OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

VOLUME 59

January 1, 1970 through December 31, 1970

ROBERT W. WARREN
Attorney General

MADISON, WISCONSIN

1970

900—341

ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukee	from June 7, 1848, to Jan. 7, 1850
S. PARK COON, Milwaukee	from Jan. 7, 1850, to Jan. 5, 1852
EXPERIENCE ESTABROOK, Geneva	from Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madison	from Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point	from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh	from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay	from Jan. 2, 1860, to Oct. 7, 1862
WINIFIELD SMITH, Milwaukee	from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertown	from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona	from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam	from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON, Mineral Point	from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend	from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc	from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madison	from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau	from Jan. 7, 1895, to Jan. 2, 1899
EMMET R. HICKS, Oshkosh	from Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDEVANT, Neillsville	from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison	from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center	from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock	from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson	from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel	from Jan. 6, 1919, to Jan. 3, 1921
WILLIAM J. MORGAN, Milwaukee	from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, Madison	from Jan. 1, 1923, to Jan. 3, 1927
JOHN W. REYNOLDS, Green Bay	from Jan. 3, 1927, to Jan. 2, 1933
JAMES E. FINNEGAN, Milwaukee	from Jan. 2, 1933, to Jan. 4, 1937
ORLAND S. LOOMIS, Mauston	from Jan. 4, 1937, to Jan. 2, 1939
JOHN E. MARTIN, Milwaukee	from Jan. 2, 1939, to June 5, 1948
GROVER L. BROADFOOT, Mondovi	from June 5, 1948, to Nov. 15, 1948
THOMAS E. FAIRCHILD, Milwaukee	from Nov. 15, 1948, to Jan. 1, 1951
VERNON W. THOMSON, Richland Center	from Jan. 1, 1951, to Jan. 7, 1957
STEWART G. HONECK, Madison	from Jan. 7, 1957, to Jan. 5, 1959
JOHN W. REYNOLDS, Green Bay	from Jan. 5, 1959, to Jan. 7, 1963
GEORGE THOMPSON, La Crosse	from Jan. 7, 1963, to Jan. 5, 1965
BRONSON C. La FOLLETTE, Madison	from Jan. 5, 1965, to Jan. 6, 1969
ROBERT W. WARREN, Green Bay	from Jan. 6, 1969, to

DEPARTMENT OF JUSTICE
LEGAL SERVICES DIVISION

ROBERT W. WARREN	Attorney General
ARVID A. SATHER	Deputy Attorney General
DANIEL P. HANLEY JR.	Executive Assistant
JAMES P. ALTMAN	Assistant Attorney General
JOHN E. ARMSTRONG	Assistant Attorney General
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JEFFREY B. BARTELL	Assistant Attorney General
CHARLES A. BLECK	Assistant Attorney General
MARY V. BOWMAN	Assistant Attorney General
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PAUL J. GOSSENS	Assistant Attorney General
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THOMAS A. HENDRICKSON	Assistant Attorney General
ALLAN P. HUBBARD	Assistant Attorney General
JAMES D. JEFFRIES	Assistant Attorney General
DONALD P. JOHNS	Assistant Attorney General
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PRISCILLA R. MAC DOUGALL	Assistant Attorney General
RICHARD R. MALMGREN	Assistant Attorney General
ROBERT D. MARTINSON	Assistant Attorney General
ROBERT B. McCONNELL	Assistant Attorney General
DAVID G. McMILLAN	Assistant Attorney General
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THEODORE L. PRIEBE	Assistant Attorney General
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SVERRE O. TINGLUM	Assistant Attorney General
ROBERT J. VERGERONT	Assistant Attorney General
WILLIAM H. WILKER	Assistant Attorney General
E. WESTON WOOD	Assistant Attorney General
E. GORDON YOUNG	Assistant Attorney General
MICHAEL L. ZALESKI	Assistant Attorney General

OPINIONS

OF THE

ATTORNEY GENERAL

Volume 59

Public Officers—Counties—Counties may not have both a county administrator, under sec. 59.033, Stats., and a county executive, under sec. 59.032, Stats., at the same time. However, in order to preserve continuity of administration, an office of county administrator which is being replaced by that of a county executive may be retained during the period of transition between the establishment and subsequent election of the county executive.

January 12, 1970.

THE HONORABLE THE ASSEMBLY

A. Res. 54 requests an opinion of the attorney general as to whether, under ch. 214, Laws 1969, the office of county executive may be created in a county which already has a county administrator appointed by the county board without abolishing the office of county administrator.

Sections 59.032 and 59.033, Stats., as affected by ch. 214, Laws 1969, relate to counties having a population of less than 500,000, and authorize, but do not require, the creation of either a county executive, with the power to veto

county board legislation and selected by popular election, or a county administrator, without veto power and appointed by the county board. In both instances, the individual chosen to fill the office possesses certain defined powers of appointment as well as county budget responsibilities and would act as the chief administrative officer of his county. The administrative and management functions in counties which choose to retain the more traditional administrative structure remains vested in the county board, the county board chairman, and various other county officers, committees, commissions, or boards.

Sections 59.032 and 59.033, Stats., as affected by ch. 214, Laws 1969, indicate that counties having a population of less than 500,000 which desire a chief administrative officer must choose, in the alternative, either the county executive or the county administrator. Under the present provisions of these statutes, the existence of one officer appears clearly inconsistent with the existence of the other officer, since obviously there can be only one chief administrative officer in a county. Therefore, it is clear a county administrator and county executive could not both function in the same county at the same time, since both officers fulfill the same basic function.

Generally, a county which is empowered by the legislature to create an office may, if unrestricted, abolish it. 42 Am. Jur., Public Officers, §33, p. 905; 4 ALR 224, 172 ALR 1387. Thus, a county may affirmatively abolish the existing office of county administrator at the time it provides for the establishment and future election of a county executive even though such action would create a hiatus during which the county would be without a chief administrative officer.

However, where a county has appointed a county administrator under the provisions of sec. 59.033, Stats., the act of creating the office of county executive under sec. 59.032, Stats., to be filled at a future election, does not necessarily imply the immediate abolition of the present office of the county administrator.

The abolition of the office of county administrator pending the election of a county executive to fill the newly

created office would create a hiatus during which no chief administrative officer would be functioning on behalf of the county. In the absence of legislative indication to the contrary, I cannot conclude that such a disruption in administration is intended.

RWW:JCM

Right to Bear Arms—Constitutional Amendment proposed by S. Jt. Res. 8 relating to the right of the people to keep and bear arms would probably not prevent legislative regulation and licensing but it is recommended that the language be clarified in that respect.

January 15, 1970.

THE HONORABLE THE SENATE

S. Jt. Res. 8 asks the attorney general for his opinion whether the Constitutional Amendment proposed by S. Jt. Res. 6 would bar the state from enacting regulatory laws on firearms and firearm ownership in such areas as licensing and registration. S. Jt. Res. 6 would create Art. I, sec. 24, Wis. Const., which would read:

"The right of the people to keep and bear arms shall not be infringed."

The first question to be considered is whether such an amendment to the Wisconsin Constitution would be unnecessary in view of the language in the U. S. Constitution, Second Amendment, that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

There are several reasons why the Second Amendment to the U. S. Constitution does not affect state licensing, regulation, and control of the bearing of firearms by its citizens: (1) the Second Amendment prohibits only the federal government, not the state governments, from infringing upon the right of the people to keep and bear arms. The Second

Amendment's protections have not been extended to the states through the Fourteenth Amendment. *United States v. Cruishank,* (1876) 92 U.S. 542, 553; *Presser v. Illinois,* (1886) 116 U.S. 252; *U.S. v. Miller,* (1939) 307 U.S. 174; (2) the Second Amendment was adopted in order to protect the states in the maintenance of their military organizations against possible encroachments by the federal government. It was not adopted to protect the rights of individual citizens to bear arms. *United States v. Tot,* (3rd Cir 1942) 131 F. 2d 261, rev'd on other grounds, (1943) 319 U.S. 463.

Since the U. S. Constitution has prevented any encroachment upon the freedom of the states to regulate themselves, state constitutional provisions relating to firearms may, absent infringement upon other constitutional rights, be written in any manner and are controlled by their own rationales. The following are examples of the language used in some state constitutional provisions relating to firearms:

Pennsylvania, Art. I, sec. 21, "The right of the citizens to bear arms in defense of themselves and the State shall not be questioned."

Kentucky, sec. 1, para. 7, "The right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons."

Idaho, Art. I, sec. II, "The people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law."

For a complete listing see the appendix to Rohner, "The Right to Bear Arms: A Phenomenon of Constitutional History," 16 *Catholic University Law Review* 53 (1967).

The decisions of the supreme courts of other states interpreting their constitutional provisions relating to the right of individuals to bear arms indicate that legislative limitations upon this right have been upheld along two basic lines of reasoning: (1) the military needs of the states; and (2) the police power of state legislatures.

Statutory limitations upon the right of individuals to bear arms may be upheld on the ground that constitutional

provisions protecting this right exist solely to preserve the military defense of the state. This military defense rationale is found in the U. S. Constitution, Second Amendment, which states that "A well regulated Militia, being necessary to the security of a free State, . . ."

Similarly, language found in the constitutions of some states have been used to support legislative limitations upon the type of weapons which may be borne by the state's citizens. For example, sec. 26, Art. II, Okla. Const., provides:

"The right of a citizen to keep and bear arms in defense of his home, person or property, or an aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons."

Section 40, Art. V, Okla. Const., provides:

"The Legislature shall provide for the organizing, disciplining, arming, maintaining and equipping the Militia of the State."

Given these two constitutional provisions, the Oklahoma Supreme Court stated that ". . . we believe there is no room for doubt that the arms defendant had a right to bear, and which right could never be prohibited him, relates solely to such arms as are recognized in civilized warfare and not those used by the ruffian, brawler, or the assassin." *Pierce v. State,* (1929) 42 Okla. Crim. 272, 275 P. 393, 395.

Other states have limited the definition of "the people" to mean "the state." Thus, in *City of Salina v. Blaksley,* (1905) 72 Kan. 230, 83 P. 619, the Kansas Supreme Court construed sec. 4, Kan. Const., which said that "the people have the right to bear arms for their defense and security . . ." to mean that the term "people" referred to the people as a collective body and that this provision dealt with the safety and security of society, not of the individual.

The right of citizens to bear arms may be traced to the days of the early Teutonic freemen. In those times, this right was based upon the duty of the freemen to defend the tribe and its chieftain. The right to bear arms, there-

fore, existed only as a corollary to the duty of the citizen to defend the state. *The Corresponding Duty to the Right to Bear Arms,* 39 Florida Bar Journal 167 (1965); Charles Stevens, *Sources of the Constitution Of The United States,* Macmillan, New York, 1894. By extending that ancient view of the right to bear arms to modern times, the military defense rationale could be inferred from any constitutional provision asserting the right to bear arms; in effect, any provision seeking to protect the right to bear arms could be limited to those arms borne in defense of the state even though the supporting constitutional provision contained no language to that effect.

Limitations upon the right to bear arms based upon a legislative exercise of the police power likewise may arise from the specific qualifying language of the constitutional provision. For example, provisions in several states provide the legislature with the power to prevent the carrying of concealed weapons. In the same vein, other state constitutions provide broadly that the legislature may prescribe the manner in which arms may be borne.

It is arguable, however, that the protective police power of the state need not rest upon any specific qualifying language of a constitutional provision but may be asserted independently by the state in the interests of the health, safety and welfare of the citizens of that state. The Michigan Supreme Court construed Art. II, sec. 5, Mich. Const., which provides:

"Every person has a right to bear arms for the defense of himself and the state."

In *People v. Zerillo,* (1922) 219 Mich. 635, 189 N.W. 927, 928, with the following language:

"There should be added to this [constitutional provision], however, the right of the Legislature, under the police power, to regulate the carrying of firearms."

It is clearly within the inherent police power for a state to regulate and limit the carrying of concealed weapons. *In re Brickey,* (1902) 8 Ida. 597, 70 P. 609; *State v. Nieto,* (1920) 101 Ohio St. 409, 130 N.E. 663. The question of the

validity of laws regulating the use and ownership of firearms through licensing and registration is a problem only recently coming before the courts. In *Burton v. Sills,* (1968) 53 N.J. 86, 248 A. 2d 521, 529, dismissed for lack of federal question (1969), 394 U.S. 82, however, the New Jersey Supreme Court upheld that state's gun control law without any constitutional provision regarding the right to bear arms. The court said, 248 A. 2d, at 529:

"The State's police power is admittedly a comprehensive one and may be invoked by the legislature whenever it deems it necessary for the protection of the public health, safety, morals or general welfare . . . even when it deals with ordinary essential commodities, the Legislature has power to adopt appropriate regulatory provisions; surely when it deals with dangerous articles such as firearms, it has comparable power with very broad sweep."

Thus, New Jersey's comprehensive gun control law was upheld as an exercise of the police power of the state.

In conclusion, the Wisconsin legislature is free, absent any infringement upon other constitutional protections, to define the limits of any right sought to be guaranteed by a constitutional provision regarding the right to bear arms. The language of S. Jt. Res. 6 stating that "the right of the people to bear arms shall not be infringed" neither defines the right sought to be protected nor does it delineate the nature of the infringements from which the right is to be protected.

Rhode Island has an unqualified provision regarding the right to bear arms in its constitution similar to that proposed by S. Jt. Res. 6. This provision has not deterred the Rhode Island legislature from passing legislation restricting the use of firearms. There has been no litigation reported to date involving the validity of this Rhode Island legislation restricting the use of firearms.

Absent specific qualification or definition of the nature and scope of the right to bear arms sought to be protected by a constitutional provision, there are grounds for contending that the state inherently possesses the police power

necessary to regulate the ownership and use of firearms by its citizens. However, the inconclusiveness of the court cases upholding state regulation of the ownership and use of firearms under the inherent state police power, absent any specific constitutional provision, suggests that the senate clarify the proposed amendment in regard to the nature and scope of the right sought to be protected by the proposed constitutional amendment. If an absolute protection from regulation is desired, "infringement" should be defined to include all types of regulation from all sources. If only a limited protection from regulation is desired, the necessary qualifications to "infringement" should be clearly defined in the amendment. If regulation by licensing and registration is deemed to be acceptable or at least not to be foreclosed, a statement to that effect would guarantee that the intent of the proposed constitutional amendment would be followed in subsequent legislative enactments and litigation.

RWW:BS

Father Groppi Resolution—Power of legislature of joint resolution discussed. S. Jt. Res. 53 prohibiting Father James Groppi from entering the state capitol and capitol grounds of no binding force or effect. Restraint of named individual, under circumstances here, violates U.S. Const., Arts. I, V, XIV.

January 15, 1970.

THE HONORABLE THE SENATE

By S. Res. 27 you have requested my opinion on the constitutionality of S. Jt. Res. 53 which reads as follows:

"Prohibiting Father James Groppi from entering the state capitol or the capitol grounds.

"Whereas, the visits of Father James Groppi and his followers to the capitol have resulted in thievery and disorder; now, therefore, be it

"Resolved by the senate, the assembly concurring, That Father James Groppi is hereby prohibited from entering the state capitol and the capitol grounds; and, be it further

"Resolved, That the capitol security officers be informed of this resolution and take whatever steps are necessary to make it effective."

Since courts frequently decline to rule on federal constitutional issues where other grounds for decision are available, and since, if passed and obeyed this resolution invites almost certain litigation, it seems appropriate to begin with a short discussion of some of the non-federal constitutional issues raised by S. Jt. Res. 53.

First, the Wis. Const., Art. IV, sec. 17, provides that legislature may enact laws only by bill. My predecessors have consistently ruled that this provision prevents joint resolutions from having the force and effect of law. 43 OAG 350 (1954), 4 OAG 1076 (1915), and 1904 OAG 335. In an opinion dated November 12, 1969, addressed to this Body, I indicated that the legislature could not, by joint resolution, order the Board on Government Operations to release funds over which the Board had been given discretion by prior legislation. A joint resolution, it was there pointed out, is directory in that it may express the legislative will, but has no binding force and effect.

By secs. 16.84 (1) and (2) Stats., you have vested control over the capitol building, grounds, and security in the Department of Administration. Jt. Res. 53 cannot change that relationship or legally obligate the department or its employes to follow the intended command of the resolution. As to the question of power, therefore, I conclude that the legislature, by Jt. Res., may not obligate the Department of Administration to carry out its wishes.

Second, as a matter of interpretation, S. Jt. Res. 53 appears to be intended as a prohibition on entry of the state capitol and the state capitol grounds. The legislature under the Wisconsin Constitution is vested with two types of power. Under Art. IV, sec. 1 it is vested with the legislative power of the state. This it must exercise by legisla-

tion. Art. IV, sec. 17. The legislature also has power to make rules necessary for its proceedings. Article IV, sec. 8 provides that "each house may determine the rules of its own proceedings. . . " Other portions of Art. IV appear to confer other powers on the legislature which, when read together with Art. IV, sec. 8, grant to the legislature the power to manage its own affairs—the necessary housekeeping function. Thus by resolution of one house, or joint resolution, the legislature or one house thereof may adjourn from time to time, fix its rules or procedure, and require the attendance of members. This grant of power many generally be classified as "management power."

Neither the legislative nor the management power, described above, encompass the type of resolution we have here. By its form it is not the exercise of legislative power. By its nature it goes beyond the management powers.

Further problems may arise if this resolution were to be adopted and the Department of Administration chose to follow its directive. Because a joint resolution does not have the force and effect of law, it would not cloak the capitol guards with authority to arrest for violation of its command. This would place the capitol guards in a wholly untenable position. Although directed to take "whatever steps are necessary," they would have no actual power under the resolution. Arrest or physical detention of Father Groppi might expose the guards to liability for false arrest and for assault.

Finally, mere passage of this resolution would probably entitle Father Groppi to an injunctive and/or declaratory relief against the state and its agents on the basis that passage and threatened enforcement of this resolution may have a chilling effect on his First Amendment rights.

It therefore appears, and I am of the opinion, that S. Jt. Res. 53, if enacted, would be of no binding force or effect for the reasons stated above.

Other problems inhere in the proposed joint resolution which deserve comment. I think it plain that the legislature may not do by joint resolution that which it could not do

by law. I am of the opinion that the legislature could not prohibit Father James Groppi, or any other named individual, from the capitol grounds or building either on the basis of past acts or in fear of future actions.

If S. Jt. Res. 53 constitutes punishment, it is void as a Bill of Attainder. As a general rule, the legislature may not punish an individual or group of individuals for past acts. *Brown v. United States,* (1965) 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed. 2d 484; Wis. Const. Art. 1, sec. 12.

If S. Jt. Res. 53 is designed as a deterrent then it is overly broad. Each citizen has a protected First Amendment right to peaceably assemble and to petition his government for redress of grievances, U.S. Const., Amend. 1. These rights may only be taken away by due process of law. *Douglas v. City of Jeanette,* (1943) 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324.

Where, as here, the legislature is dealing with protected activity it must deal narrowly with the subject. Thus,

"* * * even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker,* (1960) 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed. 2d 231.

The intent of S. Jt. Res. 53 appears to be to prevent Father James Groppi from committing acts of "thievery and disorder" in the future in the state capitol or on the capitol grounds. Wisconsin already has laws against disorderly conduct, sec. 947.01, Stats., and against theft, secs. 943.20, 943.32, Stats. These are "less drastic means" of achieving the goal of peace and security on the capitol grounds. Moreover, Wisconsin has recently enacted a "misconduct on public grounds" statute which if constitutional would appear to cover potential problems. Sec. 964.80, Stats.

I conclude therefore that even if S. Jt. Res. 53 were to have force and effect it would be unnecessary and clearly unconstitutional.

RWW:DJH

Safety Order Enforcement—Under secs. 101.104 and 101.28, Stats., when a deputy inspector determines that there is a violation of safety orders where a condition of extreme and imminent danger to a workman's life exists, he may seek the assistance of a local law enforcement officer. The local law enforcement officer has a duty to render such assistance unless in his opinion other priority assignment takes precedence.

January 15, 1970.

JOSEPH C. FAGAN, *Chairman*
Department of Industry, Labor and Human Relations

You have asked for an opinion as to whether a deputy of your department may ask any local law enforcement officer to place a watch on a job site to enforce a stop order under secs. 101.104 and 101.28, Stats., when there is imminent danger to life and limb because it is not possible for your deputy to remain there to insure that necessary safeguards have been provided. Your question is also predicated upon whether the local law enforcement officer can avoid serving in such capacity.

The stop order is issued based upon alleged violation of sec. 101.104, Stats., which provides:

"Mines, tunnels, quarries, pits; operation in violation of safety aids. If any shaft or workings of a mine, or any tunnel, trench, caisson, quarry, or gravel or sand pit is being operated or used in violation of the safety orders of the industrial commission applicable thereto, the owner or operator upon receiving notice of such violation from the commission shall immediately cease such operation or use.

The operation or use of such shaft or workings of a mine, or of such tunnel, trench, caisson, quarry or gravel or sand pit, shall not be resumed until such safety orders have been complied with."

The usual fact situation is that your deputy comes upon a situation where there is an employe working in a deep, unsloped, unshielded or unbraced trench or excavation where a cave-in is likely to occur. When he determines that a workman's life is in extreme or imminent danger, he orders the work stopped immediately and workmen removed until all required safety precautions have been taken. Experience has indicated that as soon as he leaves, the employe is ordered to complete the job inside the trench because it takes only a short time to do so and providing proper safeguards is expensive.

By 51 OAG 28, my predecessor stated that your department has the authority to permit your deputies to seek assistance to obtain law enforcement at the local level such as signing a complaint to institute civil or criminal proceedings.

Your immediate question is whether your deputy may seek assistance or order the chief of police, deputy sheriff, or local police officer to place a watch on the job site while your deputy is away seeking an injunction as provided by sec. 101.103 (6) (b), Stats., or signing a complaint before a magistrate.

Section 101.28, Stats., provides insofar as is material here:

"Sec. 101.28 Penalty for violations* * * It shall be the duty of all officers of the state, the counties and municipalities upon the request of the industrial commission to enforce in their respective departments, all lawful orders of the industrial commission insofar as the same may be applicable and consistent with the general duties of such officers."

A stop order issued by your deputy, based upon violation of safety orders whereby injury to limb or imminent danger to life has been brought to the attention of persons in re-

sponsible charge of the activity in progress, should be obeyed by him. If there is likelihood that he will not comply after being informed of the imminent danger, then any attempt to continue work without first rectifying the dangerous condition may constitute commission of a crime in violation of sec. 941.30, Stats.

Section 941.30, Stats., provides:

"941.30 Endangering safety by conduct regardless of life. Whoever endangers another's safety by conduct imminently dangerous to another and evincing a depraved mind, regardless of human life, may be fined not more than $1,000 or imprisoned not more than 5 years or both."

A peace officer, may he be a policeman, constable, deputy sheriff or village marshal, has the duty to prevent the breach of the peace or commission of any crime. See sec. 60.54, Stats., applicable to town constables; sec. 61.28, Stats., village marshals; sec. 62.09 (13), Stats., city police and sec. 59.23 (7) and (10), Stats., county sheriffs.

Although generally a crime is made up of overt acts and intent, the element of criminal intent may be supplanted by culpable negligence. If the culpable negligence is such that it manifests indifference as to consequences of his act, a criminal intent may be presumed. *State v. Carlsen,* (1958) 5 Wis. 2d 595, 604, 93 N.W. 2d 354; *State v. McCarter,* (1967) 36 Wis. 2d 608, 612, 153 N.W. 2d 527; *Holesome v. State,* (1968) 40 Wis. 2d 95, 161 N.W. 2d 283.

When a crime is being or about to be committed any peace officer has a duty to prevent it and arrest the perpetrator.

It is, therefore, my opinion that a deputy of your department may ask any local enforcement officer to place a watch on a job site to enforce a stop order. The local officer accordingly has a duty to comply with such a request subject to the necessity for placing this responsibility in a proper priority in relation to his other required duties.

RWW:RGM

Court Reporters—Suit Taxes—S.B. 143, 1969, as passed by the senate, if enacted into law, increasing salaries of county reporters and raising suit taxes, would probably not violate sec. 18, Art. VII, Wis. Const. However, basic suit taxes are required to be paid into state and county treasuries, segregated, and payments therefrom restricted to payment of judges' salaries.

January 16, 1970.

THE HONORABLE THE SENATE

By S. Res. 30, 1969, you have requested my opinion on whether an act which would result from passage of S. B. 143, 1969, in the form the bill passed the senate, would violate Art. VII, sec. 18, Wis. Const.

Section 8 of S. B. 143 provides that, if S. B. 565 is enacted into law, the changes made thereby in secs. 59.42 (1) (e), 253.07 (1) and 271.21, Stats., and the changes made in those sections by this act shall not be deemed in conflict, but shall be merged and that the *suit tax* in criminal actions and forfeiture actions under secs. 59.42 (1) (e) and 271.21 shall be $3.

