that the duties of the director of the department of general services shall include:

"1. Establishing and developing, in cooperation with the various state agencies, a system of uniform standards and specifications for purchasing. When the system is developed all items of general use shall be purchased through the department, except items used by the highway commission, institutions under the control of the board of regents, the commission for the blind, and any other agencies exempted by law."

Chapter 19B goes further to ensure equitable purchasing practices by stating that the director shall have no pecuniary interests directly or indirectly in any contract for supplies furnished to the state and that he shall whenever feasible provide for competitive bids on items to be purchased. Chapter 1, General Services Department, Iowa Department Rules, 1973, further expands on these competitive bidding practice rules.

Section 21.1(4), Code of Iowa, 1973, as amended by Chapter 121, Acts, 65th G.A., §20, 1973, states:

"* * *

"4. The state vehicle dispatcher shall purchase all new motor vehicles for all branches of the state government, except the state highway commission, institutions under the control of the state board of regents, the commission for the blind, and any other agencies exempted by law. Before purchasing any motor vehicle, he shall make requests for public bids by advertisement and he shall purchase the vehicles from the lowest responsible bidder . . . ."

It is evident from the foregoing that the centralized purchasing and state vehicle dispatcher were enacted to effectuate honest, economical, and efficient state agency purchasing practices, and it is specifically stated that all agencies must operate within the parameters of these practices except those exempted by law.

Section 173.16, Code of Iowa, 1973, states:

"All expenses incurred in maintaining the state fair grounds and in conducting the annual fair thereon . . . shall be recorded by the secretary and paid from the state fair receipts . . . ."

Section 173.17, Code of Iowa, 1973, states:

"The board shall prescribe rules for the presentation and payment of claims of the state fair receipts and other funds of the board and no claims shall be allowed which does not comply therewith.

Section 173.18, Code of Iowa, 1973, states:

"No claim shall be paid by the treasurer except upon a warrant signed by the president and secretary of the board . . . ."

It does not appear that the state fair board is exempted either specifically or by any fair implication from the centralized purchasing and state vehicle dispatcher's procedures, and accordingly, we must conclude that such board is subject to both the centralized purchasing requirements of Chapter 19B and the state vehicle dispatcher provisions of Chapter 21. However, since the state fair board has total control over receipt and disbursement of the main portion of its operating funds (disregarding that small portion which is appropriated), and since the state fair board conducts a number of operations and incurs a number of expenses which might be considered impracticable, difficult, or overly costly for the department of general services to handle, it would appear to be within the proper administrative authority of the two respective agencies to meet and devise rules as to which items, and services should be considered those of general use which should, therefore, be purchased by the department of general services, and which items and services are of such an extraordinary or novel nature that they should be purchased by the state fair board. Such rules, if agreed upon in advance, would not only minimize the amount of conflict between the two respective agencies, but would also expedite the efficient and economical purchasing of services and items for the state fair board.

November 13, 1974

ELECTIONS: Voting Machines, Write-In Votes. §§49.99, 50.12, Code of Iowa, 1973; §§50.24, 52.22, Code of Iowa, 1973, as amended respectively by §230, Chapter 136, 65th G.A., First Session (1973) and §51, Chapter 1101, 65th G.A., Second Session (1974). Stickers or pasters may be used to cast write-in votes on voting machines but they must be placed in the correct slot on the machine. Other write-in votes are sufficient if at least the last name of the candidate is used where there are no other persons with the same last name who would be eligible for the office. The canvass by the board of supervisors should be made solely from the tally lists. (Haesemeyer to Dunn, Special Asst. Hardin County Attorney, 11-13-74) #74-11-11

Mr. William N. Dunn, Special Assistant Hardin County Attorney: Reference is made to your letter of November 5, 1974, in which you state:

"At the General Election held November 5, 1974, Jim R. Sween was a write-in candidate for county attorney. Voting machines were utilized in the election and the county attorney slot on the machine was number 15. Stickers were distributed to enable people to paste on the candidate's name in Slot 15. I would appreciate your opinion as to whether or not the use of said stickers as opposed to writing in the name of the candidate would constitute a valid vote.

"Some of the stickers were placed in slots adjacent to Slot No. 15 and I would appreciate your opinion as to whether or not these stickers are to be counted as a vote for county attorney.

"In some cases the initials 'JRS' were written in the slot. There are no attorneys with these initials in Hardin County and I would appreciate knowing whether these votes should be counted.

"In some cases only the name 'Sween' was written in. There are no Sweens in Hardin County who would be qualified to serve as county attorney except Jim R. Sween. I would appreciate your opinion as to whether or not these votes should be counted.

"In some cases only the name 'Jim' was written in Slot 15 and while Jim R. Sween is the only attorney whose given name is 'Jim' there is one other attorney whose first name is 'James' and is nicknamed 'Jim' and I would appreciate your opinion as to whether or not these ballots are to be counted for Mr. Sween.

"I would also appreciate knowing whether under the provisions of Chapter 50.24 of the 1973 Code of Iowa as amended, the Board of Supervisors are authorized to open the machines for verifying the count or if their canvass is to be made solely of the tally lists."

Section 49.99, Code of Iowa, 1973, provides:

"The voter may also insert in writing in the proper place the name of any person for whom he desires to vote and place a cross or check in the square opposite thereto. The writing of such name shall constitute a valid vote for the person whose name has been written on the ballot without regard to whether the voter has made a cross or check opposite thereto. The making of a cross or check in a square opposite a blank without writing a name therein, shall not affect the validity of the remainder of the ballot."

While it is to be observed that the statute is silent on the question of using stickers for the purpose of casting write-in votes, several opinions of the Attorney General issued in the past have approved this method of voting. 1925-26 O.A.G. page 253, 1923-24 O.A.G. page 162, 1916 O.A.G. page 162. Accordingly, it is our opinion that the use of stickers placed in the appropriate place on the voting machine is a permissible method of casting write-in votes.

The answer to your second question is found in §52.16, as amended by §228, Chapter 136, 65th G.A., First Sesstion (1973) and §50, Chapter 1101, 65th G.A., Second Session (1974), which provides in relevant part:

" * * *

"Ballots voted for any person whose name does not appear on the machine as a nominated candidate for office, are herein referred to as independent ballots. * * *

"An independent ballot must be cast in its appropriate place on the machine, or it shall be void and not counted."

Thus, stickers placed in slots adjacent to Slot No. 15 may not be counted.

As we have pointed out, the statutes do not specify how names are to be written on ballots. Hence, it is necessary to fall back on certain general principles enunciated by the Iowa Supreme Court in reported cases. For example, the language of a ballot is to be construed in the light of all the facts surrounding the election, and if it expresses the intention of the voter beyond reasonable doubt it is sufficient, though technically inaccurate. *Hawes v. Miller,* 1881, 56 Iowa 395, 9 N.W. 307. In the interpretation of disputed ballots, the primary consideration is to arrive at the intent of the voter. *Beck v. Cousins,* 1961, 252 Iowa 194, 106 N.W.2d 584, 86 A.L.R.2d 1019. Accordingly, in answer to your next three questions, it would be our opinion that mere use of the initials "JRS" would be insufficient. While it might be argued that

such designation adequately expresses the voter's intent, we would be inclined to the view that at least the candidate's last name or some reasonably correct spelling of the same be used. Since as you point out there are no Sweens in Hardin County who would be qualified to serve as county attorney except Jim R. Sween, it is our opinion that the insertion of the name "Sween" would be sufficient. However, the mere insertion of the name Jim should not be counted as a vote cast for Jim R. Sween since there is another attorney in the county whose first name is "James" and is nicknamed "Jim".

In our opinion, the canvass conducted by the board of supervisors is to be made solely from the tally list. Sections 50.24, 52.22, as amended by §230, Chapter 136, 65th G.A., First Session (1973) and §51, Chapter 1101, 65th G.A., Second Session (1974) and §50.12.

November 18, 1974

LICENSES: Continuing Education Requirements. §154.6, Code of Iowa, 1973, as amended by S.F. 277, 65th G.A., §119, 1974 Session. The Board of Optometry Examiners is specifically authorized by statute to recognize local optometric study group meetings which shall be equivalent to attendance at the annual educational program of the Iowa Optometric Association. (Haesemeyer to Egenes, State Representative, 11-18-74) #74-11-12

Honorable Sonja Egenes, State Representative: In response to your request, we issued O.A.G. 74-10-15, in which we stated that S.F. 277, Acts, 65th G.A., 1974 Session, imposed a continuing education requirement only upon accounting licensees. By our opinion issued today, we supplement O.A.G. 74-10-15 by noting that §119 of S.F. 277 amends §154.6, Code of Iowa, 1973, but specifically continues the continuing education requirements provided for therein.

"Every license to practice optometry shall expire annually. Application for renewal of such license shall be made in writing to the department of health at least thirty days prior to the annual expiration date, accompanied by the required renewal fee and the affidavit of the licensee or other proof satisfactory to the department and to the Iowa state board of optometry examiners, that said applicant has attended, since the issuance of the last license to said applicant, an additional program or clinic as conducted by the Iowa optometric association, or its equivalent, for a period of at least two days. . . . In lieu of attendance at the said annual educational program or clinic, it shall be the duty of the board of optometry examiners to recognize and prove attendance at local optometric study group meetings as shall, in the judgment of said board, constitute an equivalent to attendance at the annual educational program of said association."

While the constitutionality of this continuing education requirement has not been adjudicated, the discussion in O.A.G. 74-10-15 is applicable thereto, and is dispositive of the constitutional issue. Additionally, by specifically reinstituting the continuing education requirement for optometric licensees, the legislature has tacitly approved the desirability of such a requirement for that profession. Accordingly, we find that in addition to creating a continuing education requirement for accounting licensees, the legislature has specifically reaffirmed the continuing education requirement for optometric licensees.

November 18, 1974

REGIONAL PLANNING COMMISSIONS: Chapters 453, 454, 28E. Public monies controlled by Regional Planning Commissions do not have to be

placed in public depositories pursuant to Chapter 453 of the Code nor are they afforded the protection of the State Sinking Fund under Chapter 454. (Kelly to Baringer, State Treasurer, 11-18-74) #74-11-13

Mr. Maurice E. Baringer, Treasurer of State: This opinion is in response to your request dated August 26, 1974, concerning Regional Planning Commissions. Your letter stated:

"We have received a request from Area 6 Regional Planning Commission to determine whether or not they are entitled to protection of their funds under Chapter 454, Code of Iowa.

"It is our understanding that Area 6 Regional Planning Commission is being organized under Chapter 28E, Code of Iowa, Joint Exercise of Governmental Powers.

"Our question is: Does Chapter 28E, Code of Iowa, obligate Area 6 Regional Planning Commission to comply with the provisions of Chapter 453 and Chapter 454 of the Code of Iowa?"

There are several Code provisions dealing with these areas that should be initially reviewed in the resolution of this matter. Section 28E.3 concerning the joint exercise of governmental powers states:

"Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privilege or authority, and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency."