S. B. 565 was enacted into law as ch. 253 and was published November 29, 1969.

There is no need to set forth here the amounts of the various suit taxes which would result from the enactment of S. B. 143 and merging with ch. 253, Laws 1969.

For the purposes of this opinion it can be stated that S. B. 143 is generally concerned with the compensation of county court reporters. It would repeal present sec. 20.923 (1) (a) 5, Stats., the $7,200 statutory salary established for county court reporters, and would establish a salary range for such reporters in an amount equal to that for stenographic reporter 2 in the state classification and compensation plans for positions in the classified service, establish a minimum range and provide for pay adjustments on merit on steps comparable to those applicable to those for stenographic reporter 2.

S. B. 143 as passed by the senate increases the clerk's fees to be collected in criminal cases from $5 to $6 under sec. 59.42 (1) (a) relative to a dismissal, plea of guilty or nolo contendere and raises the *additional fee* assessed against a defendant in criminal cases to $3 from $2, which additional fee is to be paid, when collected, into the state treasury. Section 271.21 (1), Stats., relating to suit tax is amended to increase the suit tax in forfeiture actions in county court from $1 to $3. Section 271.21 (3), Stats., provides that the suit tax paid in circuit court shall be paid into the state treasury, but that the suit tax paid in county courts shall be paid one-half to the state treasury and one-half to the county treasury. Under sec. 8 of S. B. 143, as passed by the senate, the additional fee of $3 applicable to criminal cases under sec. 59.42 (1) (e) is referred to as a suit tax.

No portion of the suit tax is earmarked for payment of salaries of county court reporters nor is there specific segregation of the suit tax money in either the state treasury or county treasury. It is apparent, however, that the increased suit taxes were an attempt to fund the bill and sec. 10 of the bill provides:

"When the increased compensation herein is inadequate it shall be taken from the general fund."

Although this quoted language does not make it clear, I believe that the senate was probably concerned with the possible inadequacy of extra funds generated from the increased suit taxes to pay for the increased compensation of county court reporters. Under the bill, the state and county ultimately each pay each county court reporter one-half of the salary established for such reporter under sec. 253.35 (2m), Stats. and the counties are permitted to supplement such salary out of the county treasury.

Art. VII, sec. 18, Wis. Const., provides:

"Suit tax. SECTION 18. The legislature shall impose a tax on all civil suits commenced or prosecuted in the municipal, superior or circuit courts, which shall constitute a fund to be applied toward the payment of the salary of judges."

In ch. 325, Laws 1967, the legislature placed an additional suit tax on certain civil actions. The additional amount was in the nature of funding the state's share of state established salaries for district attorneys, but was neither earmarked nor segregated for that purpose. In 57 OAG 65 it was stated:

"The requirement of imposition of a suit tax to constitute a fund to be applied toward the payment of judges must be complied with by the legislature; however, it would not, in my opinion, prohibit the legislature from establishing an additional suit tax for other purposes. The additional suit tax provided for in ch. 325, Laws 1967, is not, in any event, earmarked for payment of state aids for district attorneys' salaries."

In 4 OAG 938 (1915) the then attorney general saw no constitutional objection to a statute which required the clerk of circuit court to pay the suit tax collected in county court into the county treasury, that being the public treasury from which the county judge was then paid.

Section 18, Art. VII, Wis. Const., has received only indirect interpretation from the Wisconsin Supreme Court. From the dictum in *State ex rel. Sanderson vs. Mann,* (1890) 76 Wis. 469, 475, 45 N.W. 526, 46 N.W. 51, it would appear that the fund raised by the imposition of a suit tax must be restricted to the payment of the salary of judges.

It is my opinion that, by reason of sec. 18, Art. VII, Wis. Const., the legislature must impose a suit tax in reasonable amount on all civil suits and that the tax should be paid into the state and county treasuries and be segregated therein and payments therefrom should be restricted to the payment of salaries of judges.

When the legislature has established a suit tax in reasonable amount segregated and restricted as outlined above, it can be argued that sec. 18, Art. VII, does not prohibit the legislature from establishing an additional suit tax for other purposes, or if the amount collected exceeds the amounts of the salaries paid judges in any given year, from using any surpluses as the legislature deems fit.

S. B. 143, as passed by the senate, does not establish an additional suit tax and, since it does not directly divert any funds raised by the increased suit tax to payment of court reporters' salaries, a resulting act would probably not be in violation of sec. 18, Art. VII.

It is recommended that the legislature review all statutes relating to the imposition of a suit tax on civil suits toward the end of segregating funds raised thereby and restricting their use to the payment of salaries of judges.

RWW:RJV

Historical Society—Field Archaeology Act—The Field Archaeology Act, sec. 27.012, Stats., applies to vessels and their contents, located on state sites, if the vessels or contents have archaeological interest, except when federal admiralty law takes precedence or when the vessel or object is properly claimed by the owner as specified in secs. 20.909 or 170.07-10, Stats.

January 16, 1970.

RICHARD A. ERNEY, *Acting Director*
State Historical Society

You requested my opinion concerning two questions involving sec. 27.012, the Wisconsin Field Archaeology Act. This act places in the State Historical Society title as trustee for the state, to objects and data discovered at state sites. You inquired:

1. Does the act include ships, boats, canoes and similar vehicles of water transportation as well as objects found on these vessels when they are located under water within the state's boundaries, including the Great Lakes?

2. Is there any conflict between the authority granted by this statute for underwater archaeology and the state's salvage laws? If so, can this overlap be resolved?

In discussing these questions the following definitions and provisions found in sec. 27.012 are particularly important:

"(1) (a) 'Archaeological methods' means scientific procedures used in field archaeology by recognized professional authorities on archaeology.

"(b) 'Data' means field notes, photographs, maps and other records relating to field archaeology.

"* * *

"(d) 'Field archaeology' means the study of the traces of human culture at any state-owned land or water site by means of surveying, digging, sampling, excavating or removing objects.

"* * *

"(f) 'object' means a man-made article, implement or other item of archaeological interest.

"* * *

"(h) 'State site' or 'state archaeological site' means a land or water area, owned by this state, where there are objects or other evidence of archaeological interest. This term includes all aboriginal mounds and earthworks, ancient burial grounds, prehistoric and historical ruins, Indian mounds and objects and other archaeological and historical features on state land.

"(2) UNLICENSED FIELD ARCHAEOLOGY PROHIBITED. No person other than the state archaeologist and individuals licensed by the director shall engage in any field archaeology on any state site.

"* * *

"(5) OWNERSHIP, CUSTODY AND USE OF OBJECTS AND DATA. The state reserves to itself the title to all objects found and data gathered in field archaeology on state sites. Although a permit may name a custodian other than the historical society, title to the objects and data discovered at state sites is reserved to the historical society as trustee for the state. Physical possession of such objects shall revert to the state if such custodian ceases to

exist, or if the director, on the recommendation of the state archaeologist, finds that the custodian is not properly caring for them or keeping them conveniently available for study by students of archaeology."

The law is well settled in Wisconsin that the state holds the beds underlying navigable waters in trust for all its citizens. In the case of navigable lakes and ponds, including the Great Lakes (see *Bigelow v. Nickerson,* (1895) 70 F. 113, 17 C.C.A. 1), it is clear that a riparian owner has title to land only to the water's edge, defined as the high water mark. *Diedrich v. Northwestern Union Ry. Co.,* (1877) 42 Wis. 248, 24 Am. Rep. 399, *Mendota Club v. Anderson,* (1899) 101 Wis. 479, 78 N.W. 185. The bed of such a lake or pond to the ordinary high water mark is thus state property and, potentially, a "state site."

The state's interest in the bed of a navigable stream is subordinate to that of the riparian owner, unless the public rights of navigation and recreation are involved. The riparian owner has qualified title in the bed of a navigable stream to its center. See 10 OAG 38 (1921); 12 OAG 251, 253 (1923); *Delaplaine v. Chicago & N. W. Ry Co.,* (1877) 42 Wis. 214, 24 Am. Rep. 386; *Munninghoff v. Wisconsin Conservation Commission,* (1949) 255 Wis. 252, 38 N.W. 2d 712; and *Muench v. Public Service Commission,* (1952) 261 Wis. 492, 55 N.W. 2d 40. Thus, a stream bed would not be a "state site" unless the sunken vessel affected navigation or unless the state were the riparian owner.

Not all vessels found on underwater state property would necessarily be subject to the terms of the field archaeology act.

Vessels of no particular historical or archaeological value may include vessels raised in the familiar context of commercial salvage, which is the compensation paid to a person by whose " * * * voluntary assistance a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril, or such property recovered from actual * * * loss, *as in cases of shipwreck* * * *" 78 C.J.S. Salvage s. 1.

The Field Archaeology Act would not affect these salvage operations unless the sunken vessel or its cargo is of genuine archaeological or historical value. A difficulty arises in that the act does not specify the procedure or standards for determining when an object is of an archaeological or historical nature.

Thus, it is my opinion that the field archaeology act would apply to those vessels which are clearly of archaeological or historical interest and are found under navigable waters other than streams within the state's boundaries (with the exceptions discussed above).

Your second question concerns possible conflicts between the Field Archaeology Act and the state's "law of salvage." Salvage is an area of law under the exclusive admiralty jurisdiction of federal courts. U.S. Const. Art. 3, sec. 2, cl. 1. This power extends to all waters which are navigable. In view of this grant to the federal courts the states are without power to create or enforce any admiralty rule that conflicts with federal legislation or "the law of admiralty as determined by federal courts." 2 Am. Jur. 2d Admiralty, sec. 7. It is recognized, however, that states may legislate with respect to conduct within their borders, where the state action does not conflict with federal laws or essential features of exclusive jurisdicton. 2 Am. Jur. 2d Admiralty, sec. 7.

There appear to be few salvage cases arising in Wisconsin. Thus, federal courts in Wisconsin would follow general rules of salvage law, which may be summarized as follows: All navigable structures capable of use for purposes of transportation on water are "vessels" within admiralty jurisdiction even when aground. (2 C.J.S. Admiralty, sec. 18.) A sunken ship does not necessarily lose her character as a vessel subject to maritime jurisdiction. *The George W. Elder,* (Or.) 206 F. 268, 124 CCA 332. ". . . in the strict sense, the peril [referred to in the definition of salvage] need not be a peril of the sea." *The Jefferson,* 30 S.Ct. 54, 215 U.S. 130, 54 L.Ed. 125. "So the service may be rendered in saving property . . . on a public navigable river or lake or in saving a vessel undergoing repairs in drydock." 2

C.J.S. Admiralty, s. 7. If a ship is a derelict (i.e., "abandoned without hope of recovery and without intention of returning to it" 47 Am. Jur. 2d Salvage, s. 4), the salvors who first take possession have not only a maritime lien on the ship for salvage services, but the entire and absolute possession and control of the vessel as well. 47 Am. Jur. 2d, Salvage, s. 28. The subsequent section goes on to state that a finder of lost things on land has no lien for his services in rescuing or restoring the object, "but under the maritime laws of all countries, from considerations of public policy and commercial necessity, goods lost at sea are subject to a lien in the case of salvage, no matter where the services are rendered . . ."

While Title 46 of the U.S. Code has several chapters dealing with salvage (46 U.S.C. 721 et seq.), there appears to be no applicable federal statute dealing with title to a sunken ship which has been salvaged. Thus, conflict—if any—between state and federal "law" would involve sec. 27.012 (5), Stats., and the judicially established rule that a salvor is entitled to possession of a derelict.

The number of cases in which a vessel of genuine archaeological or historical interest is found on state-owned land by field archaeology methods may be small. In case the salvor of a historically significant vessel demanded possession of the vessel or a lien for his services, I believe the Field Archaeology Act would be found to control, for these reasons: While states may not bind or interfere with the exercise of federal admiralty jurisdiction, state statutes which are *local* in character may be enforced if enforcement does not prejudice the smooth functioning of the general maritime law. [2 C.J.S. Admiralty, s. 6; doctrine stated also in *Grant Smith-Porter Ship Co. v. Rohde,* (1922) 257 U.S. 469, 42 S.Ct. 157] Protection of archaeological objects found on Wisconsin land is a matter of strong state concern and essentially scientific in nature. Federal law, on the other hand, must be uniform in matters relating to navigation and commerce, but a restored vessel of archaeological or historical interest would probably never re-enter normal commercial navigation.

Although the state would have title to objects under sub. (5) of the act, the director can permit another person to have custody of them. The state can reclaim physical custody if the custodian does not fulfill certain obligations.

I have considered the possible applicability of Wisconsin's lost property statutes (secs. 20.909 and 170.07 — 170.10) to the questions you raise. There appear to be no cases in which these statutes have been applied to sunken vessels. Also, the statutes emphasize protection of the interest of an owner who returns to claim his lost property, whereas vessels subject to the Field Archaeology Act would have been abandoned. Application of the lost property statutes would present the possibility of recurring conflict with federal law of salvage; for this reason, the provisions of ch. 170 would probably be unenforceable. In case of a conflict between ch. 170 and sec. 27.012 (5), the Field Archaeology Act would take precedence because it is the more specific of the two.

RWW:MVB

Highway Contracts—Wage Rates—The Department of Industry, Labor and Human Relations does not have the authority to make more than one annual certification, under sec. 103.50, Stats., of the prevailing hours of labor or prevailing wage rates to apply to state highway project contracts.

January 21, 1970.

JOSEPH C. FAGAN

Department of Industry, Labor and Human Relations

You have requested my opinion whether under sec. 103.50 (4), Stats.,[1] the Department of Industry, Labor and Human Relations may update and revise its certification of prevailing hours and wages on state highway construction pro-

(See Footnote 1 on Page 24)

jects between May 1 and December 31 when the actual hourly and wage rates have undergone apparent change during that period.

In my opinion, the department does not have authority to make a revised certification, and if it did so in excess of its authority, such revised certification would have no legal effect.

Administrative agencies have only such authority as specifically granted to them by legislation or that which may be fairly implied therefrom.[2]

In this instance, the legislature has specifically given the Department of Industry, Labor and Human Relations the authority (and duty) to annually certify the prevailing hours and wages on state highway construction projects and has directed that this be done prior to May 1 of "the current calendar year."

Since the legislature has not granted specific authority to the department to certify more than once annually prior to May 1, the only question that remains is whether such authority may be fairly implied in the legislation. In my opinion there is no such implication.

The statutory history bears out the construction that the legislature intended this determination and certification to be a single annual one. While sec. 103.50, Stats., has undergone several revisions since its enactment in 1931, it has remained the same in basic content and purpose.

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[1]"(4) CERTIFICATION OF PREVAILING HOURS AND WAGES. The industrial commission shall prior to May 1 of the current calendar year certify to the highway commission the prevailing hours of labor, the prevailing wage rate and the hourly basic rate of pay for all such classes of laborers and mechanics in each area. The certification shall in addition to the current prevailing hours of labor, the prevailing wage rates and the hourly basic rates of pay include future hours and rates when such hours and rates can be determined for any such classes of laborers and mechanics in any area and shall specifically set forth the effective dates thereof when future hours and rates are certified. If a construction project extends into more than one area there shall be but one standard of hours of labor and wage rates for the entire project."

[2]*American Brass Co. v. State Board of Health,* (1944) 245 Wis. 440, 15 N.W. 2d 27 and cases therein cited: 1 Am. Jur. 2d, Administrative Law, Chap. IV.

As originally enacted[3], sec. 103.50, Stats., provided for a single annual determination without a deadline directive.

Ch. 555, Laws 1943, revised sec. 103.50, Stats., and provided, in part:

" * * *

"(4) The industrial commission shall prior to February 1 of the calendar year certify * * *."

Ch. 12, Laws 1945, changed the certification date to "April 1 of the current calendar year" and ch. 425, Laws 1949, changed the certification date to its present May 1 deadline.

The legal maxim *expressio unius est exclusio alterius*,—expression of one thing is the exclusion of another—would negate a construction that by necessary implication the department has the authority to make more than one certification a year. Subsection (4) states, in part, "* * * the industrial commission shall prior to May 1 of the current calendar year certify * * *."

Another factor in determining whether subsec. (4) authorizes the department to make more than one certification a year is the express or stated wishes of the legislature. You state that the purpose in making more than one certification a year is to keep the hourly and wage rates more exactly in line with the actual hour and wage rates then in existence. However, the statutory language of subsec. (4) suggests that the legislature was not preoccupied with exact parallelism: "* * * If a construction project extends into more than one area, there shall be but one standard of hours of labor and wage rates for the entire project."

Further, subsec. (4) gives the department authority to determine, when possible, future rates. In addition to being an attempt to alleviate the problem that gives rise to your question, this language again negates an implication that the department has the authority to make more than one annual determination, since the authority to make determi-

[3]Ch. 452, Laws 1931.

nations of future rates would be unnecessary if the department was empowered to make additional determinations during the year.

Further, in subsec. (2), the definitions section, we note again that the legislature was not concerned with precise parallelism, since the certified wage and hourly rates need not be the actual prevailing rates since the legislature has placed certain proscriptions upon the department's determination. For example, even though the prevailing work day may be longer than eight hours, the department's determination cannot exceed an eight hour day; nor could the department's determination of the prevailing wage rate be less than a "reasonable and living wage" even though the prevailing wage rate might, in fact, be lower.

I conclude that the authority of the Department of Industry, Labor and Human Relations to make more than one annual certification under sec. 103.50, Stats., is not specifically granted by law and further that such authority may not be fairly implied therefrom.

I am aware that the practices under sec. 103.50 and under the federal Davis-Bacon Act vary in this respect, but the variance results from a difference in statutory language. Further, the operation of the federal Davis-Bacon Act is not repugnant to the force and effect of sec. 103.50, Stats.

Secondly, it is my opinion that even if the department did make additional certifications, the same would be legally ineffective.

Subsection (7) establishes penalties with noncompliance with sec. 103.50, Stats. These penalties make it a criminal offense to violate the provisions of sec. 103.50, Stats. Thus, we are dealing, insofar as enforcement is concerned, with a penal statute. This being so, the statute must be strictly construed against the state so as not to include acts not clearly within the legislative intent.[4]

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[4]*State ex rel Shinners v. Grossman,* (1933) 213 Wis. 135, 250 N.W. 832; *State v. Joe Must Go Club,* (1955) 270 Wis. 108, 70 N.W. 2d 681; *State ex rel. Dinneen v. Larson,* (1939) 231 Wis. 207, 284 N.W. 21, 286 N.W. 41.

Returning now to subsec. (6) we again read, "the prevailing * * * rates * * * as certified by the industrial commission shall be specifically set forth in the proposals and contracts * * *." The words "as certified by the industrial commission" can only refer to subsec. (4), which states that the Industrial Commission shall make its certification "prior to May 1 of the current calendar year." Thus, in my opinion, a violation of a certification made outside of the scope and direction of sec. 103.50, Stats., would not be an indictable crime.

While the ineffectiveness of additional certification is not a direct reply to the question of what authority the department has, it does in my opinion, aid in construing the legislative intent of sec. 103.50, Stats.

RWW:WHW

Driver Education—On Site Inspections — Under sec. 343.06 (3), Stats., the offering of driver education courses by public schools is optional rather than mandatory; but if offered, all qualified students must be allowed to participate. The State Superintendent of Public Instruction may require private schools to consent to on-site inspections for compliance verification as a condition of approval granted those schools under that section.

March 5, 1970.

WILLIAM C. KAHL
State Superintendent of Public Instruction

You ask two questions regarding sec. 343.06 (3), Stats., which provides that drivers' licenses shall not be issued:

"(3) To any person under age 18 unless such person has satisfactorily completed a course in driver education in public schools approved by the department of public instruction, or in vocational schools approved by the state board of vocational, technical and adult education, and in non-pub-

lic and private schools which meet the minimum standards set by the department of public instruction, or has satisfactorily completed a substantially equivalent course in driver training given by a school licensed by the motor vehicle department under s. 343.61 and has attained the age of 16, except as provided in ss. 343.07 and 343.08. Such substantially equivalent course must be approved by the department of public instruction. The commissioner shall prescribe rules for licensing of schools and instructors to qualify under this section. The driver education course shall be made available to every eligible student in the state. No operator's license shall be issued unless a driver's examination has been administered by the motor vehicle department."

Your questions are:

"1. Must Wisconsin public high schools offer a driver education course and make it available to every eligible student in the district?

"2. In light of the requirements in section 343.06 (3), Stats., as revised that non-public or private schools must meet the minimum standards set by the department of public instruction, can the department of public instruction conduct on site inspections in such non-public or private schools to determine if such minimum standards are being met?"

As to the first question, I am of the opinion that public school authorities are not required to establish driver education courses as a part of their school curricula, but that if any particular public school does offer such a course, it must "be made available to every eligible student in the state," i.e., to every student attending that school either as a district resident, or on a tuition basis. Several considerations indicate to me that such a conclusion is required.

First, the subjects required by law to be taught in the public schools of this state are set forth in sec. 118.01, Stats. Significantly, subsec. (4) provides:

"(4) Prevention of Accidents. Every public school shall provide instruction on the prevention of accidents and promotion of safety on the public highways."

This is the only requirement in sec. 118.01, Stats., relative to highway safety and accident prevention. Section 343.06 (3), Stats., is, of course, a part of the motor vehicle code, and deals not with a clear, specific, mandatory direction to school authorities on a school subject as does sec. 118.01 (4), Stats., but with optional conditions to be met by applicants for drivers' licenses as precedent to administrative action by the division of motor vehicles. Had the legislature intended that the driver education course was required to be offered in the public schools, one would expect to find the requirement in sec. 118.01, Stats., either as an amendment to subsec. (4), Stats., or in a new subsection.

Second, we must consider that sec. 343.06 (3), Stats., applies only to persons between 16 and 18 years of age—that is, to those who in most instances would be obliged to attend school and who in nearly all cases would actually be in school attendance. For example, sec. 118.15 (2), Stats., requires school attendance until age 18 in districts containing a vocational, technical, and adult education school offering day class programs. Section 41.155, Stats., contemplates eventual inclusion of the entire state within these latter districts. If the establishment of the driver education course as a school subject was compulsory, there would seem to be little need, if any, to extend to applicants under sec. 343.06 (3), Stats., the option of taking driver training in a school licensed for that purpose by the division of motor vehicles. Yet, because of that option, the legislature must have anticipated some degree of enrollment of persons between 16 and 18 years of age in the latter schools.

Third, and as an extension of the second point, driver education courses, approved by you, may also be given in non-public educational institutions. Here again, the legislature certainly did not contemplate a need for a mandatory offering of the course in the public schools because of lack of authority for private schools to make the course available to their students.

Finally, "marginal" districts having but a relatively small pupil enrollment would, if required to establish the course, be put to the expense of providing something that might not even be wanted by any pupil, since sec. 343.06 (3), Stats., does not require a pupil aspiring to a license to take the driver education course, whether in a public school or elsewhere. The pupil might prefer to take driver training at a licensed school. On the latter point, the option of driver training rather than driver education as a satisfactory prerequisite to issuance of an operator's license under sec. 343.06 (3), Stats., seems to be of special significance. This is because of the marked difference that exists between the options. Driver education, as presently envisaged by the Department of Public Instruction, requires a course consisting of a minimum of 30 clock hours of classroom phase instruction, a minimum of 6 clock hours of observation time and 6 clock hours of actual behind-the-wheel instruction in the practice driving phase in order that the public school giving the course may qualify for the pertinent aids. Rule PI 3.20 (8) 1, 6 Wis. Adm. Code, 22f Driver Training Schools, on the other hand, do not appear to have promulgated any absolute minima, at least in published form, as to the various instructional phase offered by such schools. For example, the manual used by a certain driver training school (described by itself as such) in this state, advises the student:

"After 2 or 3 lessons, you and your instructor will probably be able to estimate the total number of hours instruction that may be required for you to become a safe, competent driver." *The New Driver's Guide*, p. 5 (San Dale Press, 1965).

Rule MVD 19.07 of the Division of Motor Vehicles (5 Wis. Adm. Code 142), provides that the division administrator may permit driver schools to instruct students under sec. 343.06 (3), Stats., in either a "complete course of instruction," or in a "behind-the-wheel course" only, the first of which is the driver education course required by the Department of Public Instruction as described above, and the second of which is simply the behind-the-wheel plus the 6-hours-of-observation-time portions of the entire driver edu-

cation course; provided, however, that the "short" course has been approved by the Department of Public Instruction before a driver school may begin to teach it. Consequently, a very marked difference may exist between the options extended to a student complying with sec. 343.06 (3), Stats.

My conclusion, therefore, is that the establishment of the course is optional. If it is offered, it must be on the same terms as other school subjects are offered; that is, made available to qualified students as above stated.

As to question 2, I am somewhat doubtful whether as a matter of law you would ordinarily have the authority to inspect a private or parochial school for compliance with minimum standards of education. The power of the state to regulate private schools is subject to the same limitations as exist in the case of private property or rights generally. 47 Am. Jur., Schools, sec. 221, p. 459. That consideration, however, is really academic. If a private school wishes to establish the course for the purpose of sec. 343.06 (3), Stats., it must secure your approval. In my opinion, you may require as a condition of approval, the advance consent of the school that you or your department may make on-site inspections of the school for the purpose of verifying continued compliance with approval requirements.

RWW:RDM

Revisor of Statutes—Under sec. 227.025, Stats., consent may not be given to incorporate by reference the United State Code or federal regulations, sec. 21, Art. VII, Wis. Const., requiring publication; therefore, future standards may not be incorporated by reference.

March 10, 1970.

JAMES J. BURKE, *Revisor*
Statutory Revision Bureau

You have asked for an opinion on the following questions:

"(1) Is it proper to incorporate the United States Code under sec. 227.025, Stats., which authorizes the incorporation of standards of technical societies and organizations of recognized national standing?

"2) Is it proper to incorporate the federal regulations under the above section?

"3) Is the consent procedure under sec. 227.025, Stats., required if either of the above incorporations are proper?

"4) Is the incorporation limited to the language of the standard as of the date of publication of the rule, or does it also include future amendments in the referred to federal regulations?"

In answer to your first and second questions, it is my opinion that it would be improper to incorporate by reference the U. S. Code or federal regulations under the provisions of sec. 227.025, Stats.

Section 227.025 Stats., provides in part:

" * * * All rules and other materials which agencies are directed or authorized by this chapter to file with the revisor of statutes shall be published in the Wisconsin administrative code or register in the manner prescribed by sec. 35.93. For the purpose of avoiding unwarranted expense, an agency may, with the consent of the revisor and attorney general, utilize standards established by technical societies and organizations of recognized national standing by incorporation of such standards in its rules by reference to the specific issue or issues of books or pamphlets in which they are set forth, without reproductions of the standards in full. * * * Each rule containing such incorporation by reference shall state how the material so incorporated may be obtained and that the books and pamphlets containing the standards are on file at the offices of the agency, the secretary of state and the revisor of statutes. * * * "

It is further improper to incorporate by reference the U. S. Code or federal regulations in our administrative code under our constitutional provision requiring publication.

Section 21, Art. VII, Wis. Const., provides in part:

" * * * And no general law shall be in force until published."

In *Whitman v. Department of Taxation,* (1942) 240 Wis. 564, 577, 4 N.W. 2d 180, the court held:

"The taxpayer claims, however, that while it has been numerously held the court will take judicial notice of the rules of administrative bodies, no rule of such a body becomes effective against the general public until it is published in such form as to be accessible to the general public and that there was no such publication of the rule of the Tax Commission, the predecessor of Department of Taxation, until 1932. The taxpayer contends that until that time, under our constitutional provision, sec. 21, art. VII, that 'no general law shall be enforced until published,' the rule of the Tax Commission did not become operative until published. Surely if no general law enacted by the legislature becomes effective until published, a rule of an administrative body does not become effective as a general law until published, and if the fact be that there was no publication of the rules of the Tax Commission until 1932 its rules up to that time were not effective as public laws."

My predecessors in 50 OAG 107 and 10 OAG 648 concluded that publication in full of the federal laws is required in our legislative acts and that incorporation by reference or citation is invalid.

Administrative rules have the force and effect of public law when regularly enacted pursuant to statutory authority.

The rule is stated in *Josam Mfg. Co. v. State Board of Health,* (1965) 26 Wis. 2d 587, 596, 133 N.W. 2d 301:

" 'Rules, regulations, and general orders enacted by administrative agencies pursuant to the powers delegated to them have the force and effect of law, . . .' 2 Am. Jur 2d, Administrative Law, p. 119, sec. 292."

In view of the strong language in the *Whitman* case, *supra,* I can only conclude that the reasoning of these prior

opinions concerning legislative acts is equally applicable to state administrative rules.

The specific exception to this rule is provided for in sec. 227.025, Stats., and pertains to "standards of technical societies or organizations of recognized national standing." While this exception does not include legislative processes of various governmental units empowered to make substantive laws, it may apply to physical or objective standards adopted by governmental agencies which are not policy matters.

The term "standard" is defined in the English dictionary as something that is set up and established by authority as a rule for the measure of quantity, weight, value or quality. It is synonymous to criterion, which is any objective measure by which one judges a thing by comparison as authentic, good or adequate. *Webster's Third New International Dictionary,* unabridged. Some examples are standards of measurements adopted by the National Bureau of Standards, cost of living index as ascertained by the Bureau of Labor Standards, and vital statistics as compiled by the United States Bureau of Census. These standards, usually based on scientific findings, statistics or other physical data, have general acceptance because of the department's or agency's reputation for consistent accuracy in matters of a technical or scientific nature. This general acceptance brings the findings and statistics published by these departments and agencies within the purview of sec. 227.025, Stats., as being adopted or promulgated by a "technical society" or an "organization of recognized national standing."

In view of the negative answers to questions one and two, it follows that in answer to question three, consent cannot be given.

In regard to question four, the reference to future regulations is moot. However, the question is relevant when applied to technical, objective standards which may be properly incorporated by reference. Since the reference material must be readily available and on deposit at the secretary of state's office, the adopting agency's office and the re-

visor of statute's office, such material must be current or antecedent. The material incorporated by reference cannot, therefore, include future amendments thereto, and it is my opinion that any attempt to incorporate such prospective standards or amendments by reference would be invalid.

RWW:RGM

Youth Camps—Recreational Activities—The power, jurisdiction and authority of the Department of Industry, Labor and Human Relations to promulgate rules covering the safety of frequenters while engaged in recreational activities at youth camps is limited by sec. 101.10 (2), (3), (4) and (5), Stats., to: 1) orders relating to the construction, repair and maintenance of all "public buildings" located on the youth camp premises but only insofar as such orders relate to structural defects in such public buildings.

April 2, 1970.

JOSEPH C. FAGAN, *Chairman*
Department of Industry, Labor & Human Relations

You request my opinion concerning whether the Department of Industry, Labor and Human Relations has the authority to promulgate rules covering the safety of frequenters while engaged in recreational activities at youth camps. Although this explanation is not contained in your letter, further contact between my office and your department indicates that the youth camps to which you refer might be operated by a variety of individuals or organizations, including governmental units, private non-profit organizations, religious societies and others. As you indicate in your letter, Ind 57.007 of the Wis. Adm. Code provides that the requirements embodied within ch. Ind 57 of the code shall apply to certain buildings used for overnight lodging, obviously including those buildings used to house the participants at such youth camps. Again, however, your question relates to the authority of your department to promulgate

rules relating to the safety of frequenters at such youth camps while engaged in recreational activities.

The Department's power and authority to promulgate rules or orders in this area are derived from sec. 101.10, Stats., especially subsecs. (2), (3), (4) and (5). As these subsections pertain to your immediate question, the department's power and authority is limited to: (1) ordering reasonable standards, rules or regulations designed to render public buildings safe and (2) enacting and enforcing similar reasonable orders designed to protect the safety and welfare of employes in their places of employment and frequenters of places of employment. On the other hand, sec. 101.06, Stats., (commonly known as the safe-place statute) imposes upon every employer the duty to furnish employment which is safe for the employes therein and further to furnish a safe place of employment for employes and for frequenters thereof. Moreover, this same section requires every employer and every owner of a place of employmnt or a public building to construct, repair or maintain any place of employment or any public building so as to render them safe. Although sec. 101.06, Stats., imposes certain duties upon such employers and owners of places of employment or public buildings, the department's powers to promulgate rules and orders must be found within sec. 101.10, Stats., and the cases arising thereunder.

First, it is perhaps advisable to discuss both the abolition of immunity enjoyed by certain institutions for negligence through the years and the separate question of the applicability of the safe-place statute to those institutions or units which previously were protected by such immunity in negligence actions. Gradually our court has abolished immunity from negligence actions as such immunity pertained to different entities or units. For example, see *Kojis v. Doctors Hospital,* (1961) 12 Wis. 2d 367, 107 N.W. 2d 131, 107 N.W. 2d 292, and *Duncan v. Steeper,* (1962) 17 Wis. 2d 226, 116 N.W. 2d 154 (charitable immunity); *Holytz v. Milwaukee,* (1962) 17 Wis. 2d 26, 115 N.W. 2d 618 (governmental immunity); *Widell v. Holy Trinity Catholic Church,* (1963) 19 Wis. 2d 648, 121 N.W. 2d 249 (religious immunity). Although numerous other cases might be cited, an analysis of

the above cited cases and the cases discussed therein clearly indicates that most, if not all, of the judicially established immunities from tort liability have been abolished.

It has been well established for some time that the safe-place statute does not create a cause of action but only imposes a higher standard of care. See *Widell v. Holy Trinity Catholic Church,* (1963) 19 Wis. 2d 648, 650, 121 N.W. 2d 249, and cases cited therein. At the same time, of course, the same can be said of the safety orders or rules promulgated by your department under the authority of sec. 101.10, Stats.

Even before the abolition of the several immunities discussed above, our court held that such entities were not immune from compliance with the safe-place statute. For example, see *Wilson v. Evangelical Lutheran Church,* (1930) 202 Wis. 111, 230 N.W. 708 (religious institutions); *Holzworth v. State,* (1941) 238 Wis. 63, 298 N.W. 163 (governmental units); *Grabinski v. St. Francis Hospital,* (1954) 266 Wis. 339, 63 N.W. 2d 693 (charitable institutions). These judicial determinations are totally consistent with the following broad definitions contained in sec. 101.01, Stats.:

"Definitions of terms used. The following terms as used in sections 101.01 to 101.29 of the statutes, shall be construed as follows:

" * * *

"(2) The term 'employment' shall mean and include any trade, occupation or process of manufacture, or any method of carrying on such trade, occupation or process of manufacture in which any person may be engaged, except in such private domestic service as does not involve the use of mechanical power and in farm labor as used in subsection (1).

"(3) The term 'employer' shall mean and include every person, firm, corporation, state, county, town, city, village, school district, sewer district, drainage district and other public or quasi-public corporations as well as any agent, manager, representative or other person having control or

custody of any employment, place of employment or of any employe.

" * * *

"(12) The term 'public building' as used in ss. 101.01 to 101.29 means and includes any structure, including exterior parts of such building, such as a porch, exterior platform or steps providing means of ingress or egress, used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public or by 3 or more tenants.

"(13) The term 'owner' shall mean and include every person, firm, corporation, state, county, town, city, village, school district, sewer district, drainage district and other public or quasi-public corporations as well as any manager, representative, officer, or other person having ownership, control or custody of any place of employment or public building, or of the construction, repair or maintenance of any place of employment or public building, or who prepares plans for the construction of any place of employment or public building. Said sections 101.01 to 101.29, inclusive, shall apply, so far as consistent, to all architects and builders."

The purpose of the above discussion is merely to show that no youth camp would be immune from regulation under sec. 101.10, Stats., merely because it was owned or operated by a governmental, charitable or religious organization. On the other hand, it is further necessary to discuss whether such youth camp and the accompanying recreational activities to which you refer fall within the definition of a "public building" or a "place of employment."

In construing the definition of "public building" under sec. 101.01 (12), Stats., the court in *Rogers v. Oconomowoc,* (1964) 24 Wis. 2d 308, 313, 128 N.W. 2d 640, said:

"In order for a place to be a 'public building' it must be a 'structure,' and must be used 'as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public or by 3 or more tenants.' [Sec. 101.01 (12), Stats.] In order to be a 'public building,' a structure must have 'some as-

pects of similarity to a building as that term is commonly understood.' [*Ball v. Madison,* (1957) 1 Wis. 2d 62, 66, 82 N.W. 2d 894.]"

In *Ball v. Madison,* cited above, the court further observed that "The fact that something is constructed and intended for public use does not alone constitute the structure of a public building unless it has some aspects of similarity to a building as that term is commonly understood." See 1 Wis. 2d at 66. See also, *Costee v. City of Superior,* (D.C.W.D. Wis., 1964) 231 F. Supp. 261, affirmed 343 F. 2d 100.

Based upon the definition of a "public building" and upon the cases construing this term, it is my opinion that the department's power and authority under sec. 101.10 (5), Stats., is limited to promulgating rules or orders relative to the construction, repair and maintenance of the public building in which such recreational activities may take place. For example, the department clearly could establish reasonable regulations concerning the construction, repair and maintenance of a gymnasium within a public building so as to protect frequenters from possible structural defects. On the other hand, I find no authority for promulgating regulations relative to recreational activities conducted within a public building where the anticipated hazard is unrelated to the building structure. For example, your department would have no authority to establish standards relative to safety precautions to be taken in the construction, repair or maintenance of non-structural recreational equipment such as table tennis facilities and the like. Furthermore, a playground area does not fall within the definition of a public building. See *Mlynarski v. St. Rita's Congregation,* (1966) 31 Wis. 2d 54, 60, 142 N.W. 2d 207, and cases cited therein.

Finally, as your question pertains to public buildings, there are instances in which an organization or institution does not qualify as an employer but, on the other hand, such organization or institution may fall within the definition of an owner of a public building. Again, however, the duty of the owner of a public building to maintain such building has

no application to temporary conditions unrelated to the structure of the building or the material of which it is composed. *Grabinski v. St. Francis Hospital,* (1954) 266 Wis. 339, 342, 63 N.W. 2d 693. An employer has the additional duty to furnish safe employment for his employees including the furnishing of a safe place of employment, thus extending the employer's duties beyond the basic structure to include devices and other property installed or placed in such place of employment. *Jaeger v. Evangelical Luth. Holy Ghost Cong.,* (1935) 219 Wis. 209, 211-212, 262 N.W. 585. An employer can be held liable only to an employee, and not to frequenters, under that portion of sec. 101.06, Stats., which requires that safe employment be furnished. *Rogers v. Oconomowoc,* (1964) 24 Wis. 2d 308, 315-316, 128 N.W. 2d 640. On the other hand, every employer must furnish a safe "place of employment" both for employees and for frequenters thereof under sec. 101.06, Stats.

The concept of a "frequenter" is broadly defined in sec. 101.01 (5), Stats., as follows:

"The term 'frequenter' shall mean and include every person, other than an employe, who may go in or be in a place of employment or public building under circumstances which render him other than a trespasser."

Assuming that those persons to whom you refer in your opinion request are not trespassers, the only remaining question is whether the point at which such recreational activities take place constitutes a place of employment which, under sec. 101.01 (1), Stats., is defined as follows:

"The phrase 'place of employment' includes every place, whether indoors or out or underground and the premises appurtenant thereto where either temporarily or permanently any industry, trade or business is carried on, or where any process or operation, directly or indirectly related to any industry, trade or business, is carried on, and where any person is, directly or indirectly, employed by another for direct or indirect gain or profit. * * * "

Based upon the unique and varied sponsorship of youth camps in Wisconsin, it is virtually impossible for me to give

you an unequivocal affirmative or negative answer relative to your powers of regulation. Certain guidelines which are based upon interpretations of the phrase "place of employment" may be of assistance in determining which youth camps, if any, fall within your regulatory powers concerning safety precautions associated with recreational activities.

First, the absence of a profit motive on the part of the operators of such camps prevents these camps from being treated as a place of employment notwithstanding the fact (1) that the operator may experience an actual profit or (2) that his employes experience gain or profit in the form of salary or wages. See *Rogers v. Oconomowoc,* (1964) 24 Wis. 2d 308, 315, 128 N.W. 2d 640 (pertaining to a public recreational park, beach and swimming area); *Haerter v. West Allis,* (1964) 23 Wis. 2d 567, 670, 127 N.W. 2d 768 (pertaining to a school gymnasium where the activities carried on were not sponsored, in whole or in part, by the city for a profit motive); *Coste v. City of Superior,* (D.C.W.D. Wis. 1964) 231 F. Supp. 261, 265 (pertaining to toboggan hill or slide maintained by the city).

Even the activities of a so-called nonprofit organization, under certain circumstances, may temporarily bring part or all of the organization's premises within the definition of a "place of employment." In *Minnetti v. West Side Business Men's Asso.,* (1945) 246 Wis. 586, 689-691, 18 N.W. 2d 487, a platform which was furnished by the defendant association for the use of a professional entertainer engaged in performing acrobatic acts at a harvest fair conducted by the association for advertising purposes was deemed a place of employment under sec. 101.01 (1), Stats., thereby rendering the association liable for injury sustained by the entertainer because of the unsafe condition of the platform. At the outset, the court emphasized that the entertainer was carrying on his business of providing entertainment for profit and that an electric company and a lessor of public address systems also profited from the installation of certain equipment necessary to the production of this act. In concluding that the injured entertainer was protected under the safeplace statute either as an employe or a frequenter, the court arguably placed undue emphasis upon the

profit or gain experienced by the entertainer himself and by those firms which provided the above mentioned accessories. Such emphasis appears to be unwarranted in view of later cases, set forth earlier in this opinion, which indicate that the gain or profit to which reference is made under sec. 101.01 (1), Stats., refers to the gain or profit inuring to the benefit of the employer alone.

Later in the *Minnetti* decision, however, the court found that the defendant association experienced at least indirect gain through the advertising benefits which the fair would confer. Thus, putting aside the court's references to other gain or profit, *Minnetti* can be reconciled with other decisions on the ground that this otherwise nonprofit association temporarily was engaging in an activity for gain or profit thereby rendering the site of the injury a "place of employment."

The safe-place statute does not require an employer to own the premises in order to maintain a place of employment nor is it necessary that the employer have exclusive control and custody of the premises or control of the premises for all purposes. *Schwenn v. Loraine Hotel Co.,* (1961) 14 Wis. 2d 601, 607, 111 N.W. 2d 495. Moreover, *Schwenn* emphasized that the safe-place statute imposes a duty upon an employer to anticipate what the premises constituting the place of employment will be used for and further to inspect the premises to make sure that they are safe for such uses. The court held, in part, that a semi-circular driveway located on land owned by the city but used and maintained for gain or profit by the hotel company and a cab company was a place of employment thereby subjecting both defendants to liability for injuries sustained by a woman who tripped and fell on an accumulation of snow and ice in the driveway.

Before concluding this opinion, it is interesting and perhaps worthwhile to note the changing attitude of our court concerning the applicability of the safe-place statute to pupils attending public schools, a situation not dissimilar from your present inquiry. Originally, in *Sullivan v. School Dist.,* (1923) 179 Wis. 502, 191 N.W. 1020, the court held

that a pupil attending a public school was not a frequenter of the school building within the meaning of the safe-place statute. In *Niedfelt v. Joint School Dist.,* (1964) 23 Wis. 2d 641, 646, 127 N.W. 2d 800, the court expressed certain doubt concerning the desirability of the *Sullivan* interpretation but then stated its preference that any revision of the status of a school child be left to the legislature. After reviewing the *Sullivan* and *Niedfelt* cases, the court in *Mlynarski v. St. Rita's Congregation,* (1966) 31 Wis. 2d 54, 59, 142 N.W. 2d 207, made the following observation:

"Now that the doctrine of governmental immunity from tort liability has been abrogated, the foundation underlying *Sullivan* has been taken away and the *Sullivan* rule should be changed. If parents and others who are temporarily on the premises under circumstances which do not make them trespassers are frequenters entitled to the protection afforded by the safe-place statute it defies logic and common sense why students attending classes in that building should not be entitled to that same protection. There has been no case extending the ruling of *Sullivan* to a situation that the one alleged here where a student is injured while not under instruction or supervision. * * * We would even overrule *Sullivan* itself if such would bring the respondent under the protection of the safe-place law."

In 55 OAG 174, 175, relying upon the court's observations quoted above in *Mlynarski,* the attorney general suggested that the previous distinction between schools as "places of employment" as to teachers but not as to pupils or frequenters probably would not be maintained in the future. He concluded by stating that the pupils attending school probably are "frequenters" within the meaning of sec. 101.01 (5), Stats., while inside school buildings, thereby requiring schools to comply with the safety orders as to structural defects.

This evolution of decisions and opinions relating to the status of students attending public schools raises questions concerning the adequacy and desirability of our present statutes relating to your department's authority covering places of employment. For example, based upon the present

definition of a "place of employment" under sec. 101.01 (1), Stats., and cases arising thereunder, your department's authority to promulgate rules or orders covering the recreational activities of frequenters at youth camps is limited to only those camps which are operated, for the purpose of gain or profit. This would exclude, therefore, most or all youth camps operated by governmental units, religious institutions, charitable organizations or other nonprofit groups. Recognizing the desirability of promoting safety for all residents and other frequenters of all such youth camps, such distinctions based upon the existence or nonexistence of a profit motive frustrate this very goal. In that the several definitions contained within sec. 101.01, Stats., including the definition of a "place of employment," were enacted in substantially their present form some time before the abolition of the several immunities discussed earlier, one might assume that the emphasis placed upon the employer's gain or profit motive resulted from the legislature's recognition of the existence of these former immunities enjoyed by various entities through judicial determination. However, any extension of your department's power, jurisdiction and authority in this area obviously is a question reserved for the legislature.

Returning to your immediate question, your present powers and authority to promulgate rules covering frequenters engaged in recreational activities at various youth camps are limited by sec. 101.10 (2), (3), (4) and (5), Stats., and by the definitions of terms embodied within sec. 101.01, Stats. Based upon the statutes and decisions previously discussed and upon the facts submitted in your inquiry, your authority to promulgate rules covering frequenters in recreational activities at youth camps is limited to:

(1) Orders relating to the construction, repair and maintenance of all "public buildings" located on the youth camp premises but only insofar as such orders relate to structural defects in such public buildings and not to temporary conditions unrelated to the structure or permanent materials composing the public building; and,

(2) Orders covering the recreational activities of frequenters, whether such activities take place within or without the public buildings, but only insofar as such orders relate to those youth camps which are operated for the purpose of gain or profit.

RWW:DPJ

Road Maintenance—Highway System—Maintenance responsibility for roads removed from the state highway system is that of the town if formerly a town road and still within the boundaries of the town. If road is presently within a city or village, it becomes the responsibility of that municipality. If formerly a county road, maintenance responsibility is of the county.

April 2, 1970.

WILLIS J. ZICK, *Corporation Counsel*
Waukesha County

You have requested my opinion as to which unit of state government assumes the maintenance responsibility of highways removed from the state highway system. You state that a portion of a state trunk highway will be removed from the system and there is uncertainty as to whether this road was a town or county road when it was placed on the state system many years ago.

There is also the related problem of whether maintenance responsibility must be assumed by the town or a municipality in cases where a former town or county road is now within the boundaries of a city or village.

Specifically, you ask the following questions:

"(1) Does the state remain liable for the maintenance of a roadway removed from the State Trunk Highway System or does such responsibility pass to the municipality which was charged with such responsibility at the time the road initially went onto the State Trunk Highway System?

"(2) If the latter, with the circumstances previously outlined, would the area in question be considered to have been a County Trunk Highway so as to revert to the county or a town road so as to revert to the local municipalities?"

In writing this opinion, I will attempt to cover the entire problem of maintenance responsibility of roads removed from the state system because I understand it has been a recurring one and causes difficulty from time to time.

If the road was originally a town road and is still within the political boundaries of the town at the time it is removed from the state system, it would revert to its original town road status. This was the position taken by a previous attorney general in 1930 and I see no reason to disagree with this view. See 19 OAG 421.

It is my opinion that if the road in question, formerly a town road, is within the boundaries of a city or village, it would become the responsibility of that municipality to maintain the same, for it is that echelon of government that must determine the need of the road and has the power to vacate it if deemed no longer necessary. It could not revert to the town even though it may have been a town road when it was placed on the state system, since the town would have no jurisdiction over it.

If it is established that the road was a part of the county trunk system when it was placed on the state system, will it revert to the county or to the town, city or village within whose boundaries it lies? It is my opinion that in such case, the road would revert to its status as a county road.

Under Wisconsin law, county roads may exist in cities and villages. Section 83.025, Stats., so provides.

The following is quoted from an annotation in 158 ALR 543, at page 553:

"IV. State highways and others superimposed on local roads

"State highways are usually constructed, wholly or partly, upon previously existing county or other local roads.

Where a state highway has been so constructed, the general rule is that a later alteration of it will not terminate the public easement as to parts not included in the new highway. Such parts will merely revert to their former status under the care of the local authorities. *Wilkinson County v. State Highway Commission,* (1941) 191 Miss 750, 4 So 2d 298; *State v. Hoblitt,* (1930) 87 Mont 403, 288 P 181; *Long v. Melton,* (1940) 218 NC 94, 10 SE 2d 699 (but see statute in *Mosteller v. Southern R. Co.,* (1941) 220 NC 275, 17 SE 2d 133); *Hillsdale Co. v. Zorn,* (1939) 187 Okla 38, 100 P 2d 436."

The question relating to the so-called Milwaukee Mukwonago Road, referred to as "Trunk Line 5" in the minutes of the Waukesha County Board dated December 13, 1916, was difficult to resolve. I could find no provision for a "county trunk line system", except sec. 1311-1, Stats. (1916), which refers to county "trunk roads" and applies only to counties containing a city of the second class (40,000 population). According to the Wisconsin Blue Book records, Waukesha did not qualify in 1916.

It is my opinion, however, that the action of the county board in December, 1916, is sufficient to indicate that the road in question was adopted as a county road and funds were provided by the county for its maintenance. Further, the records of the Division of Highways indicate that it was a county road when it was made a part of the state highway system in the year 1919. In this case, the maintenance would revert to the county even though a part of it is now in the City of New Berlin, since county roads may, by statute, exist in cities or villages, as stated above.