Section 28E.7 further provides:

"No agreement made pursuant to this chapter shall relieve any public agency of any obligation or responsibility imposed upon it by law except that to the extent of actual and timely performance thereof by a joint board or other legal or administrative entity created by an agreement made hereunder, said performance may be offered in satisfaction of the obligation or responsibility."

Section 28E.3 authorizes the use of powers normally held solely by one state, county, or municipal agency to be exercised jointly with other agencies. Section 28E.7 basically provides that all mandates imposed upon governmental bodies under the laws of this State cannot be circumvented by any agreement established pursuant to Chapter 28E. However §§28E.3 and 28E.7 do not permit the joint utilization of powers not usually held by a governmental body. Chapters 453 and 454 of the Code of Iowa impose specific duties upon certain officials of the State and other political subdivisions. Section 453.1 was recently amended by the Legislature; it now states:

"All funds held in the hands of the following officers or institutions shall be deposited in banks as are first approved by the appropriate governing body as indicated: For the treasurer of state, by the executive council; for the county treasurer, recorder, auditor, sheriff, township clerk, clerk of the district court and judicial magistrate, by the board of supervisors, for the city or town treasurer, by the city or town council; for the county public hospital or merged area hospital, by the board of hospital trustees; for a memorial hospital, by the memorial hospital commission; for a school corporation, by the board of

school directors; provided, however, that the treasurer of state and the treasurer of each political subdivision shall invest all funds not needed for current operating expenses in time certificates of deposit in banks listed as approved depositories pursuant to this chapter or in investments permitted by section four hundred fifty-two point ten (452.10) of the Code. The list of public depositories and the amounts severally deposited therein shall be a matter of public record. The term, 'bank' means bank or a private bank, as defined in section five hundred twenty-four point one hundred three (524.103) of the Code."

Only those officers and institutions specifically listed in §453.1 are required to deposit funds in their possession in designated depositories. The expressed mention in a statute of one thing implies exclusion of another thing; see for example, *North Iowa Steel Co. v. Stanley,* 253 Iowa 355, 172 N.W.2d 364 (1962). A Regional Planning Commission does not appear to fall into any of the classifications designated in §453.1 of the Code. More specifically, §473A.1 states in part:

"The joint planning commission shall be *separate and apart from the governmental units creating it,* may sue and be sued, contract for the purchase and sale of real and personal property necessary for its purposes, and shall be a juristic entity as the term is used in section 97C.2, subsection 6." [Emphasis added]

The purpose of the State Sinking Fund, Chapter 454, is to secure payment of deposits made pursuant to Chapter 453. It is our opinion that monies held by a Regional Planning Commission do not have to be placed in State depositories, nor are they afforded the protection of the State Sinking Fund.

November 19, 1974

CITIES AND TOWNS: Lease of Airport Property — §§330.12 and 368.35, Code of Iowa, 1973; §§16, 199 and 270, Chap. 1088, Acts of the 64th G.A., Second Session. If the lease of municipal airport property exceeds three years, notice must be given and a public hearing held. (Blumberg to Patchett, State Representative, 11-19-74) #74-11-14

The Honorable John E. Patchett, State Representative: We are in receipt of your opinion request of June 15, 1974, regarding a municipality leasing space in its airport pursuant to either §330.12 or §368.35 of the Code. You specifically asked:

"1. Is a duly constituted airport commission governed by the provision of Section 368.35 of the Iowa Code when leasing airport property or does airport property constitute a special exception the lease of which is controlled only by the provisions of Section 330.12 of the Iowa Code?

"2. If Section 368.35 applies to the leasing of airport property by an airport commission, does the lease of airport property for purposes consistent with the objectives of maintaining a municipal airport constitute lease for 'municipal purposes' within the meaning of Section 368.35 even though such airport property is leased to private individuals, corporate or otherwise?

"3. Finally, regardless of the answers to questions 1 and 2, does Section 368.35 require the publication of any lease agreement in its entirety or does the publication of only the essential terms such as a description of property to be leased, the rental fee, the lease term, the lease purpose and the parties involved satisfy the statute's requirements?"

Section 368.35 of the Code provides that a municipality may lease any municipal property not needed for municipal purposes by a two-thirds vote of the council. If the proposed lease is for a period exceeding three years, a notice of the terms shall be published pursuant to §618.14, together with the date, time and place for a hearing on the matter. Section 330.12 of the Code provides that cities and towns may lease any portion of airport property, if not injurious to the public, for a period not exceeding fifty years.

These two sections are not inconsistent. Sections 368.35 applies to all municipal property, and provides for a public hearing if the length of the lease exceeds three years. Section 330.12 provides that municipal airport property may be leased for only fifty years. This does not mean that the notice and public hearing provision of 368.35 does not apply.

As of July 1, 1975, the new City Code, Chapter 1088, Acts of the 64th General Assembly, will take effect. At that time, §368.35 will be repealed by §199 of Chapter 1088, and §330.12 will be amended by §270 of Chapter 1088. The amendment to §330.12 takes out all references of cities and towns. Section 16 of Chapter 1088 replaces §368.35 in nearly the identical language. Thus, after July 1, 1975, only section 16 of Chapter 1088, which provides for public hearings if the lease exceeds three years, will control.

In answer to your second question, leasing of space for car rental agencies, restaurants and the like are not within the meaning of "municipal purposes" in §368.35. What that part of §368.35 means is that if the city is not going to use the property for a municipal purpose it may lease the property. Thus, if the municipality has no use of the space in question, it may lease it.

Finally, with respect to your last question, §368.35 provides for a notice of the terms of the proposed lease. This is purely a fact question, determinative upon the contents of the lease. Suffice it to say that if the notice contains sufficient information for the public to understand what is being leased, for how long, the amount of money involved, to whom the lease is made, and for what purpose, it should be sufficient. However there may be other terms of the lease that the public should know about. If there is some doubt as to how much to put in the notice, publishing the entire lease will no doubt satisfy the requirements of the section.

Accordingly, we are of the opinion that if lease of municipal property exceeds three years, notice should be given and a public hearing held. Our prior opinion on this subject, Blumberg to Patchett, dated August 2, 1974, is hereby withdrawn.

November 19, 1974

LIBRARIES: State Librarian; Power to Sign Contracts. Chapter 199, 65th G.A., First Session (1973). The state librarian does not have the power to sign contracts unless and until such power is specifically granted to him by the state library commission by published administrative rules. (Haesemeyer to Porter, State Librarian, 11-19-74) #74-11-15

Mr. Barry L. Porter, State Librarian: You have requested an opinion of the Attorney General on the question of whether or not the state librarian has the authority to sign contracts.

Chapter 199, 65th G.A., First Session (1973), creates the state library commission and the position of state librarian, and defines their respective duties as follows:

"Sec. 4. NEW SECTION. *Duties of commission.* The state library commission shall:

"1. Adopt and enforce rules and regulations necessary for the exercise of the powers and duties granted by this Act and proper administration of the department.

"2. Adopt rules providing penalties for injuring, defacing, destroying, or losing books or materials under the control of the commission. All fines, penalties, and forfeitures imposed by these rules may be recovered in an action in the name of the state and deposited in the general fund.

"3. Develop and adopt plans to provide more adequate library services to all residents of the state.

"4. Charge no fee for the use of libraries under its control or for the circulation of material from libraries, except where transportation costs are incurred making materials available to users. The costs may be used as a basis for determining a fee to be charged to users.

"5. Give advice and counsel to all public libraries in the state and to all political subdivisions which may propose to establish libraries.

"6. Print lists and circulars of information and instruction as it deems necessary.

"7. Continuously survey the needs of libraries throughout the state, and ascertain the requirements for additional libraries and for improving existing libraries to provide adequate service to all residents of the state.

"8. Obtain from all public libraries reports showing the condition, growth, development and manner of conducting these libraries and at its discretion, obtain reports from other libraries in the state and make these facts known to the citizens of Iowa.

"9. Encourage the implementation of the county library law, and of countywide library service through contracts with the boards of supervisors pursuant to chapter three hundred seventy-eight (378) of the Code.

"Sec. 5. NEW SECTION. *Duties of state librarian.* The state librarian shall:

"1. Appoint the technical, professional secretarial, and clerical staff necessary, within the limits of available funds, to accomplish the purposes of this Act subject to the provisions of chapter nineteen A (19A) of the Code.

"2. Act as secretary to the commission, keeping accurate records of the proceeding of the commission.

"3. Keep accurate accounts of all financial transactions of the department.

"4. Supervise all activities of the Iowa library department.

"5. Provide technical assistance in organizing new libraries and improving those already established.

"6. Perform such other library duties as may be assigned to him by the commission. * * *

"Sec. 7. NEW SECTION. *Money grants.* The commission is authorized and empowered to receive, accept, and administer any money or moneys appropriated or granted to it, separate and apart from the general library fund, by the federal government or by any other public or private agencies.

"The fund shall be administered by the commission, which shall frame bylaws, rules, and regulations for the allocation and administration of this fund.

"The fund shall be used to increase, improve, stipulate, and equalize library service to the people of the whole state, and for adult education and shall be allocated among the cities, counties, and regions of the state, taking into consideration local needs, area and population to be served, local interest as evidenced by local appropriations, and such other facts as may affect the state program of library service.

"Any gift or grant from the federal government or other sources shall become a part of the fund, to be used as part of the state fund, or may be invested in such securities in which the state sinking fund may be invested as in the discretion of the commission may be deemed advisable, the income to be used for the promotion of libraries."

While it is the generally recognized rule that a public officer has only that authority which is specifically conferred upon him by law, it cannot be gainsaid that said officer concomitantly has the implied powers necessary to perform the specific duties of his office. Thus, at 63 Am.Jur.2d, *Public Officers and Employees,* §305 (1972) it is said:

"Inasmuch as a public officer has only the authority that is conferred on him by law, he may make for the government he represents only such contracts as he is authorized by law to make, and he must comply with the requirements of law in respect of the manner in which, and the condition upon which, contracts may be entered into. . . . [A]nd those dealing with the officer must take notice of the extent of authority conferred on him by law. If authority is not expressly given by statute, it can only arise as an incident to the exercise of some other power. However, an officer ordinarily has those powers which are essential to the main purpose for which the office was created."

And, at 67 C.J.S., *Officers,* §102(c) (1950), "A public officer can make only such contracts or agreements or (sic) are expressly or impliedly authorized, and persons contracting with him must take notice of the extent of his authority."

Section 5 of Chapter 199, supra, confers administrative and supervisory powers upon the state librarian which, in the absence of other language, might be sufficient to support an implication of additional financial powers. However, §7 clearly mandates that the power of the purse shall vest in the library commission, and that it must adopt rules and regulations for the administration of allocated funds. Accordingly, we find that the power to contract debts and incur liabilities has been *specifically* vested in the state library commission, and the only manner in which the power to sign contracts can become vested in the state librarian, is if the commission grants such power by duly enacted administrative rules or resolution.