RWW:REB

Insurance—Travel Expense—Present statutes do not authorize the Department of Administration to impose requirement of demonstrating automobile liability insurance coverage and possession of a valid operator's license upon state employes as a condition for entitlement to reimburse-

ment for travel expense, where sec. 20.916, Stats., is complied with. Secs. 16.71 and 16.53 discussed.

April 29, 1970.

WAYNE F. MCGOWN, *Secretary*
Department of Administration

You ask: May the State of Wisconsin require an employe to demonstrate automobile liability coverage in the amounts of $10,000 to $20,000 for personal injury or death, and $5,000 for property damage plus possession of a valid Wisconsin driver's license as condition to a contract between the State of Wisconsin and the employe where in such contract the employe uses his personal vehicle on official business and is compensated for this use?

You posit that the compensated use of a private vehicle for official business constitutes a contract between the states and the owner of the vehicle (state employe) for a service; that such a contract is authorized by sec. 16.71 (1), Stats.; that principals and agents may establish terms which when mutually accepted constitute elements of the contract; that further support for this position is found in sec. 20.916 (4), Stats.; that although the requirement of a valid Wisconsin operator's license exceeds the provisions of sec. 343.05 (2), Stats., which recognizes certain exemptions, it is in the best interest of the state to insist upon such a requirement; that the requirement as to automobile liability insurance is a contribution to the highway safety program; that the driver who fails to carry automobile liability insurance demonstrates such an attitude as to preclude him from entering into such a contract with the state; that the interests of other state employes traveling as passengers are ethically involved; that the imposition of the automobile liability insurance requirement would result in an economic benefit to the state in the form of a reduction of premium in the non-ownership liability insurance coverage policy now carried by the state; that the method of enforcement would be requiring the state employe to certify both as to the validity of his Wisconsin operator's license and

appropriate insurance coverage on each travel voucher claiming reimbursement for mileage; and finally, that these requirements with respect to operator's license and automobile liability insurance, were recommendations of the governor's task force on fleet safety, part I, par. 2g of the task force report of January, 1968.

Conceding the proper motives and desirable purposes to be served by imposing these requirements, I am nevertheless constrained to limit this opinion to the narrow issue of whether this procedure is authorized by law.

Administrative agencies have only such powers as are expressly granted to them or necessarily implied, and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. *American Brass Co. v. State Board of Health,* (1944) 245 Wis. 440, 15 N.W. 2d 27. Administrative boards have no common law power, their powers being limited by statute conferring such powers expressly or by fair implication. *Nekoosa-Edwards Paper Co. v. Public Service Commission,* (1959) 8 Wis. 2d 582, 99 N.W. 2d 821.

Section 16.71 (1), Stats., provides:

"The department of administration shall purchase and may delegate to special designated agents the authority to purchase:

"(1) All necessary materials, supplies, equipment, all other permanent personal property and miscellaneous capital, and contractual services and all other expense of a consumable nature for all state offices. All such materials, services and other things and expense furnished to any such office shall be charged to the proper appropriations of the offices to whom furnished, as provided in s. 20.505."

To pursue the possibility that the legislature intended "contractual services" as used above, to include contracts with state employes for the use of their personal vehicles on official business one must consider other statutes applicable to the Department of Administration when dealing with "contractual services". It is true that "contractual services" is rather broadly and vaguely defined in sec. 16.70

(4), Stats., as including "all material and services, and any construction work involving less than $2,500 for construction work to be done for or furnished to the state or any agency thereof." However, sec. 16.75 (1), Stats., provides in part:

"(1) All materials, supplies, equipment and contractual services except as otherwise provided in subs. (3) and (7), when the estimated cost exceeds $3,000, shall be purchased from the lowest responsible bidder. * * *"

Subsections (3) and (7) deal with patented or proprietary articles and stationery and printing and are not relevant here. However, the fact that the legislature specified that contracts over a specified amount shall only be let on bids indicates that each contract is to specify an amount to be paid for the services and probably a period of time within which the service is to be performed.

The statutory language, as it relates to contractual services, must have been designed to enable the Department of Administration to obtain by contract certain needed services it would not otherwise be able to obtain from available sources, especially not services which the state is entitled to receive from employes already hired by the state. Suffice it to say that it is practically inconceivable that this language could be applicable to several thousand long-term, short-term, renewable or continuous contracts with state employes using their vehicles on official business at the rate of 10 cents and 7 cents per mile.

Moreover, sec. 20.916 (1), Stats., provides:

"Traveling expenses. (1) EMPLOYES TO BE REIMBURSED. State officers and employes shall be reimbursed for actual and necessary traveling expenses incurred in the discharge of their duties. The officers and employes of any state agency shall, when for reasons of economy or efficiency they are stationed at any other place than the official location of such state agency, receive their actual and necessary traveling and other expenses when called to such official location for temporary service. The members of state agencies who are entitled to expenses but not compensa-

tion, the members of state agencies who are entitled to a per diem for time actually spent in state service, and the members of state agencies who receive an honorarium, shall be entitled to travel and other expenses while attending meetings of such state agency held at the city of Madison; but no such traveling or other expenses shall be allowed to any such member of any state agency who actually resides in the city of Madison while attending any such meeting at said city."

Further, sec. 20.916 (4) (a), Stats., as amended by sec. 115c, ch. 154, Laws 1969, provides:

"Whenever any state agency determines that the duties of any employe require the use of an automobile, it may authorize such employe to use his personal automobile in his work for the state, and reimburse him for such at a rate of 10 cents per mile for the first 400 miles per month and 7 cents per mile for each mile over 400 miles per month."

I can find no basis for construing this statute to mean that a state employe could only be reimbursed for traveling expense when performed pursuant to a contract entered into between such employe and the Department of Administration pursuant to sec. 16.71 (1), Stats.

The popular or reasonable import of words furnishes the general rule for the interpretation of public laws. *State Bank of Drummond v. Nuesse*, (1961) 13 Wis. 2d 74, 78, 108 N.W. 2d 283.

Section 20.916 (4), Stats., says "Whenever any state agency determines . . ." and this must refer to the particular state agency where the state employe is employed. When that agency determines that the duties of a particular state employe requires the use of an automobile, and authorizes that employe to use his personal automobile in his work for the state, and that employe then submits a claim for such authorized use, he is entitled to reimbursement at the statutory rate, assuming, of course, compliance with the various provisions of sec. 20.916, Stats., e.g. "actual and necessary" and "incurred in the discharge of their duties", certification "by the head of the state agency", etc.

That the legislature did consider giving the Department of Administration some special authority in this area is shown by sec. 20.916 (4) (b), Stats., which deals with additional reimbursement to an employe for the use of his vehicle as an emergency vehicle or under other special conditions.

Where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed. *State v. Welkos*, (1961) 14 Wis. 2d 186, 192, 109 N.W. 2d 889. Thus, the conferring of some special discretionary authority in the Department of Administration by sec. 20.916 (4) (b), Stats., is indicative of a legislative intent not to so confer such authority elsewhere in sec. 20.916, Stats. See, for example, sec. 20.916 (4) (d), Stats., dealing with certification by the head of the state agency of the amounts payable for use of a personal automobile. Also, see sec. 16.53 (1), Stats., dealing with procedures to be followed by the Department of Administration in pre-audit of claims (including travel) against the state and particularly sec. 16.53 (1) (ca), Stats., requiring all state departments to diligently review and supervise the travel expenditures of their employes and authorizing such state departments to adopt reasonable rules governing such expenditures.

I conclude that under present statutes there is no authority in the Department of Administration to enable it to impose requirements of demonstrating automobile liability insurance coverage and possession of valid operator's license upon all state employes as a condition for such employes' entitlement to reimbursement for use of their personal automobiles, where such use is in compliance with sec. 20.916, Stats.

RWW:JEA

Birth Control—Pregnancy—Section 151.15, Stats., would not prohibit the operation in Wisconsin of a federally-funded program in which licensed physicians or pharmacists gave

out to married persons information regarding articles used to prevent pregnancy, and made such articles available to them.

May 13, 1970.

CHARLES M. HILL, SR.

Department of Local Affairs and Development

You seek my opinion as to the effect of sec. 151.15, Stats., on a federally funded program in which licensed physicians and pharmacists would: (1) make available to married persons articles used to prevent pregnancy; and (2) distribute to married persons information on articles used to prevent pregnancy.

Section 151.15, Stats., provides as follows:

"(1) As used in this chapter, the term 'indecent articles' means any drug, medicine, mixture, preparation, instrument, article or device of whatsoever nature used or intended or represented to be used to procure a miscarriage or prevent pregnancy.

"(2) No person, firm or corporation shall publish, distribute or circulate any circular, card, advertisement or notice of any kind offering or advertising any indecent article for sale, nor shall exhibit or display any indecent article to the public.

"(3) No person, firm or corporation shall manufacture, purchase, or rent, or have in his or its possession or under his or its control, any slot machine, or other mechanism or means so designed and constructed as to contain and hold indecent articles and to release the same upon the deposit therein of a coin or other thing of value.

"(4) No person, firm or corporation shall sell or dispose of or attempt or offer to sell or dispose of any indecent articles to or for any unmarried person; and no sale in any case of any indecent articles shall be made except by a pharmacist registered under the provisions of ch. 151 or a physician or surgeon duly licensed under the laws of this state.

"(5) Any person, firm or corporation violating any provision of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than $100 nor more than $500 or by imprisonment in the county jail for not to exceed 6 months, or by both such fine and imprisonment."

The statutory prohibition with regard to "indecent articles" is operable against:

(1) any type of advertising such articles for sale to the public;

(2) public display of such articles;

(3) vending machine sales;

(4) any sale or disposition (or attempted sale or disposition) to unmarried persons; and

(5) any sale to married persons by other than a licensed physician or pharmacist.

It is clear under the statute that licensed physicians or pharmacists may sell such devices to married persons. Consequently, physicians and pharmacists who, pursuant to a federally funded program, make available or distribute to married persons articles used to prevent pregnancy or information thereon are not in violation of sec. 151.15, Stats.

The other portion of the program, described as one in which physicians or pharmacists would "distribute and circulate . . . information" on such devices to married persons, is not quite as clear. The statute does, after all, make it a misdemeanor to "publish, distribute or circulate any circular, card advertisement or notice of any kind offering or advertising any indecent article for sale."

In view of the fact that the statute permits the sale of articles to married persons by pharmacists or physicians and since sec. 151.15, Stats., is a criminal statute and to be strictly construed, therefore in the absence of any expressed prohibitions against dissemination I conclude that the statute was not intended to prohibit the dissemination information as a part of a federally funded program.

The statute is not a total ban on birth control. Its enactment in 1933 was, in fact, a "compromise", for in its original form it would have wholly prohibited birth control. See *State v. Arnold*, (1935) 217 Wis. 340, 343, 258 N.W. 843.

It is, therefore, my opinion that the program described in your letter of March 18, 1970, would not violate sec. 151.15, Stats.

RWW:WFE

Board of Regents—Fermented Malt Beverages—The Board of Regents of State Universities may allow the dispensing or furnishing of fermented malt beverages on the campus of a state university if such activity is incidental to or closely connected with another legitimate function carried on by the university, such as a student union. Such activity would not be subject to local regulation under sec. 66.054 (12) and (13), Wis. Stats. Whether such beverages will be served on any or all university campuses is for the Board of Regents to decide. Where similar services are already furnished by contractual arrangement, this service could also be provided by contract.

May 25, 1970.

EUGENE R. MCPHEE, *Executive Director*
Wisconsin State Universities

You have asked for an opinion on the following questions relating to the dispensing or furnishing of fermented malt beverages on campuses of the Wisconsin State Universities system:

(1) Is a state university subject to the provisions of sec. 66.054 (1) and (13), Stats.?

(2) Can a state university permit the dispensing or furnishing of fermented malt beverages on a campus located within a municipality which prohibits by ordinance the

dispensing or furnishing of fermented malt beverages under sec. 66.054 (13), Stats.? Can it do so where such dispensing and furnishing is not prohibited by local ordinance?

(3) If the answer to question (2) is in the affirmative, must the action to permit the dispensing or furnishing be taken by the Board of Regents before it can be initiated on a campus of the state universities system? Must the Board of Regents act separately for each unit of the system?

(4) Can the Regents contract with a private company to dispense or furnish fermented malt beverages on any campus granted permission by the Regents to carry on such an activity?

Section 66.054, Stats., is a legislative enactment of statewide concern for the purpose of providing a uniform regulation of the sale of fermented malt beverages. Subsections (12) and (13), Stats., of the statute, which provide municipalities with the general authority to enact additional regulations in reference to the sale of fermented malt beverages not in conflict with sec. 66.054 Stats., read as follows:

"(12) LOCAL ENFORCEMENT. The common council of any city, the board of trustees of any village and the town board of any town may adopt any reasonable rule or regulation for the enforcement of this section not in conflict with the provisions of any statute.

"(13) MUNICIPAL REGULATIONS. Nothing in this section shall be construed as prohibiting or restricting any city, village or town ordinances from placing additional regulations in or upon the sale of fermented malt beverages, not in conflict with the terms and provisions of this section but any city, village or town may by ordinance prohibit the selling, dispensing, giving or furnishing fermented malt beverages to anyone under 21 years of age when not accompanied by parent or guardian or spouse, and all such ordinances duly enacted before August 5, 1955, and otherwise valid are hereby declared to be valid. . . . "

In answer to your first question, it is my opinion that any municipal regulations enacted under the provisions of

sec. 66.054 (12) and (13), Stats., would not be applicable to a state university.

Ordinarily, general statutes or ordinances enacted thereunder do not bind the state or its agencies unless the legislative intent to do so clearly appears. Thus, in *State ex rel. Martin v. Reis,* (1939) 230 Wis. 683, 284 N.W. 580, our court held that laws of general application do not apply to the sovereign, stating at p. 688:

"... if it should be held that in the absense of an explicit statement in the statute to that effect, the state is subject to this regulatory statute, it would be equally subject to every other general regulatory statute, and in every general law which might affect the state it would be necessary to insert an exception. . . . "

See also *Necedah Manufacturing Corporation v. Juneau County,* (1931) 206 Wis. 316, 322, 237 N.W. 277, 96 A.L.R. 4, reversed on other grounds, 206 Wis. 316, 240 N.W. 405, 96 A.L.R. 16.

In 82 C.J.S., *Statutes,* sec. 317, pp. 554-555, the following appears:

"The government, whether federal or state, and its agencies are not ordinarily to be considered as within the purview of a statute, however general and comprehensive the language of the act may be, unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication."

It is said that broad principles of sovereignty require that a state or its agencies performing a governmental function remain free of municipal control. 5 McQuillin, *Municipal Corporations* (3d Ed., 1969 Rev. Vol.), sec. 15.31a, p. 112. The state is, of course, engaging in the performance of one of its governmental functions when operating its state university system. *State ex rel. La Follette v. Reuter,* (1967) 33 Wis. 2d 384, 401, 147 N.W. 2d 304. Further, there are specific instances where our court has refused to permit the application of local ordinances to the state or its agency. In *Milwaukee v. McGregor,* (1909) 140 Wis. 35, 121 N.W.

642, the court concluded that city building regulations could not apply in the case of the construction of a building by the Board of Normal School Regents of the State of Wisconsin. In so holding, the court pointed to the rule that statutes in general terms do not affect the state if they tend in any way to restrict or diminish its rights or interests. Likewise, in *Green County v. Monroe,* (1958) 3 Wis. 2d 196, 202, 87 N.W. 2d 827, the court recognized that the general words of the statutes conferring zoning powers on cities should not be construed to include the state, at least when engaged in a governmental function.

Over thirty years ago, a question roughly similar to the one here under consideration was presented this office in reference to the dispensing and furnishing of fermented malt beverages on the state fair grounds. In discussing that matter in 28 OAG 325 (1939), at p. 328-329, the following was stated:

"Question No. 4. 'May the town board under par. (j) of subsection (10) of section 66.05 of the statutes [now sec. 66.054 (12), Stats.] provide additional regulations to those provided by statute for the conduct of taverns on the state fair grounds and enforce the same through the local justice of peace?'

"It is the opinion of this office that despite the language of sec. 66.05 (10) (j) any additional regulations enacted by the town board will not be applicable to the state fair or fair grounds, especially in view of the broad general power given to the department by sec. 93.07 (18) to police the fair grounds and the powers which must be implied from the control which the department has over the fair grounds. This control should be held free from the interference and conflict which might result from regulation under local ordinances passed in addition to the statute. . . . "

In answer to your second question, it is my opinion that should the dispensing or furnishing of fermented malt beverages simply be incidental to or closely connected with another legitimate function carried on by the university, such as a student union, such activity may be authorized on

the campus of a state university. As pointed out in my response to your first question such opinion would be unaffected by the fact that the city, village or town in which the campus is located may have restricted the dispensing or furnishing of such beverages under the provisions of sec. 66.054 (13), Stats.

Section 37.02, Stats., sets forth the general powers of the Board of Regents of State Universities. Subsection (1) of the statute, as amended by ch. 276, Laws 1969, provides in part that in carrying out its educational program:

". . . The Board of Regents shall possess all other powers necessary or convenient to accomplish the objects and perform the duties prescribed by law. . . . "

More specifically, sec. 37.11, Stats., as amended by ch. 376, Laws 1969, reads in part as follows:

"37.11 POWERS OF BOARD OF REGENTS AS TO STATE UNIVERSITIES. The Board of Regents shall have government and control of all the state universities, and may:

"(1) Make rules, regulations and bylaws for the good government and management of the state universities and each department thereof,. . . . "

The powers thus delegated to the board of regents are obviously significant in their latitude. As pointed out previously, in 37 OAG 251, 252 (1948), the phrase "all the powers necessary or convenient" is probably as broad a grant as the legislature could properly have made. Normally, it has apparently been felt that the nature of an institution such as a university justifies, if it does not require, that the governing body be granted considerable discretion in choosing the means which best serve the overall educational purpose of a state university system. See *State ex rel. Priest v. The Regents of the University of Wisconsin,* (1882) 54 Wis. 159, 170. As pointed out in the *Priest* case, where the powers of a body such as a board of regents are not restricted by enumeration, it will be implied that a broad grant of power includes those powers reasonably

adapted to the ends for which the corporate body was created. See also 35 OAG 188, 190 (1946).

Thus, in the absence of express limitations upon the general scope of the powers and duties of the Board of Regents, they may allow a university to engage in an enterprise, even of a commercial nature, if such is incidental to or closely connected with a legitimate function carried on by the university. See 15 Am. Jur. 2d, *Colleges and Universities*, sec. 9, pp. 593-594. The general character of the regulatory powers possessed by a body such as the Board of Regents of State Universities in reference to the management of their institutions is well summarized in 15 Am. Jur. 2d, *Colleges and Universities*, sec. 22, at pp. 608-609, as follows:

" . . . However, where the power is delegated to them to do so, university and college authorities may make all necessary and proper rules and regulations for the orderly management of the institution and the preservation of discipline therein, and rules enacted in the exercise of a power so delegated by statute are of the same force as would be a like enactment of the legislature, and their official interpretation by the university authorities is a part thereof. . . . Whether the rules or regulations are wise or expedient or their aims worthy is a matter left solely to the discretion of the authorities, and with the exercise of such discretion the courts will not interfere, in the absence of a clear showing that the authorities have acted arbitrarily or have abused the authority vested in them."

In answer to your third question, it is my opinion that the determination as to whether the dispensing and furnishing of fermented malt beverages should be allowed on any or all of the campuses of the state university system, must be made by the Board of Regents. Under the provisions of sec. 37.11 (1), Stats., above quoted, it is the Board of Regents' responsibility to make rules, regulations and by-laws for the good government and management of the state universities and each department thereof. Having been charged by law with such power to promulgate rules and regulations, the board cannot in turn abdicate its authority and surrender its discretion by delegating that power to

others. 2 Am. Jur. 2d, *Administrative Law,* sec. 222, pp. 52-53. Quite clearly, any determination concerning the dispensing and furnishing of fermented malt beverages on state university campuses would involve significant general policy considerations which apply to the entire state university system. Any general policy ultimately formulated in regard to the matter should be sufficiently definitive so as to render further action by any individual unit of the system merely administrative or ministerial in nature. Otherwise, the Board of Regents should act separately for each such unit.

Finally you inquire as to whether the Board of Regents may contract with a private company to dispense or furnish fermented malt beverages on any campus where permission to carry on such activity has been granted.

As previously stated by our office in 55 OAG 246 (1966), at page 247:

"The general rule is that a state agency cannot enter into contractual agreements, with individuals, partnerships or corporations, for the furnishing of services *normally performed* by employes under the civil service laws. . . . "

In the state universities system, food and beverages are normally dispensed through university student unions and cafeterias. However, it is my understanding that at some university campuses, food service needs are supplied through contractual arrangements with private companies while at other university campuses these services are furnished through the use of state employes. Under such circumstances, it appears reasonable to conclude that where the dispensing or furnishing of food and beverages is already being accomplished under a contractual arrangement, the dispensing or furnishing of fermented malt beverages may be accomplished in like manner. Likewise, where general food service functions are normally performed by civil service personnel, those employes should be utilized to dispense or furnish fermented malt beverages.

RWW:JCM

State Building Projects—State building projects that necessitate construction of utility services, sidewalks, driveway entrances, etc. are not subject to municipal control or regulation whether such construction is done directly by the state or for the state by a building corporation of the state.

June 4, 1970.

WAYNE F. MCGOWN, *Secretary*
Department of Administration

You have requested my opinion as to whether the State of Wisconsin is subject to local regulation when it engages in construction work in city streets which work is incidental to construction on state lands.

It is my understanding that on many occasions it is necessary to service the new buildings with existing utility services such as water, heat, sewer, etc. located some distance from the new facility. In extending these services it is often the case that city streets are closed off or partially closed off as an incident to the construction of the services.

I am advised there have been occasions when the municipality has insisted that the contractor on the state project secure local permits and comply with local construction codes. It is my further understanding that in some instances the local building codes or restrictions have been at variance with the state construction specifications or plans.

Additionally, you have requested my opinion as to whether the state is subject to local regulation over construction of sidewalks, driveway entrances and curbs and gutters.

It is my opinion, with the single exception hereinafter discussed, that the state is not subject to local regulation in the construction of its improvements or projects regardless of whether such facilities are constructed on state lands or in public streets or highways.

Municipal corporations are agencies of the state and possessed of such powers as conferred by the constitution or

by the legislature. *Safeway Motor Coach Company v. City of Two Rivers,* (1949) 256 Wis. 35; *City of Madison v. Tolzmann,* (1959) 7 Wis. 2d 570.

The maintenance of streets and highways is a governmental function. *Flamingo v. Waukesha,* (1952) 262 Wis. 219. This governmental function is primarily a state duty, except to the extent that such control has been delegated to the municipalities. *Milwaukee v. Milwaukee & S. T. Corp.,* (1959) 6 Wis. 2d 299. The state has in part, as evidenced by numerous provisions in the Wisconsin statutes, delegated this governmental duty to the municipalities.

Notwithstanding this delegation, the legislature has authorized public utility use of the streets and highways for the location of poles, wires, pipes and other facilities and has delegated the regulation of such use to the municipalities. (Secs. 182.017 (1), 86.16, 62.14 (6) (b), 62.18 (13), Stats.) Municipalities cannot object to public utility use of the streets and highways when such use has been authorized by the legislature. *Wisconsin Telephone Company v. Milwaukee,* (1936) 223 Wis. 251. It is generally conceded that municipalities acting in their governmental capacity possess no vested right against the state. *Douglas County v. Industrial Commission,* (1957) 275 Wis. 309.

Consequently, municipalities have no standing to object to the use of the streets or highways when such use is a necessary incident to the construction of a state project which has legislative approval.

Unlike public utility use of the public rights of way, the state has not provided for municipal control over its use. It is a well-established principle that the state, unless specifically included, is not subject to regulation or to prohibitions in general laws or city ordinances. *Milwaukee v. McGregory,* (1909) 140 Wis. 35; *State v. Milwaukee,* (1911) 145 Wis. 131; *Fulton v. State Annuity and Investment Board,* (1931) 204 Wis. 355; *State ex rel. Martin v. Reis,* (1939) 230 Wis. 683; *Kenosha v. State,* (1966) 35 Wis. 2d 317; 56 OAG 225. The rationale behind this rule is as stated in *Fulton v. State Annuity and Investment Board, supra,* page 361:

"The purpose of the rule relied on by appellant, that general statutes are not to be construed to include to its hurt the state, is to prevent interference wtih the exercise of auhority in the administration of the affairs of state or community. * * *"

In applying this general rule to state construction projects, the court in the *McGregor* case, *supra*, page 38 held:

"Applying the foregoing, it is plain, that the assumption by the building inspector of the city of *Milwaukee* of authority over the state agent in the execution of the statutory command to build the structure in question according to plans approved by the governor, was an unwarranted interference—a pure, but not intentional, of course, usurpation. The state was not only not expressly included in the charter power of regulation, but the general law of the state passed subsequently to the enactment of the charter quite plainly commanded the Board of Regents to erect the building without regard to the judgment of any one outside of its own members, except as to approval of the plans by the governor."

Today as in the time of the *McGregor* case state building projects may be considered as express acts of the legislature under sec. 13.48, Stats.

It should also be noted that due to the former constitutional prohibition against state indebtedness, state construction projects were for many years financed and constructed by private corporations such as Wisconsin State Agencies Building Corporation, Wisconsin State Colleges Building Corporation, Wisconsin State University Building Corporation and others. The legislature in recognition of the state's immunity from local control granted such immunity to its private corporations by enactment of sec. 13.48 (13), Stats., which reads in part:

"* * * such construction shall be in compliance with all applicable state laws, codes and regulations but such construction shall not be subject to the ordinances or regulations of the municipality in which the construction takes place, including without limitation because of enumeration,

ordinances or regulations relating to zoning, materials used, permits, supervision of construction or installation, payment of permit fees, *or other restrictions of any nature whatsoever.* This subsection applies to any construction heretofore or hereafter commenced." (Emphasis supplied)

The private building corporations are not arms or agencies of the state, but they are nevertheless instrumentalities of state agencies created to aid the state agencies in the performance of their statutory or governmental functions.

In the case of *State ex rel. Wisconsin Univ. Bldg. Corp. v. Bareis,* (1950) 257 Wis. 497, on pages 502 and 503, the court defined the private corporation as an agency of the university in the following language:

"* * * Such inquiry shows it to be an agency of the regents, who, themselves, have no existence or function except as an agency of the state. Everything which the corporation does do or can do is in reality done by and in the interest of the university, and therefore in the interest of the state, including the acquisition and holding of real property. The land so held is, to the extent that it has been paid for and conveyed to the corporation, actually state land. It is just as immaterial that the named grantee is Wisconsin University Building Corporation and not the state of Wisconsin as it was when the grantees were regents of the university and not the state of Wisconsin, * * * The regents have found it convenient to handle the acquisition of property for university purposes by a corporate agency and have created the agency for that purpose. All the property in question was acquired at the direction of the regents, and if they found it necessary or convenient to do so through the machinery of their creature-corporation, such method has not prevented the property from being the property of the state."

In addition, the court in *State ex rel. Thomson v. Giessel,* (1953) 265 Wis. 185, held that these private corporations derive their power from the provisions of the acts which create them.

State building projects financed, constructed and owned by the building corporations are in the interest of the state.

The contracting and construction is under state supervision (sec. 16.85, Stats.). The projects have legislative approval, appropriation (sec. 13.48, Stats.) and when the cost is amortized through rental payments from the state, ownership reverts to the state.

Similarly, it is immaterial that the project is being constructed by the private corporation rather than the state for it is in all respects a state building devoted to state governmental functions.

The state as the "ultimate source of power," *Wisconsin Telephone Co. v. Milwaukee, supra,* delegated, in part, its duty to maintain and control streets but did not specifically include itself within such control. As the state is not specifically mentioned in the statutes authorizing local control over the use of streets or highways, I can only conclude that neither the state nor the building corporation is subject to such statutes or to ordinances enacted by municipalities pursuant to such statutes.

There is a qualification to the rule of sovereign immunity from local control under sec. 66.047 (1), Stats., which provides:

"66.047 INTERFERENCE WITH PUBLIC SERVICE STRUCTURE. (1) No contractor having a contract for any work upon, over, along or under any public street or highway shall interfere with, destroy or disturb the structures of any public service corporation encountered in the performance of such work so as to interrupt, impair or affect the public service for which such structure may be used, without first procuring written authority from the commissioner of public works, or other properly constituted authority. It shall, however, be the duty of every public service corporation, whenever a temporary protection of, or temporary change in, its structures, located upon, over, along or under the surface of any public street or highway is deemed by the commissioner of public works, or other such duly constituted authority, to be reasonably necessary to enable the accomplishment of such work, to so temporarily protect or change its said structures; provided, that such contractor shall give at least 2 days' notice of such

required temporary protection or temporary change to such corporation, and shall pay or assure to such corporation the reasonable cost thereof, except when such corporation is properly liable therefor under the law, but in all cases where such work is done by or for the state or by or for any county, city, village, or town, the cost of such temporary protection or temporary change shall be borne by such public service corporation."

The purpose of sec. 66.047, Stats., is to provide a means by which conflicting interests may be settled with a minimum of disturbance to the public. This section is not a grant of authority to municipalities to govern or control state action. The intent of the section as found in *Wisconsin Power & Light v. Gerke,* (1963) 20 Wis. 2d 181 is stated on page 190 to be:

" * * * to determine the changes which were reasonably necessary. Once it had so determined, the statute makes it clear that since the work was being done for the state, the cost would have to be borne by the power company. In view, however, of the purpose of the statute to provide for administrative determination of the changes which were reasonably necessary, it would be bad policy for the courts to make such determination where the parties bypassed the administrative determination."

The changes referred to by the court in the *Gerke* case were changes in the existing public utility line made necessary by the state construction. The court did not consider a change in the state's construction plans.

The facts presented by the present question differ from the *Gerke* case in that two public bodies are involved. In the *Gerke* case the State Highway Commission was in charge of the construction and also had jurisdiction over the highway. In the present situation the state has charge of the construction but the local municipality has jurisdiction over the street. In this situation the municipality must, in my opinion, act in the nature of an arbitrator. If the utility and the (state) contractor cannot agree, the city must, as stated in the *Gerke* case, require the utility to make what-

ever reasonable changes are necessary to facilitate the state construction. 55 OAG 149. The municipality, in my opinion, cannot refuse the state written authority as required by sec. 66.047, Stats., nor can it pass upon the state's plans or specifications. Its sole function is to determine what reasonable changes are to be made by the utility so that service is not interrupted or impaired or that such interruption or impairment is minimized.

No distinction has been drawn in this opinion based on the nature of the municipality's interest in the street or highway. Streets or highways may be acquired by municipalities in fee, by prescription, by dedication or by easement. The statutes which authorize the use of streets by utilities and define the powers of the municipalities to govern their use do not draw any distinction based on the nature of the legal interest of the municipality in the street or highway. In performing this delegated governmental duty municipalities hold such property subject to the rights of others and subject to the rights of the state.

In conclusion, I call your attention to the fact that this opinion concerns the relationship between the state and local jurisdictions or municipalities. This opinion does not concern the question of the interest of private abutting property owners.

RWW:CAB

State Building Projects—Sec. 49.45 (9) gives a "free choice" of physician, podiatrist, dentist, pharmacist, hospital, skilled nursing home or other provider of care to a person eligible for medical assistance and the choice of a nursing home cannot serve to limit the other choices.

A contract between the trustees of a nursing home and a medical clinic for exclusive medical services under the medical assistance act for residents of such home violates public policy of this state.

June 8, 1970.

JOSEPH VINEY, *Corporation Counsel*
Green County

You request my opinion concerning a controversy arising under federal and state statutes which guarantee a freedom of choice of services to any individual eligible under the medical assistance program. The medical assistance program was established as a part of Title XIX of the Social Security Act.

You state that Green county operates the Pleasant View Nursing Home which is a public medical institution. Medical services are provided at Pleasant View Nursing Home, whenever necessary, by the Monroe Clinic based upon an annual contract between the home and the clinic at a set fee. At the present time, residents at Pleasant View Nursing Home receive their medical needs as part of their daily costs. In the event that they wish medical services other than those offered pursuant to the contract with the Monroe Clinic, the residents are required to pay for such additional services. Pleasant View Nursing Home does allow all doctors to administer to patients, however, except that the resident or responsible party must pay for these services if not provided by the Monroe Clinic.

Based upon these facts, you ask whether this arrangement violates the freedom of choice provided by federal and state statutes for any individual eligible for medical assistance. For reasons hereafter stated, it is my opinion that although this arrangement does not violate federal law it does conflict with the free choice provision of sec. 49.45 (9), Stats.

The relevant federal statute is codified in 42 U.S.C.A., sec. 1396a (a) which, in part, provides:

"(a) A State plan for medical assistance must—

" * * *

"(23) provide that any individual eligible for medical assistance (including drugs) may obtain such assistance

from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services;"

Section 49.45, Stats., in part, provides:

"(6) PAYMENTS. Payment for services provided under this section shall be made directly to the hospital, skilled nursing home, other organization or individual providing such services and no additional charge shall be made to the beneficiary of such service by such hospital, skilled nursing home, other organization or individual who provided such service except for or to the extent that benefits are not provided pursuant to this section.

" * * *

"(9) FREE CHOICE. Any person eligible for medical assistance under ss. 49.46 and 49.47 may be entitled to use the physician, *podiatrist,* dentist, pharmacist, hospital, skilled nursing home or other provider of care ~~which he has designated as~~ *of* his choice, ~~and nothing~~ *except that free choice of skilled nursing home shall be limited by the department so as to provide only care which is necessary to meet the medical and nursing needs of the patient. Nothing* herein shall vitiate the legal responsibility of the physician, *podiatrist* or dentist or hospital to patients and all contract and tort relationships with patients shall remain as though dealings are direct between the physician, *podiatrist,* dentist or hospital and the patient. No physician, *podiatrist* or dentist shall be required to practice exclusively in the medical assistance program. [As amended by chs. 154 and 377, Laws 1969.]

" * * *

"(11) DEFINITIONS. As used in this section, unless the context indicates otherwise:

"(a) 1. 'Charge' means the customary, usual and reasonable demand for payment as established by the department for services, care or commodities which does not exceed the general level of charges or by others who render such

service or care, or provide such commodities, under similar or comparable circumstances within the community in which the charge is incurred.

"(a) 2. In order to determine rates for nursing homes, the department shall establish methods of reimbursement based on the various levels and types of services received by the patient that are reimbursable. The department may take into account other considerations, including federal regulations, that are found to be pertinent or required in evaluating nursing home charges.

" * * *

"(e) 'Skilled nursing home' means a facility, licensed or approved by the ~~state board of health or a facility approved by the~~ department for the accommodation of convalescents or other persons who are not acutely ill and not in need of hospital care and which employs sufficient registered nursing practitioners for supervision of those giving nursing care to patients."

The federal statute became effective July 1, 1969. Relative to the state statutes, sec. 49.45, Stats., was revised in several respects by chs. 154, 366 and 377, Laws 1969, effective September 1, 1969, and February 14 and 15, 1970. Subs. (9), Stats., was amended as indicated above wherein the new language is italicized and the deletions are also indicated in the appropriate manner. Subs. (11) (a) 1, Stats., as a result of renumbering, is former subs. (11) (a), Stats., while sub. (11) (a) 2, Stats., was created by ch. 154.

Examining first only the federal statute, it is clear that the individual's freedom of choice includes the freedom to select an organization or institution which provides for necessary services or arranges for their availability on a prepayment basis. Thus, an eligible individual is not guaranteed a free choice, other than an institution which will make available or provide these services, under federal law.

The remaining question is one of statutory interpretation of sec. 49.45 (9), Stats. Obviously, the so-called "free choice" aspect of the Wisconsin law is much more specific and limiting than is the federal statute, which is merely a

minimal requirement for participation under the federal act. The statute provides that a person eligible for medical assistance may use the "physician, podiatrist, dentist, pharmacist, hospital, skilled nursing home or other provider of care of his choice * * *."

In construing a statute, one of the first rules to observe is to discover the legislative purpose and, when that purpose is discovered, to construe it so as to effect the evident purpose of the legislature if the language admits of that construction. *Pella F. Mut. Ins. Co. v. Hartland R. T. Ins. Co.*, (1965) 26 Wis. 2d 29, 132 N.W. 2d 225. In construing a statute, the title may throw light on its meaning. *Milwaukee v. Utech*, (1955) 269 Wis. 132, 68 N.W. 2d 719.

In reading the statute in question it is obvious that the legislature intended to give those persons who find it necessary to ask the government for medical assistance the dignity of a free choice of those services which could be within reason provided to such welfare recipients. Among the choices specified by the legislature is the free choice of a physician. This choice obviously is called for under the statute whether the person is in his own home, in a hospital, a skilled nursing home, or other provider of care. If it becomes necessary for the recipient of assistance to enter a hospital, skilled nursing home, or other provider of care, where such institution has an exclusive contract for a physician's service under the medical assistance act with the physician not of that person's choice, it must be concluded either that the free choice under the statute is being denied or that the person in choosing that particular institution exercised a free choice in determining to enter an institution where a physician's services would be provided. To construe the statute as providing for the latter only would ignore the fact that the legislature provided for each choice, i.e., physician, podiatrist, dentist, pharmacist, hospital and nursing home, as a separate and individual right.

Another compelling reason to reject such construction is found in sec. 49.45 (6), Stats., which requires payment directly to the provider of services under the act. Under the facts stated, the home contracts for a set fee for physician

services. Thus the state would be reimbursing the home for services provided by the clinic. This arrangement would seem to violate the intent of the legislature that payments by the state be directly to the provider of services. In construing statutes, those statutes *in pari materia* must be given consideration. *Forest Home Dodge, Inc., v. Karns,* (1965) 29 Wis. 2d 78, 138 N.W. 2d 214.

There are other considerations in determining legislative intent in enacting the "free choice" subsection. One is the matter of ethical practice on the part of the physician who may be placed in the situation of treating a patient of another physician without that physician's consent and approval.

In addition, there is a matter of ethical considerations involved in what the American Medical Association terms "contract practice." In a 1969 publication entitled "Judicial Council Opinions and Reports" at pages 31-32 it is stated:

"There are certain points, however, that may be formulated which, when present, definitely determine a contract to be unfair or unethical. These may be stated as follows:

" * * *

"4. When a reasonable degree of free choice of physicians is denied those cared for in a community where other competent physicians are readily available."

Other types of mischief, such as monopoly and restraint of trade, which could be facilitated by exclusive arrangements for the providing of the services of a physician, podiatrist, dentist and pharmacist under the Medical Assistance Act are too obvious to enumerate. It must be concluded that the legislature in specifying free choice was attempting to obviate some of these potential evils as well as providing to the recipient of medical assistance the dignity of their free choice of physician, podiatrist, dentist and pharmacist. We must also recognize that most of the residents of nursing homes are advanced in years and that the legislature intended as a humanitarian factor that the choice of physician, podiatrist, dentist and pharmacist be *in addition to* the choice of hospital or nursing home. It is common knowl-

edge that the choice of the latter is often dictated by such factors as nearness to relatives and friends.

Accordingly, I construe sec. 49.45 (9), Stats., as giving to the recipient of medical assistance the right of free choice of physician under that program as a separate and individual right which is in addition to the right to choose a nursing home.

In answer to your question, therefore, although the facts set out do not violate the freedom of choice provisions of Title XIX under federal law, such an arrangement does violate the freedom of choice provisions of sec. 49.45 (9), Stats. In view of the contract which is in existence between the trustees of this home and the Monroe Clinic, I feel compelled to comment on that contract as it affects public policy.

It is well settled that any agreement is against public policy if it violates some public statute. *Pedrick v. First Nat. Bank of Ripon,* (1954) 267 Wis. 436, 66 N.W. 2d 154. Neither by comity nor by the will of contracting parties can the public policy of a state be set at naught. *Reed v. Kelly,* (1949) 177 F. 2d 473; *The Kensington,* 183 U.S. 263, 269, 22 S.Ct. 102, 46 L.Ed. 190. Rule H 32.07 (3) Wis. Adm. Code, applying to all nursing homes, provides as follows:

"PATIENT TO BE ALLOWED PHYSICIAN OF CHOICE. Every patient or his family, guardian or the agency responsible for him, shall be allowed the physician of his choice."

Public policy is said to be the principle under which the freedom of contract or private dealings is restricted by law for the good of the community. Thus, certain classes of acts are said to be "against public policy" when the law refuses to enforce or recognize them on the ground that they have a mischievous tendency so as to be injurious to the interests of the state apart from illegality or immorality.

In *Pittsburgh, C., C. & St. L. Ry. Co. v. Kinney,* (Ohio 1916) 115 N.E. 505, 507, in discussing the term "public policy" the Supreme Court of Ohio had the following to say:

"A correct definition, at once concise and comprehensive, of the words 'public policy,' has not yet been formulated by our courts. Indeed, the term is as difficult to define with accuracy as the word 'fraud' or the term 'public welfare.' In substance, it may be said to be the community common sense and common conscience, extending and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.

"Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people—in their clear consciousness and conviction of what is naturally and inherently just and right between man and man. It regards the primary principles of equity and justice and is sometimes expressed under the title of social and industrial justice, as it is conceived by our body politic."

I must conclude that the legislature has declared the public policy of this state in sec. 49.45 (6) and (9), Stats., and that any agreement between third parties or between a recipient under the medical assistance act and a third party which would in any way impair free choice of physician, podiatrist, dentist, pharmacist, hospital, skilled nursing home or other provider of care would be an agreement against the public policy of this state. Therefore, the agreement which you make reference to is probably void or voidable.

In a second question you ask whether PW 1.09 (1), Wis. Adm. Code, relating to duties and responsibilities of medical director, authorizes the arrangement referred to above. My answer to that question must be "no" since the Administrative Code cannot be used to enact that which is not authorized by statutory provision.

RWW:DPJ:LLD

Collection of Account—Retail Seller—While a retail seller is not prohibited by sec. 138.05 (3), Wis. Stats., from including in a note a provision requiring the payment of 25 per cent of the unpaid balance as a fee for collection of the account, such a provision is enforceable only to the extent that it reasonably relates to the actual collection expenses incurred.

June 10, 1970.

JOHN F. DOYLE

Office of the Commissioner of Banking

You have requested my opinion as to whether under sec. 138.05 (3), Stats., a retail seller is prohibited from including in a note a provision requiring the purchaser, in the event the account is placed with a collection agency or attorney for collection, to pay an additional 25 per cent of the then unpaid balance, plus any accrued interest, as a fee for collection by said agency or attorney.

Sec. 138.05 (3), Stats., provides as follows:

"A contract to make loans or an evidence of indebtedness may provide for a rate of interest or penalty payable upon the principal amount of an extension of a loan or forbearance or upon any amount in default under a loan or forebearance which shall not exceed the rate allowed in sub. (1) (a)."

Sec. 138.05, Stats., was enacted as part of a comprehensive revision of Wisconsin's usury statutes in 1961 (ch. 431, Laws 1961) for the purpose of limiting penalty charges to the 12 percent maximum usuary rate. Its effect was to overturn the doctrine enunciated in *Randall v. Home Loan & Investment Co.*, (1944) 244 Wis. 623, 12 N.W. 2d 915, that a lender may include a provision in a note for the payment of a penalty upon default in excess of the maximum rate permitted under the usury law. The court there held that a penalty charge is not a fixed obligation to pay interest under a loan agreement but is rather intended for the purpose of enforcing timely payment and, therefore, is beyond the ambit of the usury law.

Your question, however, relates not to a charge assessed upon default in payment but to an assessment of a percentage fee in the event a delinquent account is placed with a collection agency or attorney. In my opinion such a provision is not subject to the penalty charge limitations of sec. 138.05 (3), Stats.

A provision requiring the borrower to pay the costs of collection is not a penalty provision to enforce payment but is intended to enable the lender to recover the principal amount of the loan, plus interest, without having to bear the expenses of collection. 45 Am. Jur. 2d, Interest and Usury, sec. 217, pp. 167-168. The general rule as the validity of such provisions is set forth at 17 ALR 2d 288, 298, as follows:

"The general conclusion that a provision in a promissory note or other evidence of indebtedness for an attorney's fee based upon a percentage of the total debt is valid in so far as it represents an agreement to indemnify the creditor for any loss he sustains by way of payment of, or an obligation to pay, attorney's fees or other collection expenses, is supported by a large number of cases. As a corollary, *the agreement is valid and enforceable only to the extent that it is shown that the creditor has been damaged by having to pay, or assume the payment of, attorneys' fees or other collection expenses.* * * * " (Emphasis supplied)

Tallman v. Truesdell, (1854) 3 Wis. *443, involved a mortgage note which provided that the borrower, in case of foreclosure, would pay $40 as solicitor's fees. The court rejected the contention that this provision violated the usury law, saying, at 3 Wis. *454:

"So, in regard to the stipulation for the payment of counsel or solicitor's fees in case of foreclosure. Whenever this is resorted to as a cover for a greater rate of interest than is allowed by law, it then vitiates the contract, but when it is stipulated in good faith, as an indemnity for the necessary expenses of foreclosure, and is reasonable in amount, we see no objection to its incorporation in the contract, or its enforcement. * * * "

In accord is *Chapin v. Mosher,* (1860) 12 Wis. *453.

At least two Wisconsin cases have held that a provision of a note, calling for payment of a stipulated percentage of the debt as attorney's fees for collection in the event of default, is enforceable to the extent that the stipulated amount is reasonable. *First Nat. Bank v. Larson,* (1884) 60 Wis. 206, 19 N.W. 67, and *Pirie v. H. Stern, Jr., & Bro. Co.,* (1897) 97 Wis. 150, 72 N.W. 370. And see sec. 409.504 (1) (a), Stats., which allows reasonable attorney's fees and legal expenses after default to the extent provided for in a security agreement.

I am aware that several states have treated collection fee provisions as penalties. See 17 ALR 2d 288, 315. However, it is clear from the above cited authority that Wisconsin adheres to the majority view that such provisions are permissible so long as they reasonably relate to the expenses of collection.

From the foregoing it is my opinion that a 25 per cent collection fee provision such as you describe is valid and enforceable in Wisconsin only to the extent that it reasonably relates to the actual collection expenses incurred by the creditor. In other words, since Wisconsin law only permits reasonable collection fees, a creditor cannot circumvent this standard by stipulating for a higher amount, and the collection fees awarded should be reduced accordingly. Indeed, where the actual collection expenses are substantially lower than the stipulated fee, a court might consider such a provision to be a device to penalize the debtor for late payment in violation of sec. 138.05 (3), Stats., or an unconscionable clause in violation of sec. 402.302, Stats.

Your second question is whether the same kind of a provision may be used by a credit union. The answer is the same as that given to the first question and for the same reasons. The credit unions, of course, are organized and regulated pursuant to the provisions of ch. 186, Stats. Were there any provision in that chapter prohibiting credit unions from inserting in their notes a clause such as you describe, that provision would have to be given effect.

RWW:EWW:JDJ

Vocational School—Appointment of School Board—Method of selection of members of a vocational school board, under sec. 41.155 (5) (c), Stats., 1965-1967, does not contravene the requirements of the equal protection clause of the Fourteenth Amendment.

June 11, 1970.

THE HONORABLE THE SENATE

You have requested my opinion whether the appointment of members of a vocational, technical and adult education school board, under sec. 41.155 (5) (c), Stats., 1965-1967, violates the equal protection requirements enunciated in certain recent United States Supreme Court opinions.

The answer is in the negative.

Section 41.155 (5) (c), Stats., 1967, does not provide for popular election of members of a local vocational school board. Instead, the statute provides that the members of such a board shall be appointed by a group which is drawn from various officers of governmental subdivisions included within the vocational school district. The statutory paragraph is complex and ambiguous in some respects. For example, it provides one method of apportioning board members if there are less than six governmental units in the district and another method when there are more than six such units in the district, but nothing is specified as to the apportionment of members when there are exactly six units involved. However, nowhere in the paragraph is there any requirement of a popular election of vocational school board members.

Reynolds v. Sims, (1964) 377 U.S. 533, 84 Sup.Ct. 1362, 12 L.Ed. 2d 506, and *Gray v. Sanders*, (1963) 372 U.S. 368, 83 Sup.Ct. 801, 9 L.ed 2d 281, involved popular elections and applied the one-man, one-vote principle to such elections of a statewide nature. *Sailors v. Board of Education of County of Kent*, (1967) 387 U.S. 105, 87 Sup.Ct. 1549, 18 L.ed. 2d 650 held valid the Michigan statutory procedure for selecting members of a county board of education. The

local school boards there were popularly elected, and each such board delegated one of its members to sit on a body which elected members of the county school board from a list of candidates nominated by the school electors. The opinion held that a state may appoint local officials or elect them or combine the elective and appointive systems, as was done there, at least as respects non-legislative officers. However, the opinion stated:

" * * * We need not decide at the present time whether a State may constitute a local legislative body through the appointive rather than the elective process. * * *" 387 U. S. at 109-110.

It was not necessary to decide that question because the court held that the county board of education there performed an essentially administrative function. The particular board action involved was the detachment of certain schools from one district and attaching them to another.