November 19, 1974

ENVIRONMENTAL PROTECTION: Snowmobile trails — §§107.17, 107.19, 111A.4, 28E.12, Code of 1973. State conservation commission may

contract with a county conservation board to pay from the conservation fund a portion of the cost of developing snowmobile trails. (C. Peterson to Priewert, Director, State Conservation Commission, 11-19-74) #74-11-16

Mr. Fred A. Priewert, Director, Iowa Conservation Commission: Reference is made to your request for an Opinion of the Attorney General, as clarified in discussions with members of the Commission and staff, as to whether the State Conservation Commission may use monies from the conservation fund to cost share with county conservation boards in the development of snowmobile trails.

Relevant statutes, Code of Iowa, 1973, provide, in pertinent part, as follows:

"107.17 Funds. The financial resources of said commission shall consist of three funds:

1. A state fish and game protection fund.
2. A state conservation fund, and
3. An administration fund.

The state fish and game protection fund, except as otherwise provided, shall consist of all moneys accruing from license fees and all other sources of revenue arising under the division of fish and game.

The conservation fund, except as otherwise provided, shall consist of all other funds accruing to the conservation commission.

The administration fund shall consist of an equitable portion of the gross amount of the two aforesaid funds, to be determined by the commission, sufficient to pay the expense of administration entailed by this chapter." * * *

"107.19 Expenditures. All funds accruing to the fish and game protection fund, except the said equitable portion, shall be expended solely in carrying on the activities embraced in the division of fish and game. . . . * * *

"All administrative expense shall be paid from the administration fund. * * *

"All other expenditures shall be paid from the conservation fund. * * *

"111A.4 Powers and duties. The county conservation board . . . is authorized and empowered: * * *

"2. To acquire in the name of the county by gift, purchase, lease, agreement or otherwise, in fee or with conditions, suitable real estate within or without the territorial limits of the county areas of land and water for public museums, parks, preserves, parkways, playgrounds, recreation centers, forests, wildlife and other conservation purposes and for participation in watershed, drainage and flood control programs for the purpose of increasing the recreational resources of the county. The state conservation commission . . . may, upon request of the county conservation board, designate, set apart and transfer to the county conservation board for use as museums, parks, preserves, parkways, playgrounds, recreation centers, play fields, tennis courts, skating rinks, swimming pools, gymnasiums, rooms for arts and crafts, camps and meeting places, community forests, wildlife areas and other recreational purposes, any land and buildings owned or controlled by the state conservation commission . . . and not devoted or dedicated to any other inconsistent public use. * * *

"4. To plan, develop, preserve, administer and maintain all such areas, places and facilities . . ."

"28E.12 Contract with other agencies. Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity, or undertaking which any of the public agencies entering into the contract is authorized by law to perform, provided that such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives and responsibilities of the contracting parties."

Thus, under the clear language of the cited statutes, county conservation boards are authorized to acquire by gift, purchase, lease, etc., real estate for a broad range of purposes clearly including a snowmobile trail and to plan, develop, preserve, administer and maintain all such areas and facilities.

The state conservation commission and county boards of supervisors are public agencies as defined in chapter 28E and we have consistently construed the grant of authority contained in section 28E.12 as authorizing not only the joint exercise of mutually possessed powers, but also the exercise by one agency of the power of the other in accordance with the contract. See OAG Turner to Coupal, Director of Highways, April 4, 1969; OAG Gors to Thordsen, State Senator, and Bray, State Representative, February 5, 1971; OAG Haesemeyer to Milligan, State Senator, March 17, 1971; and OAG Haesemeyer to Harbor, Speaker of House of Representatives, April 27, 1971.

Since the development of snowmobile trails is not a "fish and game" activity for which expenditures from the fish and game protection fund are authorized, any expenditure therefore shall be paid from the conservation fund under the provisions of §107.19.

Accordingly, we are of the opinion that the state conservation commission may expend funds from the conservation fund to share with a county conservation board in the cost of developing and maintaining snowmobile trails pursuant to a contract authorized by the state conservation commission and the county conservation board and which sets forth fully the purposes, powers, rights, objectives, and responsibilities of each party.

November 20, 1974

CITIES AND TOWNS: Change in Compensation for Elected Officers. §59(8), Chapter 1088, Acts of the 64th G.A., Second Session; §2, Chapter 235, Acts of the 64th G.A., First Session. Pursuant to §59(8), Chapter 1088, Acts of the 64th G.A., as amended, an increase in compensation for elected officers must be made prior to the election at which such officers are elected. (Blumberg to Monroe, State Representative, 11-20-74) #74-11-17

Honorable W. R. Monroe, State Representative: We have received your opinion request of October 10, 1974, regarding a change in compensation for city councilmen. You made specific reference to §59(8), Chapter 1088, Acts of the 64th G.A. In your situation, Burlington has elected to change its form of government effective January 1, 1976. It has also adopted the above section. You wish to know which council shall prescribe the compensation of the incoming officers.

Section 59(8) of Chapter 1088, as amended by §2, Chapter 235, Acts of the 65th G.A., provides:

"By ordinance, the council shall prescribe the compensation of the mayor, councilmen, and other elected city officers, but an increase in the compensation of the mayor shall not become effective during the term in which the in-

crease is adopted, and the council shall not adopt such an ordinance increasing the compensation of the mayor or councilmen during the months of November and December immediately following a regular city election. An increase in the compensation of councilmen shall become effective for all councilmen at the beginning of the term of the councilmen elected at the election next following the increase in compensation."

This section only applies to elected city officers.

A reading of this section makes it clear that the old council should set the compensation for all elected officers prior to November, since such an increase cannot become effective until the beginning of the term of councilmen elected at the election immediately following the increase in compensation. No mention is made in the Code of a change in compensation for non-elected officials.

Accordingly, we are of the opinion that if an increase in compensation is to be made for elected officers, it must be made prior to the election at which such officers are elected. This means here that the old council should set the compensation prior to November.

November 21, 1974

LIQUOR, BEER & CIGARETTES: Use of wine bottles for decorative or display purposes. Section 123.33, 1973 Code of Iowa. Wine bottles may be used for decorative or display purposes if the bottle is rendered unfit for reuse as a container immediately after it is emptied, if the bottle is never completely emptied, or if the bottle has never been filled. (Coriden to Gallagher, Director, Iowa Beer & Liquor Control Department, 11-21-74) #74-11-18

Mr. Rolland A. Gallagher, Director Iowa Beer & Liquor Control Department: You have requested an opinion of the Attorney General with respect to the following:

"(1) May a used bottle have a hole bored in the bottom making it unusable be used for display of decorative purposes?

"(2) Could a near empty bottle containing two or three ounces of wine or alcoholic beverages being corked be used for decorative purposes?

"(3) It has been the practice of some licensees in the state to obtain empty bottles which have never been filled with alcoholic beverages from wineries which are corked and have the foil caps and are being used for display purposes. Is this legal?"

Section 123.33, Code of Iowa, 1973, provides:

"Every holder of a liquor control license shall keep a daily record of the gross receipts of his business. *Each bottle emptied, except beer bottles, shall be broken immediately by the licensee or his agent into a container provided for that purpose.* The records herein required and the premises of the licensee shall be open to agents of the division of beer and liquor law enforcement of the department of public safety during normal business hours of the licensee." [Emphasis added]

Unless the hole was bored in the bottom of the bottle *immediately* upon its becoming empty, option (1) would be illegal because the statute clearly requires that *immediately* upon emptying a bottle the licensee must break it. The requirement that the bottle be broken does not mean that the bottle be totally demolished. It is sufficient if some action is taken promptly to render it unfit for reuse as a container.

But if the bottle is never emptied as in option (2), or was never full (making emptying it an impossibility) as in option (3), then displaying such bottles does not run contrary to §123.33. In option (3) we are talking about so-called "dummy" bottles and it is important that the cap and foil on such bottles not have been tampered with.

November 22, 1974

LIQUOR, BEER & CIGARETTES: Alcoholic liquor on the premises of a class "B" beer permit holder. Sections 123.3(31), 123.95 and 123.141, 1973 Code of Iowa. Bona fide conventions or meetings cannot legally bring their own liquor onto the premises of a class "B" beer permittee. (Coriden to Holetz, Deputy Commissioner, 11-22-74) #74-11-19

Mr. Robert G. Holetz, Deputy Commissioner, Iowa Department of Public Safety: You have requested an opinion on the following:

"Do the provisions of Section 123.95, paragraph two, Code of Iowa 1973, apply to 'bona fide conventions or meetings' bringing their own legal liquor onto the licensed premises of a class 'B' beer permittee as referred to in Section 123.141?"

Section 123.95, 1973 Code of Iowa, states that:

"It is unlawful for any person to allow the dispensing or consumption of intoxicating liquor, except sacramental wines and beer, in any establishment unless such establishment is licensed under this chapter.

"However, bona fide conventions or meetings may bring their own legal liquor onto the licensed premises if the liquor is served to delegates or guests without cost. . . ."

"Licensed premises" is defined in Section 123.3(31) of the Code to mean "all rooms or enclosures where alcoholic beverages or beer are sold or consumed under authority of a liquor control license or beer permit." Reading these two sections together, it would seem that a bonafide convention or meeting could bring liquor onto the premises of a Class "B" Beer permit holder.

However, Section 123.141, 1973 Code of Iowa, specifically states that:

"No alcoholic liquor for beverage purposes shall be used, or kept *for any purpose* in the place of business of class 'B' permittees, or on the premises of such class 'B' permittees, *at any time* . . . ." (Emphasis added)

One could argue that Section 123.141 is irreconcilable with Sections 123.3(31) and 123.95 since "licensed premises" can mean premises where beer is sold under the authority of a beer permit, and therefore Section 123.95, which says that alcoholic liquor *can be* consumed on licensed premises is in conflict with Section 123.141, which says that alcoholic liquor *cannot* be consumed on the premises of a Class "B" beer permittee. However, if these sections of the Iowa Beer and Liquor Control Act were irreconcilable, one would have to consider them in light of Section 4.8, 1973 Code of Iowa, which says that: ". . . If provisions of the same Act are irreconcilable, the provision listed last in the Act prevails." These sections are part of the same Act which went into effect on January 1, 1972. Chapter 131, Acts of the 64th General Assembly (1971). Therefore, Section 123.141 would prevail over 123.95, and it would be illegal for alcoholic liquor to be consumed on the premises of a class "B" beer permittee.

But one could just as easily reach the same conclusion by reading these sections as being not in conflict with one another. "Licensed premises", after all, is a general term — it can mean either premises covered by a liquor control license or by a beer permit. Thus, one can read Section 123.141 as being a specific exclusion within the term "licensed premises." Such an interpretation, moreover, would seem to be more in keeping with the intent of the Legislature. Obviously, when the Legislature enacted, as part of the Beer and Liquor Control Act, a provision which specifically stated that alcoholic liquor should not be kept for any purpose on the premises of a class "B" beer permittee it meant just that, and to read Section 123.95 as controlling over Section 123.141 would be to negate that clear legislative intent.

In conclusion, it would be illegal for a bona fide convention or meeting to consume alcoholic liquor on the premises of a class "B" beer permit holder.

November 25, 1974

STATEWIDE LAW ENFORCEMENT RADIO PLAN: Chapter 28E, 29C and 750, Code of Iowa (1973). County and multi-municipality radio law enforcement networks cannot be established under Chapter 29C. (Kelly to Anderson, Chief of Communications, Department of General Services, 11-25-74) #74-11-20

Glen D. Anderson, Jr., Chief of Communications, Department of General Services: This opinion is in reference to your request dated August 28, 1974, regarding the Statewide Law Enforcement Radio Plan. You specifically asked whether an integrated communications dispatch center for a county and participating municipal corporations should be established under the provisions of Chapters 28E or 29C and if these two chapters are interchangeable.

The authority for the formation of a county-wide law enforcement broadcasting system can be found in Chapter 750 of the Code of Iowa (1973). This Office has held in the past that multi-municipality and county agreements of this nature are lawful, see O.A.G., §7.10 (1965).

In response to your specific question concerning Chapters 28E and 29C, it is this Office's opinion that the two chapters are not interchangeable. Chapter 29C contains Iowa's Civil Defense Act while Chapter 28E is solely concerned with the joint exercise of governmental powers. We grant that Section 29C.7 does provide for cooperation among various governmental bodies, but this cooperation is limited by the express powers and duties designated in Chapter 29C, Chapter 29C authorizes the maintenance of communication systems, however the systems envisioned in Chapter 29C are designed for emergency situations created by natural or manmade disasters. The local cooperation encouraged in Section 29C.7 is not a catch-all for any program that a municipality or county may decide to undertake.

The construction of a county-wide law enforcement radio network is a worthwhile project and this opinion is not meant to discourage such plans, but to utilize Section 29C.7 as a basis for the network totally ignores the intent of the Iowa Civil Defense Act, Chapter 29C. The specifications and requirements of Chapter 28E are easily satisfied and this chapter provides an excellent management foundation for endeavors like county-wide radio networks.

November 25, 1974

COUNTIES AND COUNTY OFFICERS: Hospital Trustees — Chap. 147 and §347.9, Code of Iowa, 1973. An attorney may be a county hospital trustee. (Blumberg to King, Assistant Polk County Attorney, 11-25-74) #74-11-21

Mr. John H. King, Assistant Polk County Attorney: We have received your opinion request of November 5, 1974, regarding County hospital trustees. You ask whether an attorney falls within the class of "licensed practitioners" that are barred from being county hospital trustees by §347.9, 1973 Code of Iowa.

There are three prior opinions which partially define "licensed practitioner" as it is used in §347.9. In an opinion found in 1958 O.A.G. 90 this office held that a funeral director fell within that class and could not be such a trustee. In 1962 O.A.G. 234, this office again held that a funeral director could not be a trustee and extended the class to include nurses. This was based on the fact that Chapter 147 of the Code included nurse within "practitioners." This was reaffirmed by 1970 O.A.G. 738. We agree with the prior opinions that "licensed practitioner" as used in §347.9 refers to those practitioners listed in Chapter 147 and other chapters of Title VIII of the Code.

Accordingly, we are of the opinion that an attorney may be a county hospital trustee.

November 25, 1974

TOWNSHIPS: Cemeteries — §§359.30, 359.32, 349.37 and 359.38, Code of Iowa, 1973. Township trustees have no mandatory duty to employ gravediggers. (Blumberg to Straub, Kossuth County Attorney, 11-25-74) #74-11-22

Mr. Joseph J. Straub, Kossuth County Attorney: We have received your opinion request of November 19, 1974, regarding township cemeteries. You ask whether township trustees are required to provide a gravedigger for township cemeteries or whether their duties are limited to those specifically enumerated in §359.30 of the Code.

Section 359.30 provides that township trustees shall levy a tax sufficient to pay for, among other things, the necessary improvement and maintenance of cemeteries. Section 359.32 provides that the trustees may provide for perpetual upkeep of said cemeteries. The trustees shall have power to improve the cemeteries, §359.37, and may appoint persons, including watchmen, sextons, superintendents, gardeners and agents. §359.38.

There is nothing in those sections which prohibit township trustees from employing gravediggers. On the other hand there is nothing making such employment or duties mandatory upon the trustees.

Accordingly, we are of the opinion that township trustees may employ gravediggers, but such is not mandatory.

November 26, 1974

MOTOR VEHICLES: Travel Trailers and Travel Coaches, §321.430(3), Code of Iowa, 1973. The seller of a travel trailer or travel coach is not required to install the equipment required by §321.430(3). (Voorhees to Millen, State Representative, 11-26-74) #74-11-23

Floyd H. Millen, State Representative: In your letter of July 10, 1974, you stated:

"It has been called to my attention that Section 321.430(3) of the Code regarding brakes and weight equalizing hitches with sway control is being interpreted in various ways by law enforcement personnel, dealers and sellers of travel trailers and travel coaches. Some dealers are equipping travel trailers and travel coaches of 3,000 pounds or more with only the brake requirement. * * *

"'Is it the responsibility of the seller or dealer, or of the buyer to equip travel trailers and travel coaches of 3,000 pounds or more with self-actuating brakes, and weight equalizing hitches with sway control on both the trailer and the passenger car before a sale is consummated?'"

Two issues inhere in your question: 1) Does the statute require that travel trailer and coaches be equipped with both brakes (either electric or self-actuating) and weight equalizing hitch with a sway control, and 2) Does the statute impose a duty on the seller to install this equipment.

Section 321.430(3), Code of Iowa, 1973, provides:

"3. Every trailer or semitrailer of a gross weight of three thousand pounds or more, and every trailer coach or travel trailer of a gross weight of three thousand pounds or more intended for use for human habitation, shall be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, and so designed as to be applied by the driver of the towing motor vehicle from its cab, or with self-actuating brakes, and weight equalizing hitch with a sway control of a type approved by the commissioner of public safety. Every semitrailer, travel trailer, or trailer coach of a gross weight of three thousand pounds or more shall be equipped with a separate, auxiliary means of applying the brakes on the semitrailer, travel trailer, or trailer coach from the cab of the towing vehicle. Trailers or semitrailers with a truck or truck tractor need only comply with the brake requirements."

It is apparent from the plain language of the statute that travel trailers and travel coaches weighing 3,000 lbs. or more must be equipped with brakes (either electric or self-actuating) adequate to control the movement of and to stop and hold the vehicle. In addition, a weight equalizing hitch with a sway control must be installed if the trailer is being towed by a car. This latter requirement is in addition to, and not in lieu of, the aforementioned brake requirement.

The question of whether it is the responsibility of the seller to install this equipment is not explicitly answered on the face of the statute. As previously noted, §321.430(3) provides that travel trailers and coaches "shall be equipped" with the specified brakes and hitch. There is no reference to the seller nor to the sale.

On the other hand, there are provisions of Chapter 321 that impose a specific duty on the seller of a vehicle to perform certain acts. For example, §321.238(18), Code of Iowa, 1973, provides: "A person shall not sell or transfer any motor vehicle . . . unless there is a valid certificate of inspection affixed to such vehicle at the time of sale . . ."

We believe that if the legislature had intended to impose an obligation on the seller — as was done in the case of the inspection law — language similar to that contained in §321.235(18) would have been used in §321.430(3). We do

not believe that the phrase "shall be equipped" can be construed as imposing any duty on the seller to install the required equipment.

The only reference in the statute to a "sale" is that portion relating to the effective date of the requirements: ". . . This act shall apply to all new and used travel trailers sold after July 1, 1971, and on all registered travel trailers after December 1, 1973 . . ."

It should be pointed out that this sentence is completely superfluous at this point in time since the section applies to all registered travel trailers after December 1, 1973, regardless of the sale date. Hence, the first clause of the above sentence is totally inoperative, and is merely an obsolete reference.

Finally, it should be noted that neither the electric brakes nor the weight equalizing hitch are exclusively contained on the trailer. The hitch, for example, must either be bolted or welded to the frame of the towing vehicle. Similarly, the electric brake controls and actuating unit are more or less permanently installed on the towing vehicle. Since these apparatuses are just as much a part of the towing vehicle as the trailer, it is logically no more the responsibility of seller of the trailer than the seller of the towing vehicle to install the devices.

For all of the above reasons, we conclude that the seller is not required to install the equipment required by §321.430(3).

November 26, 1974

CRIMINAL LAW: Venue in OMVUI case. Section 84, Chapter 282, Acts of the 65th G.A., 1st Session. §§321.1(65), 602.4, 602.20, 748.1, 753.2, 753.20, Code of Iowa, 1973. OMVUI is a traffic violation within the meaning of §84, Chapter 282, Acts of the 65th G.A., 1st Session. OMVUI cases may be tried before the nearest district judge, district associate judge, or full-time judicial magistrate in the judicial district. (Voorhees to Oliver, Madison County Attorney, 11-26-74) #74-11-24

Mr. Jerrold B. Oliver, Madison County Attorney: You have requested an opinion as to whether OMVUI is a "traffic violation" within the meaning of §753.20, Code of Iowa, 1973, as amended by §84, Chapter 282, Acts of the 65th G.A., 1st Session, which provides:

"Traffic violations may be tried before the nearest magistrate in the judicial district in which the offense is committed."

The term "traffic violation" is not defined in the Code, nor has it received judicial interpretation. Section 321.1(65), Code of Iowa, 1973, does, however, define "traffic":

" 'Traffic' means pedestrians, ridden or herded animals, vehicles, streetcars, and other conveyances either singly or together while using any highway for purposes of travel."

From the above definition we would construe "traffic violation" to mean a violation of those laws which regulate pedestrians, vehicles, etc., while using the highways. Since the OMVUI statute regulates the conduct of the operator of a motor vehicle while using a highway, it would appear to fall within the category of "traffic violation." However, there is a further aspect to this problem. As stated above, §84, Chapter 282, establishes venue for traffic violations as the nearest "magistrate." The term "magistrate" as used in a

general sense must be distinguished from the more specific term "judicial magistrate." "Magistrate" is defined by §748.1, Code of Iowa, 1973, as including "... all judges of the supreme and district court and all district associate judges and judicial magistrates."

It is fundamental that before venue can be established, the court must first have jurisdiction. Only district judges (§602.4), district associate judges, and full time judicial magistrates (§602.60) have jurisdiction of indictable offenses. Thus, when applying §84, Chapter 282, it must be borne in mind that part-time magistrates cannot be considered in determining the location of the nearest magistrate. Of course, this section is not mandatory in that it provides that traffic violations *may* be tried before the nearest magistrate. Venue would also be in the county in which the crime was committed, as provided in §753.2, Code of Iowa, 1973.