The very recent case of *Hadley v. Junior College District of Metropolitan Kansas City,* (1970) 397 U.S. 50, 90 S.Ct. 791, 25 L.ed. 2d 45, rejected the idea that the one-man, one-vote principle is applicable to some elections but not to others, depending upon the purpose of the particular election. The opinion expressly discarded any distinction depending upon whether the election were for a legislative or administrative office and went on to say, 90 S.Ct. at 795:

" * * * We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis which will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials. * * *"

Later in the opinion it is stated, 90 S.Ct. at 796-797:

"In holding that the guarantee of equal voting strength for each voter applies in all elections of governmental offi-

cials, we do not feel that the States will be inhibited in finding ways to insure that legitimate political goals of representation are achieved. We have previously upheld against constitutional challenge an election scheme which required that candidates be residents of certain districts which did not contain equal numbers of people. *Dusch v. Davis,* 387 U. S. 112 (1967). Since all the officials in that case were elected at large, the right of each voter was given equal treatment. We have also held that where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection of the laws. *Sailors v. Bd. of Education,* 387 U.S. 105 (1967); cf. *Fortson v. Morris,* 385 U.S. 231 (1966). And a state may, in certain cases, limit the right to vote to a particular group or class of people. As we said before, '[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the constitution to prevent experimentation.' *Sailors, supra,* at 110-111. But once a state has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.' *Gray v. Sanders,* 372 U.S. 368, 381 (1963)."

Although the opinion of the majority in *Hadley* does not expressly say that local officials, such as members of a vocational school board, may be selected by means other than election, it appears from the dissenting opinion of Mr. Justice Harlan that this is what the majority intended. The dissent criticizes the majority for abandoning the holding of *Avery v. Midland County,* (1968) 390 U.S. 474, 88 Sup.Ct. 1114, 20 L.ed. 2d 45. There the court had held that where the elected officials exercised general governmental powers over the geographic area, the one-man, one-vote rule was applicable to the election. The majority in *Hadley* refused to adhere to this distinction and instead held that wherever election was the process for selection of public officers, the

one-man, one-vote rule applied. The minority noted that adherence to the *Avery* opinion would not require holding unconstitutional the Missouri statute, saying, 90 S.Ct. at 798:

" * * * At the same time, it cannot be argued seriously that the Junior College District of Metropolitan Kansas City is the general governing body for the people of its area. The mere fact that the trustees can, with restrictions, levy taxes, issue bonds, and condemn property for school purposes does not detract from the crucial consideration that the sole purpose for which the district exists is the operation of a junior college. * * *"

From the foregoing it is my conclusion that the members of a board of vocational, technical and adult education district need not be elected by popular vote. If, instead of popular election, some other process is adopted for selecting the board members, the one-man, one-vote principle is inapplicable.

RWW:EWW

Board of Regents—Student Court—Board of regents has power to make reasonable rules governing student use of automobiles on university property and can enforce them by imposing reasonable monetary penalties and withholding records. Student court can be designated by board of regents as an auxiliary enterprise. Moneys thereby collected must be paid into general fund. By regent action, they may be appropriated therefrom for operation of that activity.

June 15, 1970.

CLARKE SMITH, *Secretary*
The Regents of the University of Wisconsin

You ask what effect ch. 455, Laws 1969, has upon the university of Wisconsin's ability to retain student "fines" collected through "student court" for certain violations of university rules pertaining to motor vehicles.

The portion of ch. 455 applicable to the University of Wisconsin created sec. 36.06 (11), Stats., which provides:

"36.06 (11) (a) The board of regents may obtain injunctive relief to enforce this chapter or any rules promulgated thereunder.

"(b) The board of regents may adopt such rules under ch. 227 as are necessary or proper to protect the lives, health and safety of persons on property under its jurisdiction and to protect such property and to prevent obstruction of the functions of the university. The penalty for violation of any rule created under this subsection is a fine of not more than $500 or imprisonment of not more than 90 days or both.

"(c) The board of regents may prescribe rules and regulations for the management of all property under its jurisdiction, for the care and preservation thereof, and for the promotion and preservation thereof, and for the promotion and preservation of the orderly operation of the university in any or all of its authorized activities and in any or all of its branches with forfeitures for their violation, which may be sued for and collected in the name of the board of regents before any court having jurisdiction of such action. Any rule, the forfeiture for violation of which exceeds $25, shall be subject to ch. 227. Forfeitures shall not exceed $500.

"(d) All fines imposed and collected hereunder shall be transmitted to the county treasurer for disposition in accordance with s. 59.20 (5) and (8). All forfeitures, including forfeitures of posted bail if any, imposed and collected hereunder shall be deemed collected in favor of the state and shall be transmitted to the county treasurer for disposition in accordance with ss. 288.13 to 288.17."

You point out that it is the language of the last above quoted sub-paragraph (dealing with disposition of fines and forfeitures) that prompts your request for advice. You have included a copy of the "constitution" of the Student Court of the University of Wisconsin, Madison Campus, approved by the Regents in September, 1969. This document pro-

vides, among other things, that the Student Court shall determine what amount shall be due the University on each citation and whether the University should withhold students' records pending payment of the amount due, that all receipts from penalties shall be paid to the student financial advisor to be credited to the Student Court Fund, that expenses of the Student Court shall be paid from the Student Court Fund, that, with immaterial exceptions, all balances over $500 at fiscal year end shall be credited to Wisconsin Student Association Scholarship Fund or loan fund, administered by Wisconsin Student Association student senate and faculty committee on loans and undergraduate scholarships.

You state that if the Student Court is to continue to function it will need funds to cover its expenses and that it should not be expected to carry out a governmental function without equitable compensation.

You say it should be noted that this request does not cover violations of Wis. Adm. Code sec. UW 1.03, motor vehicle regulations and 1.05, traffic regulations except 1.05 (7) dealing with private motor vehicles owned by students, in the possession of students, or used for transportation of students. From this, I assume that student court handles matters dealing with alleged student violation of sec. 1.05 (7) as well as sec. 1.04 dealing with parking. I think it is also understood that student court is not a court in any legal or judicial sense but rather an administrative creature of the Board of Regents—and those performing student court functions are agents to whom the Board has delegated certain of its powers.

Action taken by the Board of Regents March 6, 1970, repealed, recreated and amended a number of its rules in the Wis. Adm. Code as a result of the enactment of ch. 455, Laws 1969. However, secs. 1.03, 1.04, and 1.05 were not among those affected.

Therefore, the funds in question are not derived from fines or forfeitures imposed or collected under ch. 455 and that chapter is not applicable. Notwithstanding this, the fact remains that if these funds are derived from fines, within the meaning of sec. 59.20 (5) and (8), Stats., or

derived from forfeitures within the meaning of secs. 288.13 to 288.17, Stats., they must be disposed of in accordance with those statutes.

The first question then is what is the nature of these "fines" collected from students for certain parking and traffic violations. And in order to discover the nature of these "fines" one must look at the source of the Regents' authority to make rules such as these.

FINES

Section 36.06 (3), Stats., provides:

"The board [of regents] may prescribe rules and regulations for the management of the libraries, cabinet, museum, laboratories and all other property of the university and of its several departments, and for the care and preservation thereof, *with penalties and forfeitures by way of damages for their violation,* which may be sued for and collected in the name of the board before any court having jurisdiction of such action." (Emphasis added.)

This statute, whatever its meaning as to "penalties" or "forfeitures" or "damages" deals with management, care and preservation of property but mentions no limitation or guidance as to the amount of such penalties, forfeitures or damages.

However, sec. 36.06 (8), Stats., provides:

"(8) Insofar as they can be made applicable to the lands owned by or under the control of the regents all special powers conferred on the conservation commission by s. 27.01 (2), (3), (4), (5) and (8) are conferred upon the regents and *all penalties set forth or referred to in said subsections apply with equal force and effect to this subsection.*" (Emphasis added.)

What are the "special powers" conferred on the Conservation Commission by the mentioned subsections of sec. 27.01?

Subsection (2) deals with the general powers of the Conservation Commission—giving it power to supervise the state park system, acquire land, classify park areas, con-

struct roads, camping and picnic areas, etc. The only subdivisions of subsec. (2) having relevance here are (j) which deals with the power to make rules necessary to govern the conduct of state park visitors and for the protection of state park property or the use of facilities, including boats, watercraft, roads, trails or bridle paths, and (k) which deals with the designating of parking areas and regulating the use and movement of vehicles in state parks. There is no mention of penalties in this subsection.

Subsection (3) deals with legal counsel, recites that "The attorney general shall act as counsel and attorney" for the Conservation Commission, and that the respective district attorneys of the counties where the parks are located shall prosecute all violations of this section "occurring within their respective counties as provided in s. 26.18." The pertinent part of sec. 26.18, Stats., provides that whenever an arrest shall have been made for any violation of ch. 26 (which deals with protection of forest lands and specifies offenses such as setting fires) the district attorney of the county in which the criminal act was committed shall prosecute the offender. There is no mention of penalties in this subsection.

Subsection (4) deals with park managers—gives them all the powers of state fire wardens. There is no mention of penalties in this subject.

Subsection (5) is entitled "penalties" and provides:

"The penalties for the destruction of any notices, posted by the said commission, or for the breaking, tearing up or marring of trees, vines, shrubs or flowers, the dislocation of stones or the disfigurement of natural conditions within the boundaries of any state or county parks or state fish hatchery grounds shall be the same as those provided in s. 26.19."

The sec. 26.19, Stats., referred to in subsec. (5) deals with destruction of forest protection equipment and notices and provides:

"Any person who shall destroy, deface, remove or molest or destroy any forest protection equipment or property or

disfigure any forest fire sign, poster or warning notice, shall be fined not less than $25 nor more than $100, or imprisoned not less than 10 days nor more than 3 months, or both."

It must be noted that this subsection does mention penalties—fine or imprisonment or both—but only for the offenses of destroying notices, breaking, tearing up or marring trees, vines, shrubs or flowers, dislocating stones and disfiguring natural conditions.

Subsection (8), the last one referred to in sec. 36.06 (8), Stats., provides:

"The conservation commission shall have police supervision over all state parks, and its duly appointed agents or representatives in charge of any state park may arrest, with or without warrant, any person within such park area, committing an offense against the laws of the state or in violation of any rule or regulation of the state conservation commission in force in such state park, and deliver such person to the proper court of the county wherein such offense has been committed and make and execute a complaint charging such person with the offense committed. The district attorney of the county wherein such offense has been committed shall appear and prosecute all actions arising under this subsection."

Even though this provision gives the Regents "police supervision" over lands under their control, and gives their agents certain arrest powers, there is no mention of penalties in this subsection.

Thus, the only specifically authorized penal sanctions for any regent promulgated rules (including traffic regulation) are those related to conduct destructive of notices, trees, shrubs and other natural conditions.

While it may be said that by means of sec. 27.01 (2) (k), Stats., the Board of Regents is empowered to designate parking areas and regulate the use and movement of vehicles on lands under the control of the Board of Regents, it cannot be overlooked that the legislature has omitted to provide any penalties such as fine or imprisonment for vio-

lation of any of such regulations. Yet it has provided such penalties for violation of others, as mentioned above. These statutes are *in pari materia,* that is, upon the same subject matter. Where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intent existed. 82 C.J.S. Stats., p. 813, sec. 366a; *State v. Welkos,* (1961) 14 Wis. 2d 186, 192, 109 N.W. 2d 889. Also, see sec. 37.11 (16) (a) and (b), Stats., dealing with the rule-making authority of the Board of Regents of State Universities and providing a fine of not more than $10 for violation of parking regulations.

I am aware that in 1932 the attorney general construed sec. 36.06 (3), Stats., as authorizing the regents to prescribe " * * * penalties for the violation of the traffic rules of the university * * * [which] * * * could be collected in a court of law * * *." However, the question of the nature of these penalties, i.e., whether these penalties were "fines" in a penal sense, was not considered. 21 OAG 217, 218 (1932).

It is significant, however, that the legislature, in enacting ch. 455, Laws 1969, must have considered that the Regents were generally handicapped, by absence of statutory authority, in making rules which could be legally enforced with penal sanctions (fines). It is also worth observing that sec. 59.20 (5) and (8), Stats., is a statutory mechanism for carrying out the mandate of Art. X, sec. 2, Wis. Const., which provides, among other things, that " * * * the clear proceeds of all fines collected in the several counties for any *breach of the penal laws* * * * " shall be set apart as a separate fund to be called "the school fund." (Emphasis added.) I conclude, therefore, that whatever the nature of the funds derived from penalties which the regents are authorized to collect from students for parking and traffic violations of rules now in existence, these cannot be regarded as "fines" within the meaning of sec. 59.20 (5) and (8), Stats.

FORFEITURES

What did the legislature mean by the phrase, in sec. 36.06 (3), Stats., " * * * with penalties and forfeitures by

way of damages for their violation which may be sued for and collected in the name of the board before any court having jurisdiction of such action."

This language first appeared in the statutes in revised statutes of Wisconsin, 1878, sec. 381, ch. 25. Prior to 1878 the only language which resembled this, dealing with the powers of the Board of Regents, was the following, created by sec. 2, ch. 229, Laws 1876:

"The regents of the university may, by regulation, prescribe penalties by way of damages for injuring, defacing, destroying, taking away, or losing any book and for violating any rules established for the government of the library, which may be collected before any justice in the manner provided for the collection of penalties and forfeitures and shall be applied to the benefit of the library of the law department."

This section was repealed by the revision of 1878, ch. 205.

Although the terms "fine", "forfeiture" and "penalty" are often used loosely and even confusedly, the term "forfeiture" has a distinct meaning. It is a comprehensive one and expresses the result which flows from a failure to comply with the law. 37 C.J.S. 4, Forfeitures, sec. 1. Forfeitures are not favored; they are considered harsh exactions, odious and to be avoided when possible. A statute imposing a forfeiture should be construed strictly and in a manner as favorable to the person whose property is to be seized as is consistent with fair principles of interpretation. The strict letter of the law will not be enforced against persons who could not possibly be informed of its enactment. For a statute to be construed so as to produce a forfeiture, its language must clearly show an intent to do so; forfeitures are never to be inferred from doubtful language. 37 C.J.S. 8, 9, Forfeitures, sec. 46. *Fay v. Lovejoy*, (1886) 20 Wis. 403.

The statement made earlier with respect to the legislature's intent in enacting ch. 455 to provide the Regents a new rule enforcement power with respect to fines also is applicable with respect to forfeitures. Also, see Art. X, sec.

2 Wis. Const., as to forfeitures and secs. 288.01 and 288.02, Stats., as to action for forfeitures.

I conclude that the legislature's use of the "penalties and forfeitures by way of damages" in sec. 36.06 (3), Stats., was not intended to mean forfeitures as used in secs. 288.13 to 288.17, Stats.

PENALTIES—DAMAGES

What, then, was the power the legislature intended to vest in the Board of Regents by this language? It would be an absurd result to say that the legislature intended to confer a rule-making power upon the Board of Regents without any power to enforce its rules. The time of the enactment of this legislation (1878), was, of course, long before the existence of the Administrative Procedure Act (ch. 227) which in many cases is useful in giving administrative rules the force and effect of law. Ch. 375, Laws 1943. Also, in 1878, the legislature was not thinking in terms of automobiles, parking or traffic problems. Student disciplinary problems, however, had attracted a considerable amount of attention during this era.[1]

In this context, it seems most likely that the legislature, in a significant measure, regarded the Board of Regents, with its corporate powers, as a contract-making creature, with power to make rules in the nature of a contract with the persons (e.g., students) with whom it was dealing and the breach of which could be enforced through prescribed penalties. In fact, sec. 36.03, Stats., which now provides: "The board of regents and their successors in office shall constitute a body corporate by the name of 'The Regents of The University of Wisconsin' and shall possess all the powers necessary and convenient to accomplish the objects and perform the duties prescribed by law * * *." earlier read: "The regents of the university, and their successors in office, shall constitute a body corporate, with the name and style of the 'regents of the university of Wisconsin' with

[1]Curti and Carstensen, The Univ. of Wis. 1848-1925, Vol. 1, pp. 174-176, 333, 381, Univ. of Wis. Press, 1949.

the right as such of suing and being sued, *of contracting and being contracted with, of making and using a common seal, and altering the same at pleasure.*" (Emphasis added.) Section 6, ch. 21, Revised Statutes of Wisconsin, 1858. Even though this language was no longer retained in the revision of 1878, it is still significant, along with the other statutory duties and functions of the Board of Regents of that era. This interpretation is also consistent with the slightly different statutory language, referred to above, dealing with the government of the library.

Section 36.06 (3), Stats., reads in part, "* * * penalties and forfeitures *by way of damages* * * *." (Emphasis added.) What was the purpose of inserting the phrase "by way of damages"? One plausible explanation is that this referred to the type of action that was to be brought, if necessary, to enforce (collect) the penalty. Generally, the remedy for breach of contract is an action for damages. 17A C.J.S. 1009, Contracts sec. 523 (1). There are certain distinctions between an action for damages and an action to enforce a penalty. *U.S. v. Price*, (1961) C.A. Ohio, 290 F. 2d 525, 526. A forfeit or forfeiture is "* * * that which is lost, or right to which is alienated, by a crime, offense, neglect of duty, or *breach of contract* * * *." (Emphasis added.) *Tate v. LeMaster*, (1957) 231 S.C. 429, 99 S.E. 2d 39, 46. Penalties in the nature of damages due to the state are distinguishable from fines and forfeitures. 36 Am. Jur. 2d 676. Also, see 1959 WLR 418.

Elsewhere in ch. 36, Stats., the legislature has delegated broad and general powers to the Board of Regents.[2] Section 36.02, Stats., says: "The government of the university shall be vested in a board of regents * * *." Section 36.03, Stats., says the Board of Regents "* * * shall possess all the powers

[2]As to the legislature's ability to delegate broad rule-making power generally and the importance of procedural safeguards, see: *Gilman v. Newark*, (1962) 73 N.J. Super. 562, 180 A. 2d 365, 384, 1 Davis, Administrative Law, sec. 2.17 (1965), *Schmidt v. Local Affairs & Development Dept.*, (1968) 39 Wis. 2d 46, 57, 58, 158 N.W. 2d 306.

necessary and prescribed by law, * * *."[3] Section 36.06 (1), Stats., says the Board of Regents " * * * shall enact laws for the government of the university in all its branches; * * * ."

One can cite a number of authorities for the proposition that the Board of Regents has been delegated extremely broad powers by the legislature. *State ex rel. Priest v. The Regents of the University of Wisconsin,* (1882) 54 Wis. 159, 170; 37 OAG 251, 252 (1948); 36 OAG 433, 434 (1947); 35 OAG 92, 93, 94 (1946).

"The board of regents necessarily has a considerable amount of discretion to determine what activities will contribute to the services which the public is entitled to expect of its state university. The courts will not interfere within that area provided there is any relation between the methods adopted and the purposes for which the university was established."

35 OAG 188, 190 (1946); also see 27 OAG 648 (1938), 26 OAG 555 (1937), 22 OAG 332 (1933), and *Martin v. Smith,* (1941) 239 Wis. 314, 1 N.W. 2d 163.

Perhaps a more familiar example of the Regents' ability to make rules and enforce them by imposing monetary and other penalties is in the governing of a library. One who violates a library rule may be called upon to pay a library "fine" or suffer loss of certain privileges. Although it would seldom be necessary or practical, the Regents could bring an action for damages in a court of competent jurisdiction to collect this penalty. Likewise, with parking and traffic rule violations, if the administrative measures (e.g., student court) for enforcing the rules proved inadequate, the Regents could seek relief in court. In other words, these traffic "fines," like library "fines," are not "fines" in the usual penal sense.

Every student on his admission impliedly promises to submit to and be governed by all the necessary and proper

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[3]Sec. 36.13, Stats., states: "The object of the university of Wisconsin shall be to provide the means of acquiring a thorough knowledge of the various branches of learning connected with literary, scientific, industrial and professional pursuits. * * * "

rules and regulations which have been or may be adopted for the government of the institution, although rules and regulations may be annulled by the courts when found to be unauthorized, against common right, or palpably unreasonable. 15 Am. Jur. 2d 609, College and Universities, sec. 22. This statement, however, in view of numerous recent court decisions, is subject to considerable qualification. *Soglin v. Kauffman,* (1968) 295 F. Supp. 978, *Soglin v. Kauffman,* (1969) 418 F. 2d 163, *Marzette v. McPhee,* (1968) 294 F. Supp. 562, *Stricklin v. Regents of University of Wisconsin,* (1969) 297 F. Supp. 416.

I conclude that the Board of Regents, by reason of the statutes and authorities cited above, has power, independent of ch. 455, Laws 1969, to make reasonable rules governing the conduct of students in their use of university property including parking lots, streets, driveways, etc., and the use of automobiles in connection therewith, and that such rules may be administratively enforced upon students by the imposition of reasonable monetary penalties and by the withholding of certain records or certifications.

DISPOSITION OF FUNDS

The next question is what disposition is authorized with respect to the moneys received through the enforcement of these rules.

Section 36.03, Stats., provides in part:

" * * * *The state treasurer shall have the charge of* all securities for loans and *all moneys belonging to the university* or in any wise appropriated by law to its endowment or support; * * *." (Emphasis added.)

Section 36.10, Stats., provides in part:

"Unless otherwise provided by law, all moneys collected or received by each and every person for or in behalf of the university of Wisconsin, or which are required by law to be turned into the state treasury, *shall be deposited in or transmitted to the state treasurer at least once a week* * * *." (Emphasis added.)

Section 20.906 (1), Stats., provides in part:

"Unless otherwise provided by law, all moneys collected or received by any state agency for or in behalf of the state, or which is required by law to be turned into the state treasury, *shall be deposited in or transmitted to the state treasury at least once* a week * * *. All moneys paid into the treasury shall be credited to the general purpose revenues of the general fund unless otherwise specifically provided by law." (Emphasis added.)

Section 20.285 (2) (k), Stats., provides in part:

"*Auxiliary enterprises.* All moneys received for or on account of the following activities and including any cash balances pertaining to the university of Wisconsin press, parking facilities, car fleet, secondary schools testing program and such other activities as the regents of the university of Wisconsin designate * * * shall be paid into the general fund, and are appropriated therefrom * * * to be used for 1) the operation, maintenance and capital expenditures of such activities, * * *." (Emphasis added.)

The Board of Regents, in my opinion, has authority to designate the operation of the foregoing statute. In any event, the moneys received from the operation of student court must be paid into the general fund. Then, pursuant to proper regent action, the funds may be automatically appropriated therefrom to be used for the operation, maintenance and capital expenditures of such activities.

RWW:JEA

Partial Veto—Governor—A bill which increases judicial salaries, expressly refers to existing statutes containing sum sufficient appropriations for the payment of such salaries and, in the case of Milwaukee County, expressly requires the state treasurer to pay the increase in circuit judges' salaries to the county treasurer, is an appropriation bill within the meaning of Art. V, sec. 10, Wis. Const., and hence is subject to the partial veto.

In exercising a partial veto, the Governor may produce a law not in accord with the intent of the legislature.

Following a partial veto, the approved portion of the bill becomes law, subject only to repeal or amendment, as in the case of any law.

June 25, 1970.

THE HONORABLE THE SENATE

By S. Res. 33 you have requested an opinion as to the consitutionality of the partial veto of 1969 S.B. 565, with particular emphasis upon two questions.

Article V, sec. 10, Wis. Const., empowers the governor to approve an appropriation bill in whole or in part. If he approves such a bill in part only, that part becomes law. In answering the general question as to the validity of the partial veto of S.B. 565, it is necessary to determine whether the bill was an appropriation bill and whether the vetoed portion constitutes a "part" within the meaning of the constitutional provision.

S.B. 565, which ripened into ch. 253, Laws 1969, amends sec. 20.923, Stats., so as to raise the salaries of judges. The act amends four lines of sec. 20.923 (1) (a), Stats., each of which lines specifies the salary of a class of judges and enumerates the statute section which appropriates a sum sufficient to pay the salaries of that class of judges. For example, sec. 1 of the act amends sec. 20.923 (1) (a) 3., Stats., to read:

"20.923 (1) (a) 3. 20.625 Circuit judge . . . ~~20,000~~ *21,000*"

Section 20.625, Stats., referred to in the quoted language, is the section which appropriates a sum sufficient for the salaries of circuit judges. Neither the title nor the text of S.B. 565 expressly mentions appropriations. The vetoed portion of the bill would have limited the present exemption from bonding requirements, court clerk's fees and suit taxes, accorded to indigents by sec. 271.29, Stats.

The partial veto provision of Art. V, sec. 10, has come under the scrutiny of the Wisconsin Supreme Court in only three cases since the provision became effective in 1930. *State ex rel. Wis. Tel. Co. v. Henry,* (1935) 218 Wis. 302, 260 N.W. 486; *State ex rel. Finnegan v. Dammann,* (1936) 220 Wis. 143, 264 N.W. 622; and *State ex rel. Martin v. Zimmerman,* (1940) 233 Wis. 442, 289 N.W. 662. Only in the *Dammann* case did the court have to decide whether a particular bill was an appropriation bill within the meaning of the constitutional provision.

The bill involved in *Dammann* amended sec. 194.04 (4), Stats., by increasing the fees for motor carrier permits of various classes. The governor vetoed some of those increases. Section 194.04 (1), Stats., 1933, which was not mentioned in the bill, provided that the motor carrier permit fees should be paid into the state treasury and were reappropriated as in sec. 20.51 (5), Stats., which statute appropriated from the general fund to the Public Service Commission moneys collected under sec. 194.04, Stats. Thus, the bill indirectly would have increased the appropriation to the Public Service Commission by increasing the fees which were appropriated by another statute untouched by the bill. The court held that the bill there involved was not an appropriation bill and, since the legislature adjourned sine die the day after the bill was submitted to the governor for approval, the entire bill failed of passage. In view of the adjournment, the bill could not be returned to the legislature; and the partial veto being invalid, the result was a pocket veto.