November 27, 1974

COUNTIES AND COUNTY OFFICERS: County Homes — §252.38 and Ch. 253, Code of Iowa, 1973. Contracts for pharmaceutical supplies for a county home must be pursuant to the bidding procedure of §252.38 of the Code. (Blumberg to Potter, State Senator, 11-27-74) #74-11-25

The Honorable Ralph W. Potter, State Senator: We have received your opinion request of October 21, 1974, regarding bidding procedures for County homes. You ask whether a board of supervisors must initiate bid procedures to enter into a contract with a supplier of pharmaceuticals for a county home. You make specific reference to §252.38 of the Code which provides the board of supervisors may make contracts with the lowest responsible bidder for furnishing all supplies needed by the poor.

County homes are provided for in Chapter 253 of the Code. Section 253.2 provides that contracts and purchases may be made for a county home. There is nothing in that chapter regarding bids. However, it is apparent from reading the chapter that county homes are provided for maintenance of the poor. Therefore, §252.38 must, of necessity, apply to chapter 253. It matters not that some of the residents of a county home may be able to pay, and do pay, for the services rendered.

Accordingly, we are of the opinion that contracts for pharmaceutical supplies for a county home must be done by a bidding procedure pursuant to §252.38 of the Code.

December 3, 1974

STATE AUDITOR: Savings and Loan Associations. §534.8, Code of Iowa, 1973. Sale of real estate on contract by an association which had acquired such property through foreclosure is not in violation of §534.8 although the same is made to a director of the association unless it can be shown that funds were loaned to the director for a down payment or otherwise on the contract of sale. (Nolan to Sheppard, Supervisor, Auditor's Office, 12-3-74) #74-12-1

Mr. Richard G. Sheppard, Supervisor, Savings and Loan Associations, Office of Auditor of State: This is written in response to your request for an opinion interpreting §534.8(2), Code of Iowa, 1973. According to your letter, on the last examination of Dania Savings and Loan Association, Des Moines, Iowa, it was found that a director of the association had purchased on contract a

parcel of real estate that had been foreclosed by the association. You ask whether such action is in violation of Chapter 534 of the Code.

Section 534.8, which is pertinent to this inquiry, provides:

"It shall be unlawful for an officer, director or employee of an association: * * *

"2. To make a real estate loan to a director, officer or employee of the association, or to any attorney or firm of attorneys, regularly serving the association in the capacity of attorney at law, or to any partnership in which any such director, officer, employee, attorney or firm of attorneys has an interest, and no real estate loan shall be made to any corporation in which any of such parties are stockholders, except that with the prior approval of the board of directors a real estate loan may be made to a corporation in which no such party owns more than fifteen percent of the total outstanding stock and in which the stock owned by all such parties does not exceed twenty-five percent of the total outstanding stock: Provided, that nothing herein shall prohibit an association from making loans on the security of a first lien on the home property owned and occupied by a director, officer or employee of an association, or by an attorney or member of a firm of attorneys regularly serving the association in the capacity of attorney at law upon a two-thirds vote of the directors, the interested director not voting."

Your letter makes no reference to a loan of funds to the director for downpayment or otherwise on the contract of sale. Therefore, we assume that no such loan was made. In the absence of such an advance of funds, it is the opinion of this office that the contract of sale cannot then be considered a loan in the meaning of §534.8(2). Your letter specifies that your office objected to the transaction because the contract was "not a first lien on the property and the property was not occupied" by the director. Again, assuming that the contract of sale did not, in any way, constitute the purchase money mortgage or an attempt to merge the foreclosed mortgage of the prior owner into a continuing obligation to the savings and loan corporation, it would appear to be immaterial that the contract of sale does not constitute a first lien on the property. However, inasmuch as it would appear that more information is required with respect to the facts supporting this request for an opinion, it would appear that it will have to suffice to say that based upon the information given, the sale on contract should not be construed to be a loan.

December 3, 1974

COUNTIES: Sheriff. §338.1, Code of Iowa, 1973; Chapter 1205, Acts, 65th G.A., 1974 Session. In the absence of documentation of actual cost the sheriff shall not be reimbursed for boarding and caring for prisoners in the county jail. (Nolan to TePaske, Sioux County Attorney, 12-3-74) #74-12-2

Mr. John D. TePaske, Sioux County Attorney: You have requested an Attorney General's opinion interpreting Chapter 1205, Acts of the 65th General Assembly, 1974 Session. This legislation amends §338.1, Code of Iowa, 1973, so as to read as follows:

"The duty of the sheriff to board and care for prisoners in his custody in the county jail shall be performed by the sheriff without compensation, reimbursement or allowance therefor except his salary as fixed by law. However, the board may reimburse the sheriff for the actual cost of board furnished prisoners directly by the sheriff, upon presentation of sufficient documentation showing the actual cost and may compensate the spouse or a relative of

the sheriff for services rendered in aiding the sheriff in carrying out the provisions of this section."

Your letter inquires whether the county board of supervisors can pay for care on a per diem basis, or only reimburse the sheriff for actual expenses of care supported by receipts or other documentation.

There is a well-settled rule of statutory construction in this State that the express mention of one thing in a statute excludes all others not so mentioned. Accordingly, it is the opinion of this office that payment cannot be made to the sheriff on a per diem basis without documentation that the amount to be paid is the actual cost of board for the prisoners.

On the other hand, the spouse or a relative of the sheriff may be paid on a per diem basis for assisting the sheriff in the board and care of the prisoners.

The second question raised by your letter is whether or not the Sioux County Board of Supervisors can pay the sheriff of a neighboring county on a per diem basis for board and care furnished to Sioux County offenders transferred to his jail.

There is no doubt but that a county can enter into an agreement with a neighboring county for board and lodging of prisoners. Such agreement may reflect the cost of such care on a per diem basis. However, unless the agreement specifically provides for direct billing by the sheriff of the receiving county, he should be reimbursed his costs of feeding all prisoners by the board of supervisors of his own county.

December 6, 1974

COUNTIES: Plat Book System. §441.29, Code of Iowa, 1973; 31 U.S.C., §1222 (1974); §§23.2, 23.18, Code of Iowa, 1973; §23.1, Code of Iowa, 1973, as amended by Chapter 123, Acts, 65th G.A., §27 (1973). Reconstruction of a county plat book system is not a public improvement within the terms of Chapter 23 of the Iowa Code, and the letting of the contract therefor does not require a public hearing or competitive bids. (Haesemeyer to Oppen, Hardin County Attorney, 12-6-74) #74-12-3

Mr. Allan M. Oppen, Hardin County Attorney: In your letter of October 29, 1974, you request an Attorney General's opinion as to whether or not an expenditure of $150,000 for the adoption of a new set of plat books would be a contract upon which public hearing and competitive bids would be required under the Iowa Code. You state that the use of revenue sharing funds is being contemplated to defray part of the cost of the new plat book system.

The use of a system of plat books is specifically authorized by §441.29, Code of Iowa, 1973, and thus this project would be a valid county administration cost. 31 U.S.C., §1222(a)(1)(h) (1974) states that financial administration costs shall be valid "priority expenditures" of federal revenue sharing funds, and Title 31 imposes no further public hearing or competitive bid requirements.

However, §23.2 of the Code requires a public hearing for any public improvements costing $5,000 or more, and §23.18 requires competitive bids to be let on such an improvement. However, §23.1 states:

"The words 'public improvement' as used in this chapter shall mean any building or other construction work to be paid for in whole or in part by the use of funds of any municipality.

"The word 'municipality' as used in this chapter shall mean county . . . ."

Thus, a contract for the renovation of a county plat book system would not be a public improvement within the terms of the applicable Iowa state, but it would nevertheless be a valid public expense for the use of federal revenue sharing funds.

December 9, 1974

STATUTORY CONSTRUCTION: Public Agencies. §29F.11, 1973 Code of Iowa, is not the exclusive authority for the grant of power of eminent domain to a Chapter 28E public agency and in many cases is not applicable. (Nolan to DenHerder, State Representative, 12-9-74) #74-12-4

Mr. Elmer H. DenHerder, State Representative: Your letter of November 22, 1974, requesting an opinion as to the right of eminent domain possessed by the Missouri Basin Municipal Power Agency (MBMPA) and the Missouri Basin Municipal Power Financing Corporation has been received.

The question arises because MBMPA has requested a ruling from the Internal Revenue Service that the interest on obligations issued by MBMPA is exempt from federal income tax. MBMPA seeks to qualify as a political subdivision of the state under Treasury regulation Section 1.103-1(B). The ruling officer questions MBMPA's application on grounds that Iowa Code 28F.11 provides the sole authority for a separate legal entity created by the joint action of governing bodies pursuant to Chapter 28E, Code of Iowa, to be delegated any power of eminent domain.

It is the view of this office that §28F.11, Code of Iowa, 1973, as amended by Chapter 1088, §212, Acts of the 64th G.A., 1972, is now applicable to the acquisition of public works and facilities related to collection and disposition of liquid and solid waste and sewage and the operation of swimming pools and golf courses. The amending legislation, it should be borne in mind, is related to the exercise of constitutionally granted home rule powers by cities. Thus, it can be reasoned that because it is not applicable by its terms to the exercise of eminent domain power by a public agency operating facilities for the generation, transmission or distribution of electric energy, the authority for the delegation of eminent domain power must be found elsewhere.

The Missouri Basin Municipal Power Agency is a public agency established pursuant to Chapter 28E, Code of Iowa. This office has previously advised that powers held by any of the governmental bodies which are parties to the agreement establishing a Chapter 28E agency may be exercised by that agency for the mutual benefit of all the parties to the agreement. In 1972 OAG 68 at page 70, the following appears:

"Manifestly the political subdivisions which went together to form the Central Iowa Regional Planning Agency are 'public agencies' within the meaning of §28E.2 and under §28E.3 they may exercise their powers jointly or by an agreement made under §28E.4 form a new independent agency to exercise the joint powers. Indeed, under §28E.12 if any of the public agencies has the power to perform some governmental service or activity it may contract with one or more other public agencies to perform the service whether or not the latter also possess the same powers.

". . . At the general election held November 5, 1968, the people approved the following amendment to Article III of the Constitution of Iowa:

"'Municipal home rule. Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the General Assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the General Assembly.

"'The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state.' Amendment 2, Amendments of 1968, Constitution of Iowa. * * *

"The effect, therefore, of the 1968 home rule amendment was to give municipal corporations considerably more latitude in governing their own affairs than they previously enjoyed. In other words unless expressly prohibited by statute from exercising some power or following a course of conduct a municipal corporation, after November 5, 1968, was free to do so."

The constitutionality of Chapter 28E has been unheld by the Iowa Supreme Court in *Goreham v. Des Moines Metropolitan Solid Waste Agency,* Iowa, 1970, 179 N.W.2d 449. In *Goreham* the court held that Chapter 28E must be interpreted with reference to the power or powers which the contracting governmental units already have.

The power of municipality to purchase or take by condemnation "any lands within or without the territorial limits of the corporation for such public purposes as are an incident to such other powers and duties conferred upon such corporations as make necessary or reasonable the acquisition of such land by said municipal corporations" is clearly expressed in §368.37, Code of Iowa, 1973.