In *Dammann* it was contended that any bill containing an appropriation is an appropriation bill and, on the other hand, that to constitute an appropriation bill the act must deal predominantly with appropriations. The court found it unnecessary to explore these conflicting views, and the decision stated:

"Assuming without determining that the first contention is sound, we are met with the fact that this bill does not within its four corners contain an appropriation. Does the fact that it indirectly affects continuing revolving fund

appropriations theretofore enacted by raising the permit fees of various types of carriers, constitute it an appropriation bill? We are convinced that this question must be answered in the negative. To answer it otherwise would extend the scope of the constitutional amendment far beyond the evils it was designed to correct. The paragraphs vetoed are revenue raising measures and as conceded in the defendant's brief, '. . . taxation and appropriation are more nearly antonyms than synonyms. . . .' " (220 Wis. at 147-148)

The decision then quoted three definitions of an appropriation bill and went on to say:

"The act under examination satisfies none of these definitions. It seems to us that since the constitutional amendment deals with appropriation *bills,* the bill itself must satisfy the constitutional requisites, and that it does not do this merely because its operation and effect in connection with an existing appropriation law has an indirect bearing upon the appropriation of public moneys.

"It is appreciated that a genuine difficulty is presented, arising by reason of the practice of creating revolving fund appropriations which are continuing in character. It may be that such a practice impairs to some extent the power of the governor effectively to reach objectionable appropriations by exercise of the partial veto. If this is an evil, however, it cannot be remedied by giving a distorted meaning to the term 'appropriation bill.'

"It seems to us that Bill No. 312, S., could not without distortion be held to be such a bill. It deals with appropriations neither in the title nor in the body of the act, and would not be considered such a bill either in common speech or in the language of those who deal with legislative or governmental matters." (220 Wis. at 148-149)

The *Dammann* opinion quoted the following definition of appropriation bill from *Webster's New International Dictionary*:

" ' * * * Govt. A measure before a legislative body authorizing the expenditure of public moneys and stipulating the

amount, manner, and purpose of the various items of expenditure.' "

The opinion held that the bill there involved did not satisfy that dictionary definition, although passage of that bill would have authorized the Public Service Commission to increase its expenditures to the extent of any increased revenues from the permit fees which were raised directly by the bill. Of course, there was no guaranty that there would be any increase in revenues from permit fees merely because the fees were raised.

The *Dammann* opinion did emphasize that the bill itself must satisfy the constitutional requisites and that the requisites are not met merely because the effect of the bill in connection with an existing appropriation has an indirect bearing upon the appropriation of public moneys.

S.B. 565, in connection with sec. 20.625, Stats., has a *direct* bearing upon the appropriation of public moneys because it requires increased expenditures to meet the increased salaries of circuit judges. No further legislation is necessary, since sec. 20.625, Stats., already contains a sum sufficient appropriation to meet the salaries specified in sec. 20.923, Stats. In this regard the situation differs from that involved in *Opinion of the Justices,* (1948) 323 Mass. 764, 79 N.E. 2d 881. There the opinion held that a bill raising salaries of public officers was not an appropriation bill because it merely increased salaries, which, there being no express appropriation, made the increases contingent upon future appropriations to meet them.

S.B. 565 shows on its face that judicial salaries are to be raised, expressly refers to the statutes which contain sum sufficient appropriations for such salaries and, in the case of the Milwaukee judges, requires that the increase in salary granted by the act "shall be paid by the state treasurer to the county treasurer, rather than to the circuit [sic] judges, as state reimbursement to offset the $3,000 increase granted to such judges by the county board on January 1, 1969."

While the question is a very close one, it is my opinion that the differences between the bill here involved and that with which the court was concerned in *Dammann* are sufficient to distinguish that case and to bring the instant bill within the meaning of an appropriation bill as the term is used in Art. V, sec. 10. I conclude that a court probably would hold the bill to be an appropriation bill and the partial veto by the governor in this case to be constitutional.

Your resolution requests an opinion with particular emphasis upon the following two questions:

"1. In exercising his constitutional power to approve or veto parts of appropriation bills, may the governor in fact restructure the proposed law so as to change the intent of the legislature?

"2. Because a veto may be overridden only by a two-thirds majority, so as to enact the vetoed part notwithstanding the objections of the governor, may the regular majority of the legislature protect its rights through rescinding of their approval of the remainder of a bill vetoed in part, so as to assure that no part of the bill partially vetoed shall then be the law of this state?"

The statement of the first question almost answers itself. When the legislature passes an appropriation bill, its intent is to create a law in the terms of that bill. When the governor vetoes a portion of that bill, he has produced a law which is not in strict accordance with the intent of the legislature. The purpose of the partial veto power was described in the following terms in *State ex rel. Martin v. Zimmerman,* (1940) 233 Wis. 442, at 447-448, 289 N.W. 662:

" * * * Its purpose was to prevent, if possible, the adoption of omnibus appropriation bills, logrolling, the practice of jumbling together in one act inconsistent subjects in order to force a passage by uniting minorities with different interests when the particular provisions could not pass on their separate merits, with riders of objectionable legislation attached to general appropriation bills in order to

force the governor to veto the entire bill and thus stop the wheels of government or approve the obnoxious act. * * * "

The first of the two specific questions quoted above must be answered in the affirmative. Any other answer would render the partial veto provision of the constitution meaningless.

The pertinent language of Art. V, sec. 10, of the Constitution provides:

" * * * Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for other bills. * * * "

In the *Zimmerman* case, supra, it was contended that the partial veto so changed the legislative program as to render the approved portion invalid. In answer to this contention the decision stated:

" * * * It must be conceded that the governor's partial disapproval did effectuate a change in policy; so did the partial veto of the bill involved in the case of *State ex rel. Wisconsin Tel. Co. v. Henry, supra,* which this court held to be valid. The question here is whether the approved parts, taken as a whole, provide a complete workable law. We have concluded that they do, and we must give them effect as such." (233 Wis. at 450)

In *State ex rel. Wis. Tel. Co. v. Henry,* (1935) 218 Wis. 302, 260 N.W. 486, the court also had reached the conclusion that the partial veto power enabled the governor to pass on "each separable piece of legislation."

Thus there are limits to the use of the partial veto. The governor may veto part of an appropriation bill, but the remainder must constitute a complete, workable law. If the partial veto meets that test, the part of the bill approved becomes law.

In the instant matter, the portions of S.B. 565 which were approved by the governor do constitute a complete, workable law. The vetoed portion of the bill, I am told, would not materially affect the revenues from clerk's fees and suit

taxes. Aside from this immaterial connection between the increase in judicial salaries and the vetoed restriction upon the indigents' exemption from payment of clerk's fees and suit taxes, there is no connection between the approved parts of the bill, on the one hand, and the vetoed part on the other.

Your second specific inquiry is whether the regular majority of the legislature may protect its rights by rescinding their approval of the portions of the bill not vetoed, "so as to assure that no part of the bill partially vetoed shall then be the law of this state." The answer is in the negative.

Art. V, sec. 10, expressly provides, in the case of an appropriation bill which has been approved in part by the governor, that "the part approved shall become law * * *." Thus, when the governor approves an appropriation bill in part only, the part approved has become law and may only be repealed by the legislature pursuant to a subsequent bill.

RWW:EWW

Temporary Assistance—Dept. of HSS—The State Department of Health and Social Services is not compelled to reimburse counties for "such temporary assistance" as may be needed pursuant to sec. 49.01 (7) under sec. 49.04 (1) for any claims for reimbursement pertaining to relief granted after June 6, 1968. Based upon the decisions of two three-judge federal courts in Wisconsin and upon a later decision by the United States Supreme Court, the concept of "temporary assistance" as that term is used under secs. 49.01 (7) and 49.04 (1) no longer existed after June 6, 1968.

June 26, 1970.

WILBUR J. SCHMIDT, *Secretary*
Department of Health and Social Services

You inquire concerning the correct interpretation of secs. 49.01 (7) and 49.04, Stats., following the United States Su-

preme Court's decision holding all durational residence requirements relative to eligibility for public welfare benefits unconstitutional.

Prior to the court decision to be discussed later in this response, the sharing of responsibility between the State of Wisconsin and the several counties in granting benefits for general relief and for categorical aid programs was established by the above statutes. Section 49.01 (7), Stats., provided and, in fact, still provides that:

"Definitions. As used in ch. 49:

" * * *

"(7) 'Eligible' or 'eligibility' means a dependent person *who has continuously resided for one whole year in this state immediately prior to an application for relief* except that temporary assistance including medical care may be granted during the initial year to meet an emergency situation pending the negotiations for the return of the applicant and family to the former place of residence or legal settlement outside this state or to meet a medical emergency developing during the initial one year period of residence. Such temporary assistance shall not extend beyond 30 days unless a medical emergency requires further extension. * * *" (Emphasis supplied.)

Moreover, sec. 49.04 (1), Stats., provided and still provides:

"State dependents. (1) From the appropriation made in sec. 20.435 (4) (e) the state shall reimburse the counties for such temporary assistance as may be needed pursuant to sec. 49.01(7) for all dependent persons who do not have a settlement within any county in this state and who have resided in the state less than one year."

In *Ramos v. Health and Services Bd. of State of Wis.*, (E.D. Wis. 1967) 276 F. Supp. 474, decided by a three-judge court, the durational residence requirement under sec. 49.01 (7), Stats., was held unconstitutional as it pertained to federally sponsored and funded categorical aid programs. In *Denny v. Health and Social Services Bd. of State of Wis.*, (E.D. Wis. 1968) 285, F. Supp. 526, decided June 6, 1968, by

the same three-judge panel, this same provision was held unconstitutional as applied to applicants for general relief as opposed to categorical aid benefits. Prior to and after these decisions, similar decisions were rendered by various federal courts throughout the country, and several of these decisions were appealed and consolidated in the United States Supreme Court.

In *Shapiro v. Thompson,* (1969) 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600, decided April 21, 1969, the Supreme Court held that all such durational residence requirements were unconstitutional on various grounds. The effect of this ruling was to render subsec. (7) of sec. 49.01, Stats., unconstitutional either in whole or in part. At the very least, this decision, in effect, eliminates from that subsection the clause underlined above referring to a one year residence requirement. This decision also raises the additional question, which is the subject of your inquiry, concerning the effect, if any, of the references to "temporary assistance" within secs. 49.01 (7) and 49.04 (1), Stats.

At the outset, it is arguable that the decision in the *Shapiro* case effectively eliminated subsec. (7) of sec. 49.01, Stats., from our valid statutes relating to public assistance and relief. However, even if it can be said that some portion of sec. 49.04 (1), Stats., has been preserved, it is my opinion that the concept of "temporary assistance" no longer exists.

The reference to temporary assistance under subsec. (7) constitutes an exception to the one year residence requirement. Therefore, when the one year residence requirement is eliminated from our statutes, the temporary assistance exception necessarily also is eliminated. As all persons otherwise eligible for public assistance or relief programs must be granted benefits without considering their length of residence in this state, there is no longer any need for providing what used to be known as temporary assistance.

The wording of the statutes do not permit severability of the residence requirement from the provision for temporary assistance reimbursement. The test of severability is stated in *Muench v. Public Service Commission,* (1952) 261 Wis. 492, 515-o, 53 N.W. 2d 514, 55 N.W. 2d 40.

" 'It is well understood that part of a statute may be unconstitutional and the remainder may still have effect, provided the two parts are *distinct* and *separable* and are *not dependent upon each other.*' " (emphasis supplied)

When material provisions of the statute are declared unconstitutional, it is nevertheless possible to sever the statute and hold the remaining portions valid, " . . . if the part upheld constitutes, independently of the invalid portion, a *complete law in some reasonable aspect* . . ." (emphasis supplied) *State ex rel. Milwaukee County v. Boos,* (1959) 8 Wis. 2d 215, 99 N.W. 2d 139.

Severability is not permissible because the reimbursement provided for in sec. 49.04, Stats., is made pursuant to sec. 49.01 (7), Stats. With the latter section removed, there would be no statute defining temporary assistance which could then be funded under sec. 49.04, Stats. Removing sec. 49.01 (7), Stats., would make sec. 49.04, Stats. meaningless. Also, if sec. 49.01 (7), Stats., is totally eliminated, there remains no definition of the concept of temporary assistance. Thus, sec. 49.04, Stats., could not be considered distinct, separable and independent from sec. 49.01 (7), Stats.

It necessarily follows, therefore, that the state is not compelled to reimburse the counties for "such temporary assistance as may be needed pursuant to sec. 49.01 (7)" under sec. 49.04 (1), Stats.

It is my opinion, therefore, that (1) the counties are liable for the payment of all general relief without any reimbursements of temporary assistance pursuant to secs. 49.01 (7) and 49.04, Stats., forthcoming from the state, and (2) the joint sharing of financial responsibility among the federal, state and county governments under the categorical aid programs is effective immediately upon the approval of any application again with no reimbursement of temporary assistance forthcoming from the state to the counties during the first 30 days residence or, for that matter, during the entire first year of the recipient's residence in Wisconsin.

You further ask concerning the date upon which the state's duty to reimburse the counties under sec. 49.04 (1),

Stats., relating to temporary assistance, ceased. The *Ramos* decision, which was filed on November 20, 1967, specifically stated that the holding related only to the categorical aid programs and further invited counsel for plaintiff to amend the complaint to include general relief if counsel so desired. As this amendment was not made, the *Denny* case was initiated for the purpose of extending the *Ramos* holding to general relief. The *Denny* decision and order were entered June 6, 1968.

It is my opinion that as of June 6, 1968, the state dependent program embodying temporary assistance ceased to exist in Wisconsin for the above stated reasons unless the United States Supreme Court had upheld the position taken by the several states in the *Shapiro* case. It is clear from *Shapiro* that, although that case specifically dealt with categorical aids, all durational residence requirements similar to sec. 49.01 (7), Stats., are unconstitutional whether applied to categorical aid programs or to general relief programs. The effect of the *Shapiro* holding is to sustain the *Denny* ruling by the three-judge federal court in issuing the preliminary injunction and, therefore, it is my opinion that the state's duty to reimburse any county for temporary assistance under sec. 49.04 (1), Stats., ceased on June 6, 1968, the date on which the court in *Denny* enjoined the defendants from enforcing the one year residence requirement. Thus, any claims for reimbursement under sec. 49.04 (1), Stats., which your department receives or has received pertaining to any relief granted after June 6, 1968, should be rejected.

Your question, of course, arose primarily under statutes in effect prior to the recent amendments contained in ch. 154, Laws 1969. Under ch. 154, secs. 49.18 (2) (a), 49.19 (4) (b), 49.22 (1) (c) and 49.61 (2) (b), Stats., all have been amended in an attempt to comply with the *Shapiro* case. Each of these provisions, as they pertain to the four categorical aid programs, generally provides that an applicant must allow the county agency 15-30 days to process his application with payments of aid not being retroactive beyond the first of the month in which eligibility is established. These changes, however, would not affect my con-

clusions contained herein relative to the abolition of the concept of temporary assistance.

RWW:DPJ

Industrial Sites—Industry—In view of the legislative declaration as to public need and public purpose, sec. 66.521, Stats., which authorizes Wisconsin cities, villages and towns to acquire industrial sites and buildings to promote the development of industry, is not unconstitutional upon its face.

June 29, 1970.

WARREN P. KNOWLES, *Governor*

In your letter of March 26, 1970, you have asked me for my opinion on the constitutionality of sec. 66.521, Stats., created by ch. 278, Laws 1969.

There are no facts before me other than the statute itself. Accordingly, my opinion on the public purpose doctrine is limited to a consideration of the statutory declaration by the legislature.

Section 66.521, Stats., authorizes Wisconsin cities, villages and towns to acquire industrial sites and buildings to promote the development of industry. The financing of the acquisition of property is accomplished by the issuance of municipal revenue bonds.

The legislative declaration as to public purpose is found in the newly created sec. 66.521 (1), Stats., which states:

"66.521 PROMOTION OF INDUSTRY. (1) FINDINGS. It is found and declared that industries located in this state have been induced to move their operations in whole or in part to, or to expand their operations in, other states to the detriment of state, county and municipal revenue raising through the loss or reduction of income taxes, real estate and other local taxes, and thereby causing an increase in unemployment; that such conditions now exist in certain areas of the state and may well arise in other areas;

that economic insecurity due to unemployment is a serious menace to the general welfare of not only the people of the affected areas but of the people of the entire state; that unemployment results in obligations to grant public assistance and in the payment of unemployment compensation; that the absence of new economic opportunities has caused workers and their families to migrate elsewhere to find work and establish homes, which has resulted in a reduction of the tax base of counties, cities and other local governmental jurisdictions impairing their financial ability to support education and other governmental services; that security against unemployment and the preservation and enhancement of the tax base can best be provided by the promotion, attraction, stimulation, rehabilitation and revitalization of commerce, industry and manufacturing; that there is a need to stimulate a larger flow of private investment funds from banks, investment houses, insurance companies and other financial institutions. It is therefore declared to be the policy of this state to promote the right to gainful employment, business opportunities and general welfare of the inhabitants thereof and to preserve and enhance the tax base by authorizing municipalities to acquire industrial buildings and to finance such acquisition through the issuance of revenue bonds for the purpose of fulfilling the aims of this section and such purposes are hereby declared to be public purposes for which public money may be spent and the necessity in the public interest for the provisions herein enacted is declared a matter of legislative determination."

This language is almost identical to the legislative findings in sec. 59.071 (2), Stats. The only differences between the two declarations are those necessitated by the creation of separate county agencies to issue the bonds under sec. 59.071, Stats., and the reliance upon municipalities to issue the bonds under sec. 66.521, Stats.

In 1967 our Supreme Court examined the constitutionality of ch. 90, Laws 1965, which created sec. 59.071, Stats., known as the "Industrial Development Law." Under its provisions counties are permitted to organize industrial de-

velopment agencies pursuant to ch. 181, Stats., the Wisconsin Nonstock Corporation Law.

In *State ex rel. Bowman v. Barczak,* (1967) 34 Wis. 2d 57, 69, 148 N.W. 2d 683, the court said:

"In view of the legislative declaration as to public need and public purpose, sec. 59.071, Stats., is not unconstitutional upon its face. However, our decision cannot in any way be construed as containing an imprimatur of approval upon any actual performance by an industrial development corporation, and the respondents can glean but small comfort from this lawsuit. Nevertheless, the housekeeping expenditure involved in the case at bar and also the declaration of public purpose contained in the statute are entitled to our approval.

"We cannot at this point determine whether the corporations which may be created under this law will carry out the lofty purposes of the statute in a constitutional manner. The powers given to industrial development corporations under this enactment are so extensive that such a corporation might confer a direct benefit to a private industry with only a remote benefit to the general public; such action would be abhorrent to the constitution of Wisconsin even if it were deemed consistent with the statute. The possibility of operational illegality does not of itself condemn the legislation because, as noted earlier, we presume constitutionality, and the relator has not presented us with facts demonstrating that the instant expenditure is not for a valid public purpose under the statute." (Emphasis supplied.)

Under these circumstances, the court's analysis of the public purpose doctrine in *State ex rel. Bowman v. Barczak, supra,* would be applicable to sec. 66.521, Stats.

Other constitutional considerations will now be considered and may be disposed of in a manner similar to that found on pages 72-73 of *State ex rel. Bowman v. Barczak, supra.*

Section 66.521, Stats., does not provide for the creation of municipal debt in excess of the constitutional limits provided in sec. 3, art. XI, Wis. Const.

Section 66.521 (4) (a), Stats., provides in part:

" * * * Bonds and interest coupons issued under authority of this section shall never constitute an indebtedness of the municipality, within the meaning of any state constitutional provision or statutory limitation, and shall not constitute nor give rise to a pecuniary liability of the municipality or a charge against its general credit or taxing powers. * * *"

Since no municipality is under a legally enforceable obligation no municipal debt is created.

Section 3, Art. VIII, Wis. Const., prohibits the giving and lending of state credit in aid of any individual, association or corporation. Sec. 4, art. VIII, Wis. Const., prohibits the state from contracting any public debt except as provided. These constitutional proscriptions are not violated because no legally enforceable debt against the state is created.

Section 10, Art. VIII, Wis. Const., is not violated because this prohibition against works of internal improvement applies only to works engaged in by the state, and is not applicable to activities carried on by municipalities.

It should be noted that in the *Barczak* decision the Supreme Court expressed its concern over the lack of facts in the case before it. It was cautious to conclude at pages 75-76:

"We conclude that the relator has not met the burden of presenting facts which would enable this court to declare the Industrial Development Act unconstitutional. We do not purport, however, to uphold the constitutionality of sec. 59.071, Stats., as applied to any *modus operandi* which is not before us. With regard to the public-purpose doctrine we go no further than to hold that the disbursement by the county treasurer of Milwaukee county of a sum to be used for the Milwaukee County Industrial Development Corporation's operating expenses does not on its face violate any constitutional provisions.

"*By the Court.*—Sec. 59.071, Stats., is declared to be constitutional, as limited in the opinion."

The constitutionality of sec. 66.521, Stats., can best be determined by a test case which would allow a trial court

to thoroughly examine the facts of an actual operation before it would be reviewed by the Supreme Court.

In view of the legislative declaration as to public need and public purpose, sec. 66.521, Stats., is not unconstitutional upon its face.

RWW:APH

State Fair—Site Change—Senate B. 706, which would create sec. 13.85, Wis. Stats., to encourage and permit private development of a facility on which the annual state fair would be held, does not violate the internal improvements clause (Art. VIII, sec. 10) of the Wisconsin Constitution. The validity of such a proposal under the "public purpose" doctrine cannot be determined until more facts are known, but S.B. 706 does not, on its face, violate this rule.

July 6, 1970.

THE HONORABLE THE SENATE

S. Res. 36 (1969) requests my formal opinion on the constitutionality of S.B. 706 (1969) with regard to the "internal improvements" clause of Art. VIII, sec. 10, of the Wis. Const.

The bill authorizes the Department of Local Affairs and Development to invite proposals for private development and operation of a facility on which the annual state fair would be held. The bill's stated intent is to:

" * * * encourage private development of a facility in Milwaukee county at which an annual state fair would be held at no cost or expense to the state. Such a facility would be operated as a private venture. The current state fair program at the exposition center at West Allis would be terminated upon the satisfactory completion of said facility. The state would, by contractual arrangement with the owner, establish standards for the programs and activities conducted on the private facilities as part of the annual state

fair so as to assure protection of the public interest and to preserve the customary program content of an educational, agricultural, cultural, conservation and trade nature."

The department is to analyze all proposals and report to the building commission. The building commission is authorized to approve a proposal "which is found to be consistent with the public interest and the intent of this legislation," and to contract with the Southeastern Wisconsin Regional Planning Commission for a study of the best use of the present state fair site at West Allis, which would be abandoned.

Article VIII, sec. 10, of the Constitution provides in part that "the state shall never contract any debt for works of internal improvement, or be a party in carrying on such works . . . "

State ex rel. La Follette v. Reuter, (1966) 33 Wis. 2d 384, 147 N.W. 2d 304, expressly reaffirmed the definition of "works of internal improvement" first stated in *Rippe v. Becker,* (1894) 56 Minn. 100, 57 N.W. 331, and adopted by the Wisconsin court in *State ex rel. Owen v. Donald,* (1915) 160 Wis. 21, 151 N.W. 331. That definition is as follows:

" 'Works of internal improvement,' as used in the constitution, means, not merely the construction or improvement of channels of trade and commerce, but any kind of public works, except those used by and for the state in performance of its governmental functions, such as a state capitol, state university, penitentiaries, reformatories, asylums, quarantine buildings, and the like, for the purposes of education, the prevention of crime, charity, the preservation of public health, furnishing accommodations for the transaction of public business by state officers, and other like recognized functions of state government."

The state has, of course, been providing direct assistance to the state fair since its inception without any question as to whether the fair—or fairground construction—constituted a work of internal improvement. Under the above quoted text, a state fair—having education and advancement of the agricultural sciences as its primary goals—is clearly a

governmental function; and the state's indirect participation in carrying it on is no less proper under this section of the constitution than its direct participation has been over the years.

The resolution seeking my opinion goes no further than requesting my advice on the application of the internal improvements clause. However, in order to avoid a further inquiry, I have also considered the effect of the "public purpose" doctrine—a long-standing "constitutional" rule of hazy origins which has best been described as a "judicial articulation of the belief that governmental power should be used for the benefit of the entire community." See Mills, "the Public Doctrine in Wisconsin." 1957 Wis. L.Rev. 40.