Under Code §397.1, cities and towns are authorized to establish and operate, within and without their corporate limits, electric light or power plants. The power of condemnation is expressly granted for such purpose in §397.8, together with the power to delegate such power:

"3. Delegated power. To confer by ordinance the power to appropriate and condemn private property for such purpose upon any individual or corporation authorized to construct and operate such works or plants."

Accordingly, it is the opinion of this office that the cities and towns which are parties to the MBMPA agreement may delegate their power of eminent domain to this public agency by ordinance. The delegation of power should be set out in the agreement pursuant to §28E.5 and all necessary actions taken to strictly comply with the provisions of §28E.4:

". . . Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force."

Under our previous opinions, the passage of an ordinance delegating §397.8 eminent domain power to the agency by any one of the cities or towns party to the Chapter 28E agreement is sufficient to confer such power on the agency.

December 9, 1974

HIGHWAYS: Local authorities may restrict; vehicle and weight limitations. §321.473, Code of Iowa, 1973 and §321.474, as amended by Chapter 220, Acts, 65th G.A. Penalty provided in §321.474 not applicable to violation stated in §321.473 (Tangeman to Peckosh, Jackson County Attorney, 12-9-74) #74-12-5

Mr. Thomas F. Peckosh, Jackson County Attorney: This is in response to your request for an Attorney General's opinion. Your inquiry is as follows:

"The Jackson County Board of Supervisors would like to prohibit the operation of certain vehicles or limit the weight on certain vehicles pursuant to Section 321.473 of the Iowa Code.

"Assuming such a resolution was passed by a county in Iowa, do the penal sanctions of 321.474 apply to 321.473?

"Section 321.474 does refer to 321.473 and in fact restricts 321.473 by requiring that the restrictions be for a definite period of time not to exceed 12 months and requiring the expiration date to be posted.

"The second paragraph of 321.474, which provides for panel sanctions, refers back to the first paragraph of 321.474 by the wording 'such resolution.' Does 'such resolution' refer to the first sentence in Paragraph 1, which would limit the penal sanctions to state highway commission resolutions; or does it refer to the resolutions used in the last sentence of Paragraph 1, which would appear to include both Highway Commission resolutions plus 321.473 resolutions.

"In the event it did include 321.473 resolutions, are criminal charges filed in the name of the State of Iowa or the county which adopted the resolution?"

In answer to your first question which is contained in paragraph 2 of your letter, the answer is no. The first paragraph of §321.474, 1973 Code of Iowa, as amended by Chapter 220, Acts of the 65th G.A., says in effect that the State Highway Commission shall have authority to impose limitations "likewise" to the authority given to local authorities under §321.473. The penalty provision depends upon the term "such resolution" to indicate the resolution or resolutions to which the penalty is to apply. You will note that §321.473 gives the local authorities the option of both prohibiting the operation of trucks or other commercial vehicles and of imposing limitations as to weight, while the authority given the Highway Commission under §321.474 is limited to imposing restrictions as to weight. Since the penalty is limited to providing a penalty for weight violations only, it is clear that the term "such resolution" refers only to the one authorizing the Highway Commission to impose the weight restrictions. Had the reference been intended to include both resolutions the prefatory phrase would have been "*any* such resolution".

Your second question contained in the last paragraph of your letter was predicated upon an affirmative response to your first question. Since that response was in the negative, no response to your second question is required.

December 9, 1974

SCHOOLS: School Aid. §442.4, Code of Iowa, 1973. Under H.F. 1121, 65th G.A., 1974 Session, the School district providing shared-time and/or part-time instruction to non-public school pupils is entitled to count such school pupils in its enrollment for §442.4 purposes regardless of whether or not

they are actual residents of that school district. (Nolan to Smith, Deputy Superintendent, Department of Public Instruction, 12-9-74) #74-12-6

Dr. Richard N. Smith, Deputy State Superintendent, Department of Public Instruction: You have submitted the following question:

"Your opinion is requested on language found in House File 1121 recently enacted by the 1974 Session of the General Assembly. Our specific question deals with the second paragraph of Sec. 2 of House File 1121 which states in part, 'Shared-time and part-time pupils of school age, *irrespective of the districts in which the pupils reside,* shall be counted . . .'

"Our question on which we need your opinion deals with the meaning of the underlined wording which was added by the 1974 Session of the General Assembly. Does this wording mean that the district of residence of the nonpublic school pupil should count the pupil, or does it mean that the district in which the nonpublic school is located from which students go to a public school for shared-time programs count the student?"

The complete Section 2 of House File 1121 is as follows:

"Sec. 2. Section four hundred forty-two point four (442.4), unnumbered paragraphs one (1) and three (3), Code 1973, as amended by Acts of the Sixty-fifty General Assembly, 1973 Session, chapter two hundred fifty-eight (258), section three (3), are amended to read as follows:

"Except as otherwise provided in this section, enrollment shall be determined by adding the resident pupils who are enrolled on the second Friday of January in the base year or the second Friday of September in the budget year, whichever number is larger, in public elementary and secondary schools in another district or state for which tuition is paid by the district, and in special education programs conducted by a county board of education. The September enrollment may be estimated for budget purposes but actual enrollment shall be used for final computations. If actual September enrollment is higher than the enrollment estimated for the certified budget, the certified budget may be amended as provided in section twenty-four point nine (24.9) of the Code.

"Shared time and part-time pupils of school age, *irrespective of the districts in which the pupils reside,* shall be counted as of the same date in the proportion that the time for which they are enrolled or receive instruction for the school year bears to the time that full-time pupils carrying a normal course schedule, at the same grade level, in the same school district, for the same school year, are enrolled and receive instruction. *Tuition charges to the parent or guardian of any shared-time or part-time out-of-district pupil shall be reduced by any increased state aid, occasioned by the counting of said pupil.*" [italic indicates additional language added by the legislature]

Prior to the enactment of House File 1121, only resident students could be counted by a public school district. See Section 3, Chapter 258, Acts of the 65th General Assembly. Also prior to the enactment of House File 1121, shared-time and part-time resident students were included in enrollment computations. The language you cite changed the law to allow a school district to count shared-time and part-time students as part of their enrollment whether they are resident students or not,

Inasmuch as the complete statute is only concerned with enrollment of pupils of a public school district, the effect of the new language is an authorization that such district may, for the first time, count part-time and shared-time *non*-resident students who are enrolled in its school.

The public school district of residence of a part-time public school pupil may claim said pupil if he is enrolled in that school for classes. (This could be done before the enactment of House File 1121.) If the pupil attends classes at a public school outside of his district of residence, and is enrolled in the school, then that district is enabled by the new language of House File 1121 to include this child in its enrollment calculation.

My answer to your question is that the public school district where the pupil is enrolled counts the pupil. The location of the nonpublic school and the residence of the student is not relevant.

December 10, 1974

COUNTY OFFICERS: County attorney—vacancy. §39.17, Code of Iowa, 1973, as amended by Chapter 136, Acts, 65th G.A., §8, 1973 Session; §§69.1, 69.4(4), 69.2(1), 69.8(4), 69.10, 63.8, 69.11, Code of Iowa, 1973; §336.3, Code of Iowa, 1973, as amended by Chapter 122, Acts, 65th G.A., §20, 1973 Session. Upon a failure to elect a county attorney at the regular election, and upon failure of the incumbent to hold over, the board of supervisors must appoint a successor, who, barring resignation or removal, will hold office until the next regular election at which a new county attorney may be elected. (Haesemeyer to Smith, Harrison County Attorney, 12-10-74) #74-12-8

Mr. Charles L. Smith, III, Harrison County Attorney: Reference is made to your letter of August 19, 1974, in which you request an Attorney General's opinion as follows:

". . . There are no candidates for my office in Harrison County and therefore there will be a vacancy in the office of the county attorney in this county as of midnight December 31, 1974. . . . It would be my understanding that when a vacancy in office occurs, that the district court judge appoints a county attorney and that he is reimbursed according to statute by the political subdivision. If this is not correct or if there is any other procedure which you would feel acceptable in order to validate his appointment, I would be most interested in being advised of this so that there may be an orderly and legal transition."

Section 39.17, Code of Iowa, 1973, as amended by Chapter 136, Acts, 65th G.A., §8, 1973 Session, states:

". . . There shall be elected in each county at the general election to be held in 1974 and each four years thereafter, . . . a county attorney who shall hold office for a term of four years."

Section 69.1, Code of Iowa, 1973, provides that:

"Except when otherwise provided, every officer elected or appointed for a fixed term shall hold office until his successor is elected and qualified, unless he resigns, or is removed or suspended, as provided by law."

If the incumbent should choose to resign, he must do so according to §69.4, Code of Iowa, 1973:

"Resignations in writing by civil officers may be made as follows, except as otherwise provided: * * *

"4. By all county and township officers, to the county auditor, ..."

Section 69.2, Code of Iowa, 1973, defines a vacancy as follows:

"Every civil office shall be vacant upon the happening of either of the following events:

"1. A failure to elect at the proper election, or to appoint within the time fixed by law, unless the incumbent holds over. . . ."

Section 63.8, Code of Iowa, 1973, states:

"Vacancies shall be filled by the officer or board named, and in the manner, and under the conditions, following: * * *

"4. *County offices.* In county offices, by the board of supervisors. . . ."

Such appointment must be made according to the provisions of §69.10, Code of Iowa, 1973:

"Appointments under the provisions of this chapter shall be in writing, and filed in the office where the oath of office is required to be filed."

Appointees must also qualify according to the terms of §63.8, Code of Iowa, 1973:

"Persons elected or appointed to fill vacancies, and officers entitled to hold over to fill vacancies occurring through a failure to elect, appoint, or qualify, as provided in chapter 69, shall qualify within ten days from such election, appointment, or failure to elect, appoint, or qualify, in the same manner as those originally elected or appointed to such offices."

The appointed officer will have tenure as follows, according to §69.11, Code of Iowa, 1973:

"An officer filling a vacancy in any office which is filled by election of the people shall continue to hold until the next regular election in which such vacancy can be filled, and until a successor is elected and qualified. . . .

In your letter you refer to the appointment of a county attorney by the district court judge. You are referring to §336.3, Code of Iowa, 1973, as amended by Chapter 122, Acts, 65th G.A., §20, 1973 Session, which states:

"In case of absence, sickness, or disability of the county attorney and his deputies, the court before whom it is his duty to appear, and in which there may be business requiring his attention, may appoint an attorney to act as county attorney, by order to be entered upon the records of the court, . . ."

A failure to elect would not constitute an "absence" within the meaning of §336.3, but rather, would constitute a vacancy under Chapter 69 of the Code.

Accordingly, if you do not choose to hold over upon a failure to elect a successor, you should file a written resignation as per the terms of §69.4. The failure to elect, coupled with your resignation, will constitute a vacancy under the terms of §69.2, and the board of supervisors must appoint a substitute pursuant to §69.8, and §69.10. The appointee must then qualify within ten days in accordance with §63.8, and he will hold office until the next regular election at which a successor can be elected as per §69.11, unless he resigns or is removed prior to that time.

December 10, 1974

STATE OFFICER AND DEPARTMENTS: Vietnam Veterans' Bonus; Residency requirements, §2, Ch. 64, Acts of 65th G.A., First Session. The six month residency requirement for recipients of the Vietnam Veterans' Bonus is valid as there is a sufficient state interest. Intention must combine with actual presence in the state before legal residency can be established. (Robinson to Kauffman, Executive Secretary, Vietnam Service Compensation Board, 12-10-74) #74-12-7

Mr. Ray J. Kauffman, Executive Secretary, Vietnam Service Compensation Board:

Re: Claim 66880 — Sharratt, Bryan Edwards

I have reviewed the complete file in the above matter wherein you ask whether we consider this veteran (although he is still on active duty) a "legal resident" of Iowa six months prior to entry into active duty and thus, eligible for the Vietnam Bonus. We must answer in the negative.

After Mr. Sharratt became 21, he at first (by his own statement) considered himself a resident of North Carolina while he was a law student at Duke Law School. He did not plan to stay there after his schooling and service obligations. In 1971 he decided to become an Iowa resident. He was admitted to the Iowa bar and has voted and paid taxes here. The Iowa Supreme Court has exclusive power to admit persons to practice law in this state. Their rules provide that the applicant be an "inhabitant" of this state. *In re Estate of Jones,* 1921, 192 Iowa 78, 182 N.W. 227, the Iowa Supreme Court discussed the problems associated with the use of various terms such as "residency", "legal resident", and "domicil." It also points out that one may establish a domicil for one purpose that would not be the same for another purpose. It is significant, therefore, that there is no time requirement as to the length of time one must be an inhabitant before admission to the bar.

The leading case we rely upon is *Mason v. World War II Service Compensation Board,* et al., 1952, 243 Iowa 341, 51 N.W.2d 432, wherein the court states:

" 'Legal residence' is frequently distinguished from 'actual residence' in that it is more permanent in character and there is no present intent on removing therefrom. *The act of abiding and the intent to return when absent must concur.* See Kollmon v. McGregor, 240, Iowa 1331, 1333, 39 N.W.2d 302, 303 and citations; 17 Am.Jur., Domicil section 11." [Emphasis added] (pp. 436-437 of 51 N.W.2d).

In 25 Am.Jur.2d, Domicil §14 we find:

"It should be pointed out that while intention is a principal feature of domicil of choice, mere intention without the fact of presence in the locality cannot bring about acquisition of a new domicil."

It is clear that a state may impose a residency requirement if there is a valid state interest. In *Kanapaux v. Ellison,* (not yet published. 74-1356, U.S. Dist. Ct. for So. Car., Oral order given Sept. 26, 1974, and written order filed Oct. 3, 1974. Appealed directly to U.S. Supreme Court, 74-377, affirmed without opinion Oct. 21, 1974) the name of a Candidate for governor was not allowed on the ballot because he had not met the five-year durational residency requirement. A similar case involving the governorship of New Hampshire is *Chimento v. Stark,* 353 F.Supp. 1211 (1973) which was also appealed directly to the

U.S. Supreme Court and affirmed without opinion 414 U.S. 802, 94 S.Ct. 125, 38 L.Ed.2d 39. We believe there is a valid state interest in limiting a war bonus to persons who have been residents of a state for a short time prior to their entry into military service. Otherwise career personnel would simply choose the state having the highest bonus for their residency and then change to another state for some other purpose such as no income tax. Thus, the nominal residency requirement of six months as found in §2, Ch. 64, Acts of 65th G.A., 1973 session, we believe to be valid.

As we view the facts as presented by this claim, Mr. Sharratt never actually lived in Iowa until shortly before he came here and took the bar in June. He was not, however, a legal resident of Iowa six months prior to his entry into the service on August 2, 1971. If it can be shown that Mr. Sharratt came to Iowa six months before August 2, 1971, then his intent and the fact of presence would combine into the establishment of his legal residency. If this cannot be shown, his claim should be denied.

December 16, 1974

MOTOR VEHICLES: Suspension for violating drivers license restrictions; proof of financial responsibility for the future. Sections 321.193, 321A.17, Code of Iowa, 1973. One whose drivers license was suspended for conviction of violating drivers license restrictions must be required to prove financial responsibility for the future. (Linge to Gallagher, State Senator, 12-16-74) #74-12-9

The Honorable James V. Gallagher, State Senator: You have requested an opinion of the Attorney General that asks if it is legal for the State of Iowa to require one whose drivers license was suspended following a conviction for violating his drivers license restrictions to prove financial responsibility for the future.

Section 321.193, Code of Iowa, 1973, states in relevant part:

"When provided in rules adopted pursuant to Chapter 17A, the department upon issuing an operator's or chauffeur's license shall have authority . . . to impose restrictions . . . applicable to the license . . . as the department may determine to be appropriate to assure the safe operation of a motor vehicle by the licensee.

The department may upon receiving satisfactory evidence of any violation of the restrictions of such license suspend or revoke the same. . . .

It is a misdemeanor . . . for any person to operate a motor vehicle in any manner in violation of the restrictions imposed in a restricted license issued to him."

The 1973 Iowa Departmental Rules, page 790, section 13.11(321), describes the vision test required to obtain a drivers license and indicates when glasses will be required as a restriction on the drivers license.

Section 321A.17 provides in relevant part:

"1. Whenever the commissioner, under any law of this state, suspends or revokes the license of any person upon receiving record or conviction. . . .

2. Such license . . . shall remain suspended or revoked and shall not at any time thereafter be renewed nor shall any license be thereafter issued to such

person . . . unless and until he shall give and thereafter maintain proof of financial responsibility."

In *Doyle v. Kahl,* 1951, 242 Iowa 153, 46 N.W. 2nd 52, the Iowa Supreme Court examined the validity of the financial responsibility law and found it free from constitutional defects.

In *Danner v. Hass,* 1965, 134 N.W. 2nd 534, 257 Iowa 654, the Iowa Court refrained from finding section 321A.17 unconstitutional in a case in which future proof of financial responsibility was required following a conviction and drivers license suspension for a speeding violation.

The important public policy of this statute is to require that adequate provision has been made for compensation to persons who might be injured before a drivers license is to be issued to an irresponsible person and is a proper exercise of the State's police power. *Doyle* and *Danner,* supra.

It would appear the operation of a motor vehicle by one without glasses when glasses are necessary and required is a serious and dangerous practice and does warrant the imposition of fines, suspension and proof of financial responsibility for the future.

It is further noted that section 321A.18 provides for methods of giving such proof in addition to a certificate of insurance.

December 17, 1974

STATE OFFICERS AND DEPARTMENTS: Auditor of State; frequency of audits. §11.18, Code of Iowa, 1973. The auditor of state may in his discretion audit political subdivisions at any time he deems such action to be in the public interest. He may conduct a 12 month audit followed by a 6 month audit covering the 18 month transitional period of the fiscal year law. (Turner to Smith, Auditor of State, 12-17-74) #74-12-10

The Honorable Lloyd Smith, Auditor of State: You have requested an opinion as to how frequently you may audit political subdivisions on account of the fiscal year change for program budgeting provided by Chapter 1096, 64th G.A., 1974 Session.

I am unable to find anything in this new act relating to time or frequency of audits but §11.18, Code of Iowa, 1973, in its third paragraph, provides:

"In addition to his powers and duties under other provisions of the Code, the auditor of state may at any time, if he deems such action to be in the public interest, cause to be made a complete or partial audit of the financial condition and transactions of any city, town, county, school corporation, governmental subdivision, or any office thereof, even though an audit for the same period has been made by certified or registered public accountants. Such state audit shall be made and paid for as provided in this chapter, except that in the event an audit covering the same period has previously been made and paid for, the costs of such additional state audit shall be paid from any funds available in the office of the auditor of state. This paragraph shall not be construed to grant any new authority to have audits made by certified or registered public accountants."

In view of the foregoing paragraph, it appears to me you have discretion to audit any of the political subdivisions named therein at any time you deem such action to be in the public interest. Thus, you may, as you indicate, conduct a 12-month audit, followed by a 6-month audit, covering the eighteen

month transitional period of the fiscal year law. As I understand it you intend to conduct such audits, or direct them to be conducted by others, on this uniform basis, and that appears to me quite properly within the exercise of your broad discretion.

December 26, 1974

COUNTIES AND COUNTY OFFICERS: Hospital Trustees—§§347.134(4), 347.13(5) and 347.14(10), Code of Iowa, 1973. A county hospital trustee may not also be an employee of that hospital. (Blumberg to Flores, Buena Vista County Attorney, 12-16-74) #74-12-11

Mr. Daniel T. Flores, Buena Vista County Attorney: We have received your opinion request of November 9, 1974, regarding county hospital trustees. You specifically ask whether such a trustee can also be an employee of that hospital without the existence of a conflict of interest.

Section 347.13(4) and (5) of the Code provides that the hospital trustees shall employ an administrator, necessary assistants and employees, and fix their compensation; and, have control and supervision over the physicians, nurses and attendants. Section 347.14(10) provides that the trustees may do all things necessary for the management, control and government of said hospital, and exercise all rights and duties pertaining to hospital trustees generally. The individual in question is a surgical technician, which is not a licensed practice. Therefore, §347.9 is not applicable to this question.

There is nothing in Chapter 347 which specifically prohibits an employee from also being a trustee. However, we are of the opinion that, at the least, a conflict of interest would exist. In *State ex rel. Crawford v. Anderson,* 1912, 155 Iowa 271, 273, 136 N.W. 128, there is a discussion on the incompatibility of offices:

"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 the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' State v. Bus, 135 Mo. 338, 36 S.W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra [112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211]; State v. Goff, 15 R.I. 505, 9 A. 226, 2 Am.St. Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility 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 incombent to retain both'."

Although this may not be the type of situation involved in *Anderson,* i.e. the holding of two public offices at the same time, we feel the above proposition is applicable since a public office is involved. It would be an impropriety for such a trustee to pass on the question of how much he or she should be paid as an employee, whether he or she should be retained in employment, and any other possibility of self dealing. Many times the mere appearance of such an impropriety is worse for the public trust than any actions taken.

Accordingly, we are of the opinion that a trustee of a county hospital may not also be an employee of that same hospital. In order for this person to be a trustee he or she would have to give up employment for that hospital.

December 27, 1974

SCHOOLS: Bussing. Chapter 28E, Code of Iowa, 1973, provides authority for a joint governmental service contract between two school districts where children are transported from the district in which they reside to the district where they attend school. Selection of any one of three options available under Chapter 1169, Acts, 65th G.A., 1974 Session, satisfies the statutory mandate. (Nolan to Ferguson, State Representative, 12-27-74) #74-12-12

The Honorable Bill Ferguson, State Representative: Several months ago you requested an opinion of this office regarding the following situation:

"A peninsula-like part of the Carroll Public School district (varying in width up to 2 miles) is surrounded on three sides by the Ar-We-Va public school district. (See attached map.) Because of the road pattern in the area, and in an effort to operate an efficient and economical transportation system, the Ar-We-Va school district has for several years operated buses across this peninsula. Both the Ar-We-Va and Carroll public school boards have agreed to this travel arrangement.

"On the roads regularly traversed in this peninsula of the Carroll school district, reside several students who are attending a non-public school in the Ar-We-Va district.

"In the light of Section 285 of the Code of Iowa and the recent changes in it and since the passage of HF 1476 authorizing transportation of non-public students, the following question has arisen:

"'CAN THE AR-WE-VA PUBLIC SCHOOL BUS STOP INSIDE THE CARROLL SCHOOL DISTRICT TO PICK UP STUDENTS WHO ATTEND A NON-PUBLIC SCHOOL IN THE AR-WE-VA DISTRICT?'"

Subsequently, at a meeting in this office it was suggested by me that the Ar-We-Va and Carroll school boards explore the possibility of handling this matter under a Chapter 28E joint services agreement. It would appear that there is ample legal authority for such a contract between the two school districts to implement the provisions of Chapter 1169, Laws of the 65th General Assembly, 1974 Session.

Subparagraphs 1 and 3 of §3 of Chapter 1169, *supra,* provide:

"1. Resident pupils attending a nonpublic school located either within or without the school district of the pupil's residence shall be entitled to transportation on the same basis as provided for resident public school pupils under this section. The public school district providing transportation to a nonpublic school pupil shall determine the days on which bus service is provided, which shall be based upon the days for which bus service is provided to public pupils, and the public school district shall determine bus schedules and routes. In the case of nonpublic school pupils the term 'school designated for attendance' means the nonpublic school which is designated for attendance by the parents of the nonpublic school pupil. * * *

"3. If the nonpublic school designated for attendance of a pupil is located outside the boundary line of the school district of the pupil's residence, the pupil may be transported by the district of residence to a public school or

other location within the district of the pupil's residence. A public school district in which a nonpublic school is located may establish school bus collection locations within its district from which nonresident nonpublic school pupils may be transported to and from a nonpublic school located in the district. If a pupil receives such transportation, the district of the pupil's residence shall be relieved of any requirement to provide transportation."

A second question that you raise also involves the implementation of Chapter 1169 and in this connection, your letter states:

"The Ar-We-Va public school district has a problem in implementing H.F. 1476. 136 resident students of that district attend Kuemper high school, a nonpublic school in Carroll, Iowa. This is outside the Ar-We-Va district and all these pupils live considerably more than the 3-mile requirement and are eligible for transportation benefits. The Ar-We-Va district is now considering contracting with Kuemper high school. The Kuemper school has in the past picked up the 136 children at 3 pick-up points rather than at a number of collection points, as this is the most workable method because of the distances involved. Presently, Kuemper high school and many of the parents of the 136 children wish to contract on this basis. Ar-We-Va school district is concerned whether this type of contract would be legal and whether such a contract would fulfill their transportation obligations under H.F. 1476 or whether they would still owe transportation reimbursement to parents of nonpublic school children because of the wording of Section 285.1(2), 1973 Iowa Code."

There are three options available to a school district in which the child resides. These options set forth in Section 4 of the Act, supra, are:

"a. Transportation in a school bus operated by a public school district.

"b. Contracting with private parties as provided in section two hundred eighty-five point five (285.5) of the Code. However, contracts shall not provide payment in excess of the average per pupil transportation costs of the school district for that year.

"c. Utilizing the transportation reimbursement provision of section two hundred eighty-five point one (285.1), subsection three (3) of the Code. However no reimbursement shall exceed forty dollars per nonpublic school pupil per year."

Selection of any one of these for any one child will satisfy the statutory mandate.

December 30, 1974

STATE DEPARTMENTS: State Historical Society. Curators of the State historical society whose terms have not expired continue to hold their offices for the balance of the term to which they were elected. Only members of the state historical board can be reimbursed $40.00 per diem under Chapter 1175, 65th G.A., 1974 Session. (Nolan to Neely, President, Board of Curators, 12-30-74) #74-12-13

Mr. Marion R. Neely, President, Board of Curators, State Historical Society: You have asked for a clarification of the status of curators elected to the State Historical Society pursuant to the authority contained in Chapter 304, Code of Iowa, 1973. You point out that the terms of some of the present curators have not expired. Chapter 1175 enacted by the 1974 Session of the 65th General Assembly establishes a new Iowa State Historical Department and state historical board with the historical society placed under the supervision of the latter. Such Chapter 1175 also repeals Chapter 304, Code of Iowa, 1973.

Section 4 of Chapter 1175 specifically provides that the society may elect officers, but is silent concerning the status of those whose terms had not expired when the reorganization legislation took effect.

The problem is complicated by the fact that since 1867 the membership of the Iowa State Historical Society has also operated as a legal entity under articles of incorporation duly filed pursuant to the laws of Iowa governing corporations. The corporation is not dissolved by the statute which establishes the Iowa State Historical Department. Nor is it the "society" which is subject to reorganization in the State Historical Department. Its assets and powers are separate and distinct.

The General Assembly has withdrawn from the state historical society most of the authority it formerly exercised as a state agency, and relegated it to a position under the supervision of the state historical board. In its new position as a mere division of the state historical department, the society is given the power to elect six of the twelve members of the governing board of the department, as well as to elect officers of the society.

The department board authorized by statute consists of twelve members. At present, there are only six members, those appointed by the governor. This board is now powerless to take any official action because a quorum is impossible until the six state historical society members are elected. Code §4.1(31) provides:

"A quorum of a public body is a majority of the number of members fixed by a statute."

Obviously, such impass can be cured by legislation in the next General Assembly. However, it is the opinion of this office that the State Historical Society curators also have power to effect a reorganization by providing for a special election to fill the six open seats on the department board. Such authority is necessarily implied under Chapter 1175.

The society's officers and board of curators continue to hold their offices for the remainder of the terms to which they were elected. The President may appoint a committee to obtain nominations for department board members to be elected by the society.

A second question raised by your letter is whether curators of the State Historical Society should be reimbursed $40 per diem plus expenses under terms of Chapter 1175, although the existing articles of the State Historical Society preclude the members from receiving compensation from state funds for services rendered directly to the Society.

The answer to this question is that such compensation and reimbursement is available only to members of the board of the state historical department. It may very well be that some of the present curators of the society will be elected by the society to serve on the state board. In that event they will be entitled to receive the per diem payable to members of the board. Since their services will then be performed for the benefit of the state department and not directly to the society, the language of the Articles prohibiting compensation to curators will not have application. Regardless of the services which the curators perform in the transitional period, no person is entitled to receive compensation under Chapter 1175 until that person becomes a duly appointed or elected member of the state board. Accordingly, no compensation is payable to curators for their services.

December 30, 1974

STATE OFFICERS AND DEPARTMENTS: Commission for the Blind, food service facilities. §§601C.1 and 601C.3, Code of Iowa, 1973. The Iowa Commission for the Blind cannot be required to pay to the Department of General Services the cost of utilities involved in the food service operations in state buildings controlled by the Department of General Services. (Haesemeyer to Jernigan, Director, Iowa Commission for the Blind, 12-30-74) #74-12-14

Mr. Kenneth Jernigan, Director, Iowa Commission for the Blind: Reference is made to your letter of December 20, 1974, in which you state:

"As part of its program of rehabilitation of blind persons the Commission for the Blind establishes and operates cafeterias, restaurants, snack bars, and vending service in public buildings throughout Iowa. A number of private business establishments have also allowed blind persons (under Commission sponsorship) to manage such concessions in their buildings. The Commission for the Blind has established and operated such concessions for many years, but the program was greatly strengthened by the 1969 Legislature with the passage of the law entitled 'Operation of Food Service in Public Buildings,' which is now Chapter 601C of the Code of Iowa.

"At the time of the enactment of this law the Commission for the Blind was operating the cafeterias in the Capitol complex. The Commission was paying neither rent nor utilities. The Governor and Executive Council had authorized the operation as part of the Commission's overall rehabilitation effort. Blind persons were thus enabled to earn their livelihood, and a public demonstration was also made of the competence and ability of the blind, as well as the state's good faith in its assertions that the blind are competitively employable.

"In this atmosphere Chapter 601C of the Code was adopted. The Commission was not paying utilities or rent. A question has now been raised as to whether the Commission can be required to pay the Department of General Services for utilities used in the food service operations in state buildings under the control of the Department of General Services. We have felt that such payments cannot be required since no other department is required to make such payments and since we can find no indication that the Legislature contemplated such payments from the Commission for the Blind when Chapter 601C was enacted.

"We have felt that the fact that we have made arrangements with individual blind persons for them to operate cafeterias under our sponsorship does not alter our relationship with the Department of General Services with respect to the provision of utilities. Otherwise, we might (by analogy) help a blind person get training as a secretary, persuade one of the departments of government to give that blind secretary employment, buy that blind secretary an electric typewriter, and then find the Department of General Services wanting to charge our Commission or the blind secretary for the electricity necessary to operate the typewriter. We have felt that our financial arrangements with individual blind persons (regardless of what they may be) are not relevant in any dealings we may have with the Department of General Services.

"In view of this background we would ask the following question: Can the Iowa Commission for the Blind be required to pay to the Department of General Services the cost of utilities involved in the food service operations in state buildings controlled by the Department of General Services? We will appreciate your opinion concerning this matter."

Sections 601C.1 and 601C.3, Code of Iowa, 1973, provide respectively:

"It is the policy of this state to provide maximum opportunities for training blind persons, helping them to become self-supporting and demonstrating their capabilities. This chapter shall be construed to carry out this policy. * * *

"A governmental agency which proposes to operate or continue a food service in a public office building shall first attempt in good faith to make an arrangement for the commission for the blind to operate the food service *without payment of rent.* The governmental agency shall not offer or grant to any other party a contract or concession to operate such food service unless the governmental agency determines in good faith that the commission for the blind is not willing to or cannot satisfactorily provide such food service. This chapter shall not impair any valid contract existing on July 1, 1969, and shall not preclude renegotiation of such contract on the same terms and with the same parties." (Emphasis added)

As you point out, agreements for the operation of food service facilities are entered in to between the government agencies, in this case the Department of General Services, and the Commission for the Blind. The fact that the Commission has arrangements with various individual blind persons to operate the food service facilities under its sponsorship is irrelevant to the question you raise. We have been unable to find any authorities construing the expression "without payment of rent", however, in view of the statement of public policy contained in §601C.1, the fact that other governmental agencies are not charged for utilities by the Department of General Services and the administrative practice of long standing which has existed both prior and subsequent to the enactment of Chapter 601C of not charging for utilities, it is our opinion that the Iowa Commission for the Blind cannot be required to pay to the Department of General Services the cost of utilities involved in the food service operations in state buildings controlled by the Department of General Services.

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