Although the origins of the doctrine are unclear, there is no doubt as to its validity, for the Wisconsin court has consistently recognized that the state can raise taxes and appropriate funds only for "public purposes" of "statewide concern." *Heimerl v. Ozaukee County,* (1949) 256 Wis. 151, 158, 40 N.W. 2d 564; *State ex rel. Bowman v. Barczak,* (1967) 34 Wis. 2d 57, 148 N.W. 2d 683. The rule for determining whether or not a "public, statewide purpose" is served by a particular appropriation is set forth in *State ex rel. Thomson v. Giessel,* (1953) 265 Wis. 207, 215-216, 60 N.W. 2d 763, as follows (quoting 81 C.J.S., Stats., p. 1149, sec. 133):

" 'Generally, in connection with the validity of the expenditure of state funds, what is . . . a public purpose, is a question for the legislature to decide, with respect to which it is vested with a large discretion, which cannot be controlled by the courts unless its action is clearly evasive. . . . Where a doubt exists whether the purpose of an appropriation is public or private, it will be resolved in favor of the validity of the appropriation, . . .'

"That rule has been followed in Wisconsin. In the case of *Brodhead v. Milwaukee,* 19 Wis. *624, this court said:

" 'To justify a court in declaring a tax void, and arresting proceedings for its collection, the absence of all possible public interest in the purposes for which the funds are raised

must be so clear and palpable as to be immediately perceptible to every mind. Claims founded in equity and justice, in in the largest sense of those terms, or in gratitude or charity, will support a tax.' (Headnotes 3 and 4.)"

See also *State ex rel. La Follette v. Reuter,* (1967) 33 Wis. 2d 384, 397, 147 N.W. 2d 304; *State ex rel. La Follette v. Reuter,* (1967) 36 Wis. 2d 96, 114-115, 153 N.W. 2d 49.

If a public purpose can be conceived which might rationally be deemed to justify an act of the legislature, courts cannot further weigh the adequacy of the need or the wisdom of the method. *State ex rel. Zillmer v. Kreutzberg,* (1902) 114 Wis. 530, 549, 90 N.W. 1098; *State ex rel. Bowman v. Barczak,* (1967) 34 Wis. 2d 57, 68, 148 N.W. 2d 683.

It is clear that if the purpose of an expenditure is legitimate because it is "public," it will not be defeated because some private interests benefit. Conversely, incidental benefits to the public which result from the promotion of private interests do not justify their aid through the use of public funds. Am. Jur., Public Funds, pp. 757-758, §57. Between these two extremes, the matter is primarily one for the exercise of legislative discretion, and, as indicated above, the legislative judgment will only be overturned in "a plain case of departure from every public purpose which could reasonably be conceived."

Although a definite answer to the public purpose/private benefit question must await formulation of a specific program defining in detail the nature and extent of the state's participation, I see no constitutional flaw in the general idea of some state participation in the private operation of the annual Wisconsin State Fair. The fair itself fulfills a traditional public purpose, and the only forseeable constitutional question will relate to extent of the private benefits flowing from the state's participation in the project. As indicated, this cannot be determined until more detailed program information is available.

Insofar as S.B. 706 itself is concerned, however, I find no constitutional infirmities in its terms based on either Art.

VIII, sec. 10, Wis. Const., or on the "quasi-constitutional" public purpose doctrine.

RWW:WFE

Women's Working Hours—Civil Rights Act—Sec. 103.02, Wis. Stats., and administrative rules limiting the maximum hours women may work are superseded by provisions of the Civil Rights Act of 1964 as to employers covered by that Act, but other employers remain subject to the state law.

July 27, 1970.

EDWARD E. ESTKOWSKI, *Chairman*
Department of Industry, Labor and Human Relations

You ask whether state and federal laws proscribing discrimination in employment based on sex supersede the state law imposing limitations on the maximum hours of work for women.

By sec. 103.02, Stats. (and administrative rules made pursuant thereto), no female may be employed at employment or in places of employment, which are broadly defined, more than a prescribed number of hours, e.g., as stated in subsec. (1):

" * * *

"At day work, more than nine hours in any one day, or more than fifty hours in any one week. Provided, that during emergency periods of not to exceed four weeks in any calendar year any female may be employed for not to exceed ten hours in any one day and not more than fifty-five hours in any one week, such excess time to be paid for at the rate of one and one-half times the regular rates.

"At night work, more than eight hours in any one night, or more than forty-eight hours in any one week.

"Day work is done between six o'clock A.M., and eight o'clock P.M., of the same day; provided, that employment

not more than one night in the week after eight o'clock P.M. shall not be considered night work.

"* * * *."

Violation of the limitations provided subjects an employer to liability for a penalty of $10 to $100 for each offense.

For more than a hundred years Wisconsin has restricted the maximum hours of labor of women. See ch. 83, Laws 1867. The undoubted purpose of these statutes and rules is to protect the health, safety and welfare of women in employment. The constitutionality of such classification has been established for many years. The state has a legitimate interest in the protection of the welfare of women. In *Muller v. Oregon,* (1908) 208 U.S. 412, 421, 28 S.Ct. 324, 52 L.Ed. 551, in sustaining the constitutional authority of the state to limit the working hours of women to ten hours in one day, the court stated that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence" and her physical well-being "becomes an object of public interest and care in order to preserve the strength and vigor of the race." In *West Coast Hotel Co. v. Parrish,* (1939) 300 U.S. 379, 394-395, 57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330, referring to *Muller v. Oregon,* the court said:

"* * * We emphasized the need of protecting women against oppression despite her possession of contractual rights. We said that 'though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right.' Hence she was 'properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.' We concluded that the limitations which the statute there in question 'places upon her contractual powers, upon her right to agree with her employer, as to the time she shall labor' were 'not imposed solely for her benefit, but also

largely for the benefit of all.' Again, in *Quong Wing v. Kirkendall,* 223 U.S. 59, 63, 32 S.Ct. 192, 56 L.Ed. 350, in referring to a differentiation with respect to the employment of women, we said that the Fourteenth Amendment did not interfere with state power by creating a 'fictitious equality.' We referred to recognized classifications on the basis of sex with regard to hours of work and in other matters, and we observed that the particular points at which that difference shall be enforced by legislation were largely in the power of the state. In later rulings this Court sustained the regulation of hours of work of women employees in Riley v. Massachusetts, 232 U.S. 671, 34 S.Ct. 469, 58 L.Ed. 788 (factories), Miller v. Wilson, 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed. 628, L.R.A. 1915F, 829 (hotels), and Bosley v. McLaughlin, 236 U.S. 385, 35 S.Ct. 345, 59 L.Ed. 632 (hospitals)."

See *Hoyt v. Florida,* (1961) 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed. 2d 118; *Goesaert v. Cleary,* (1948) 335 U.S. 464, 466, 69 S.Ct. 198, 93 L.Ed 163; *Ward v. Luttrell,* (E.D. La. 1968) 292 F.Supp. 162, 164; *Gruenwald v. Gardner,* (2d Cir. 1968) 390 F. 2d 591, 592-593; *United States v. St. Clair,* (S.D.N.Y. 1968) 291 F.Supp. 122, 124-125. "A constitutional statute cannot be *contrary* to public policy,—it *is* public policy." *Borgnis v. Falk Co.,* (1911) 147 Wis. 327, 351, 133 N.W. 209.

It is also within the legislative power to fix maximum hours of work for both men and women, *United States v. Darby,* (1941) 312 U.S. 100, 125, 61 S.Ct. 451, 85 L.Ed. 609, but Wisconsin and many other states have not done so. The recent effort of your department to have the law so extended was unsuccessful. A. B. 687, 1969 legislature.

A compelling philosophical argument can be made that men deserve similar protection in the interests of health, safety and welfare. Legislative failure to provide such protection does not invalidate the law, as stated by the court in *West Coast Hotel Co. v. Parrish,* (1939) 300 U.S. 379, 400, 57 S.Ct. 578, 81 L.Ed. 703, upholding a state minimum wage law for women:

" * * * The argument that the legislation in question constitutes an arbitrary discrimination, because it does not

extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The Legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms."

In 1961, the legislature amended the state nondiscrimination statute to prohibit discrimination based on sex. Section 111.32 (5), Stats., now provides in part:

" * * *

"(d) The prohibition against discrimination because of sex does not apply to the exclusive employment of one sex in positions where the nature of the work or working conditions provide valid reasons for hiring only men or women, or to a differential in pay between employes which is based in good faith on any factor other than sex.

" * * *

"(g) It is discrimination because of sex: 1. For an employer, labor organization, licensing agency or person to refuse to hire, employ, admit or license, or to bar or to terminate from employment or licensing such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment or licensing;

" * * *."

The nondiscrimination statute, in my opinion, does not supersede the lawful regulation of hours women may work. In *United States v. Borden Co.*, (1939) 308 U.S. 188, 198-199, 60 S.Ct. 182, 84 L.Ed. 181, the court said:

"It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. * * * The intention of the legislature to repeal 'must be

clear and manifest.' * * * It is not sufficient as was said by Mr. Justice Story in Wood v. United States, 16 Pet. 342, 362, 363, 10 L.Ed. 987, 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary.' There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy.' "

I do not find an inescapable or irreconcilable conflict between the statutes involved. An employer may comply with both by following the policy of applying the limitations on hours to male and female employees. Different limitations are permissible if based on factors other than sex. An employer who denies equality of employment, promotion, or pay between the sexes must be prepared to justify such action under the nondiscrimination statute. Compliance by an employer with the laws regulating women's hours of employment would not preclude a determination of discrimination based on sex. For example, it would be discriminatory for an employer to refuse to hire women by fixing the length of the working shift a half-hour longer than the law allows women to work.

Section 703 (a) and (e) of Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352, 78 Stats. 253) makes it an unlawful employment practice for an employer to fail or refuse to hire or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of sex, or to limit, segregate, or classify his employees so as to deprive or tend to deprive an employee of employment opportunities or adversely affect his status as an employee because of sex, except where sex is a "bona fide occupational qualification" reasonably necessary to the normal operation of that particular business or enterprise. 42 U.S.C. §2000e-2. In general, the Act applies to employers engaged in interstate commerce who have 25 or more employees for each working day of 20 or more calendar weeks in the year. Sec. 701 (b); 42 U.S.C. §2000e.

First impression suggests that the Federal Act serves a purpose similar to the Wisconsin nondiscrimination statute and is not in conflict with the state laws limiting working hours of women. In *Colorado Anti-Discrim. Com'n v. Continental Air L.*, (1963) 372 U.S. 714, 722, 83 S.Ct. 1022, 10 L.Ed. 2d 84, the court ruled that mere identity of legislative subject matter did not invalidate or preempt state measures under Art. VI, Clause 2 of the U.S. Constitution, stating:

" * * * To hold that a state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustated by the state statute."

There is persuasive evidence that congress did not intend to supersede reasonable state regulation of maximum working hours of women.

The Civil Rights Act of 1964 expressly provides for state activity in complement with federal purposes. Sec. 708 of Title VII (42 U.S.C. §2000e-7) states:

"Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."

Pursuant to sec. 706 (b) of the Act (42 U.S.C. §2000e-5), no charge of an unlawful employment practice may be filed with the Equal Employment Opportunity Commission under sec. 706 (a) until the expiration of 60 days after proceedings have been commenced under the fair employment practice law of the state. The aim and emphasis of the Act—and of the Wisconsin statute—are on private settlement and elimination of unfair practices without litigation through voluntary conference, persuasion and conciliation. *Culpepper v. Reynolds Metals Company*, (5th Cir. 1970) 421 F. 2d 888, 891, and *Murphy v. Industrial Comm.*, (1968) 37 Wis. 2d 704, 711-712a, 155 N.W. 2d 545, 157 N.W. 2d 568.

Section 1104, Title XI of the Civil Rights Act of 1964 (42 U.S.C. §2000h-4) recites:

"Nothing contained in any title of this act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

When the Civil Rights Act of 1964 was pending in Congress, all but seven states had maximum work hour limitations for women. American Women's Report of the President's Commission on the Status of Women (1963), p. 36. It is unlikely that congress intended these long-established provisions to be swept silently away.

Although provision against discrimination based on sex was a belated addition to the Act, the quoted regulation appears to be consonant with the purpose and policy of the Act in treating with other forms of discrimination. See 1964 U.S. Code Cong. and Adm. News, p. 2355.

On December 2, 1965, the Equal Employment Opportunity Commission, which administers the federal act, promulgated guidelines on discrimination because of sex, providing in part (29 C.F.R. §1604.1, 30 F.R. 14927):

"* * *

"(b) The Commission believes that some state laws and regulations with respect to the employment of women, although originally for valid protective reasons, have ceased to be relevant to our technology or to the expanding role of the woman worker in our economy. We shall continue to study the problems posed by these laws and regulations in particular factual contexts, and to cooperate with other appropriate agencies in achieving a regulatory system more responsive to the demands of equal opportunity in employment.

"(c) The Commission does not believe that Congress intended to disturb such laws and regulations which are in-

tended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception. However, in cases where the clear effect of a law in current circumstances is not to protect women but to subject them to discrimination, the law will not be considered a justification for discrimination."

On August 19, 1969, the Commission revised this reading of congressional intent relating to the effect of the Act's "saving clauses" on protective state regulations (34 F.R. 13367):

"* * *

"(b) (1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, or for more than a specified number of hours per day or per week.

"(2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict wth Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception."

While construction by an administrative agency is entitled to deference, the courts are the final authorities on issues of statutory construction and are not obliged to affirm a construction contrary to congressional intent or the langu-

age of the statute. *Volkswagenwerk Aktien v. Federal Mar. Com'n,* (1968) 390 U.S. 261, 272, 88 S.Ct. 929, 19 L.Ed. 2d 1090, and *Phillips v. Martin Marietta Corp.,* (5th Cir. 1969) 411 F. 2d 1, 3.

The Fair Labor Standards Act of 1938 (29 U.S.C. Secs. 201 et seq.), as amended, including the Equal Pay Act of 1963 (29 U.S.C. Sec. 206 (d)), also prohibits employers in interstate commerce from discriminating between employes in pay, except where the differential is based on a factor other than sex, such as seniority, productivity, etc. This provision is in pari materia with the Civil Rights Act of 1964 *Schulz v. Wheaton Glass Company,* (3rd Cir. 1970) 421 F. 2d 259, 264. The Fair Labor Standards Act contains the noninterference clause (29 U.S.C. §218):

"No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter * * *."

As the Wisconsin restrictions on maximum hours (sec. 103.02, Stats., and ch. Ind. 74, Wis. Adm. Code) are more stringent than those of this Federal Act (29 U.S.C. §207), there would seem to be no preemption or supersedure involved. In respect to a correlative issue in *Rivera v. Division of Industrial Welfare,* (Cal. App. 1968) 71 Cal. Rptr. 739, 762-763, the court said:

"A specific regulation of the Industrial Welfare Commission may enter a relatively narrow regulatory sphere reserved by Congress or may actually conflict with a federal regulation. (See, for example, United Air Lines, Inc. v. Industrial Welfare Committee, supra, 211 Cal. App. 2d 729, 28 Cal. Rptr. 238.) Indeed, conflict is charged here, that is, by establishing minimum pay and working conditions of women and not men, California indulges in a discriminatory employment practice prohibited by the Federal Civil Rights Act, supra. One group of real parties in interest contends that the Industrial Welfare Commission orders result in

discrimination against women by inducing employers to hire men at less pay. Other real parties in interest argue that the orders discriminate against men by confining their protection to women (and minors). One is tempted to rejoin that a state regulation which discriminates against both sexes discriminates against neither.

"There is nothing in the history of the Federal Civil Rights Act indicative of congressional intent to abrogate state legislation fixing minimum pay and working conditions for women. The state legislation does not sanction discrimination between the sexes, and there is no evidence that such is its effect. The federal act permits hiring selection based upon a 'bona fide occupational qualification' necessary to the normal operation of the enterprise. (42 U.S.C.A., §2000e-2, subd. (e).) As we interpret this provision, the absence of state-imposed minimal standards for male employees is not a bona fide occupational qualification which would permit an employer to hire male applicants and reject females. Since federal law would require the employer to accept or reject both sexes without regard to state-imposed minimal standards for one, the state law deprives neither sex of equal job opportunities. In terms of equal pay and working conditions, the state law and regulations neither require nor permit employers to maintain men at conditions inferior to those of women. Whether the Federal Civil Rights Act or federal equal pay statute (29 U.S.C.A. §206, subd. (d)) requires employers to bring male employees up to the minimum standards which state law fixes for females, is an interpretive and enforcement problem for the federal agencies, one which is not before us in this proceeding. As a practical matter, the minimal conditions provided for women tend to become a common floor for all. That employers will or may in practice employ male workers at inferior conditions is at best a speculation. We find no enforced discrimination between the sexes arising from state law, hence no conflict with federal anti-discrimination legislation."

A month after this state court decision, a California District Court in *Rosenfeld v. Southern Pacific Company,* (C.D. Cal. 1968) 293 F.Supp. 1219, 1224, involving employer refusal to consider a woman for a position as agent-telegraph-

er because of a state code limitation on weights that women employees were permitted to lift, ruled:

"The California hours and weights legislation violates the provisions of the Civil Rights Act of 1964. Accordingly, such legislation is contrary to the Supremacy Clause (Art. VI, Clause 2) of the United States Constitution and, therefore, is void, and of no force or effect."

Despite the cogency of reasoning to support a contrary conclusion, it is my opinion that the federal courts would hold that the Civil Rights Act of 1964, as to employers subject to its provisions, supersedes our state statutes and rules restricting maximum working hours of women in employment. The attorneys general of other states, including Michigan, North Dakota, South Dakota, Oklahoma and Pennsylvania, have written opinions of similar effect.

In *Richards v. Griffith Rubber Mills,* (D.C. Ore. 1969) 300 F.Supp. 338, 340, the court held:

" * * * Except in rare and justifiable circumstances, * * * the law no longer permits either employers or the states to deal with women as a class in relation to employment to their disadvantage. * * * Individuals must be judged as individuals and not on the basis of characteristics generally attributed to racial, religious, or sexual groups. The particular classification in Order No. 8 may be reasonable under the Equal Protection Clause, but it is no longer permitted under the Supremacy Clause and the Equal Employment Opportunity Act."

Although the United States Supreme Court has not provided the authoritative answer, federal courts which have ruled on the sex discrimination issue under the Civil Rights Act of 1964 have barred employers from classifying employes according to sex for purposes of compensation and working conditions unless the employer could prove that all or substantially all women would be unable to fulfill the duties of the position.

Even when it is clear that a rational basis exists for an employer to discriminate against women as a class in filling a position, e.g., where men can on the average perform the

tasks more efficiently and more safely, the employer may not do so lest the bona fide occupational exception swallow the rule against discrimination. *Cheatwood v. South Central Bell Telephone & Tel. Co.*, (M.D. Ala., N.D. 1969) 303 F.Supp. 754, 759.

In *Weeks v. Southern Bell Telephone & Telegraph Co.*, (5th Cir. 1969) 408 F. 2d 228, 236, the court held that refusal of a company to permit a woman to fill a "strenuous" job as switchman violated the Civil Rights Act, stating:

" * * * Title VII * * * vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise."

See also *Schulz v. Wheaton Glass Company*, (3rd Cir. 1970) 421 F. 2d 259; *Bowe v. Colgate-Palmolive Company*, (7th Cir. 1969) 416 F. 2d 711. Cf., *Phillips v. Martin Marietta Corp.*, (5th Cir. 1969) 411 F. 2d 1.

From the federal decisions, I conclude that it would be an unlawful employment practice for an employer under the Civil Rights Act of 1964 to treat female employes as a class in limiting the maximum hours they may work each day or each week without regard to individual differences. Accordingly, you are advised that the Wisconsin statute and rules regulating maximum hours of women are superseded with respect to those employers who are subject to the Civil Rights Act of 1964. Other employers not covered by the federal act remain subject to the hour limitations of the Wisconsin law. The problems and inequities flowing from disparate treatment under the state and federal laws deserve careful legislative and administrative attention.

RWW:GS

Dept. of HSS—Compensation Standards—Pursuant to sec. 49.50 (2), the State Department of Health and Social Services has authority to prescribe statewide compensation standards applicable to county welfare department employes. Under secs. 46.22 (3) and 59.15 (2) (c), any fixing of salaries of such employes by county boards of supervisors must be within the limits of the statewide prescribed standards.

July 31, 1970.

WILBUR J. SCHMIDT, *Secretary*
Department of Health and Social Services

You have requested my opinion on a number of questions concerning the authority of the State Department of Health and Social Services to prescribe statewide compensation standards for county welfare department employes.

Your first question is whether the State Department of Health and Social Services has authority to prescribe statewide compensation standards for county welfare department employes.

The answer to this question is "yes."

The primary source of your department's power is set forth in sec. 49.50 (2), Stats., which provides:

"RULES AND REGULATIONS, MERIT SYSTEM. The department shall adopt rules and regulations, not in conflict with law, for the efficient administration of aid to the blind, old-age assistance, aid to families with dependent children and aid to totally and permanently disabled persons, in agreement with the requirement for federal aid, including the establishment and maintenance of personnel standards on a merit basis. The provisions of this section relating to personnel standards on a merit basis supersede any inconsistent provisions of any law relating to county personnel; but this subsection shall not be construed to invalidate the provisions of s. 46.22 (6)."

Insofar as we are concerned herein, there are three main expressions in the statute which indicate that your depart-

ment, as state supervisor, has authority to prescribe and require compliance with statewide compensation standards for county welfare employes.

First, the rules which you adopt must be in agreement with the requirement for federal aid.

42 U.S.C.A., Public Health and Welfare, sec. 302 (5), provides that the state plan for administration of old-age assistance programs shall include methods relating to the establishment and maintenance of personnel standards on a merit basis and that such plan go to the selection, tenure and compensation of employes.

The same requirement is found in 42 U.S.C.A., Public Health and Welfare, sec. 602 (a), which relates to the state plan for administration of aid and services to needy families with children.

Federal law governing other programs referred to in sec. 49.50 (2), Stats., have similar requirements.

Federal law requires that compliance with the approved state plan shall be mandatory on all political subdivisions of the state administering federal funds in such cases. 42 U.S.C.A. sec. 602 (1). If a state does not set up and abide by a suitable employe merit system, federal funds may be withheld. 42 U.S.C.A. secs. 304, 605, 715, 1204, 1384.

In *Norton v. Blaylock,* D.C. Ark. 1968, 285 F.Supp. 659, it was stated that requirements of federal grants-in-aid programs that states set up and operate under personnel merit systems express a congressional policy in favor of security of welfare employes who have attained permanent status.

Federal rules set forth "Standards for a Merit System of Personnel Administration" and are applicable to all personnel, both state and local, unless exempted. 45 CFR 70.6 provides standards for a job classification plan and 45 CFR 70.7 sets forth compensation plan standards as follows:

"A plan of compensation for all classes of positions in the agency will be established and maintained. Such plan will include salary schedules for the various classes in which the salary of a class is adjusted to the responsibility and

difficulty of the work. The salary range for each class will consist of minimum, intervening, and maximum rates of pay to provide for salary advancements within the range. In arriving at such salary schedules, consideration will be given to the prevailing rates for comparable positions in other departments of the State and to other relevant factors. The State administrative agencies will adopt plans for salary advancements based upon quality and length of service. Salary laws and rules and regulations uniformly applicable to departments of the State government will be given consideration in the formulation of the compensation plan."

Second, your rules and regulations must provide for "the establishment and maintenance of personnel standards on a merit basis."

A merit system is a civil service system. However, it should be noted from a reading of secs. 49.50 (5) and 46.22 (6), Stats., that there must be compliance with the state-prescribed merit system, at least insofar as compensation standards are concerned, even where there is an existing county system of civil service.

A merit system of civil service in Wisconsin includes the idea of a workable compensation plan. See secs. 16.01, 16.105, 16.106, 16.19, 59.07 (20), 59.21 (8), 63.09, 63.11, Stats. Also see 15 Am. Jur. 2d, Civil Service, sec. 29, Compensation, 491. Other portions of a system include provisions for job classification, recruitment, examination and testing, certification and appointment, promotion, reclassification, performance evaluation, hearing, suspension and dismissal. The list is not all inclusive. However, a merit system cannot operate effectively unless there is job classification and a reasonable compensation plan which relates thereto.

Third, sec. 49.50 (2), Stats., expressly provides that:

"The provisions of this section relating to personnel standards on a merit basis supersede any inconsistent provisions of any law relating to county personnel; * * *."

Your questions are prompted in part by contentions by some county board supervisors that passage of ch. 154,

Laws 1969, removes the merit rule as a controlling factor in employe-employer relations in county welfare departments and permits that the county boards of supervisors have a free hand in the fixing of employes' salaries.

Chapter 154, Laws 1969, amended sec. 46.22 (3), Stats., as follows:

"The county director of public welfare shall serve as the executive and administrative officer of the county department of public welfare. In consultation and agreement with the county board of public welfare he shall prepare and submit to the county board of supervisors an annual budget of all funds necessary for the county department, and shall prepare annually a full report of the operations and administration of the department. ~~He~~ *The County board of supervisors shall review and approve, reject or revise by majority vote the annual budget of the county department of public welfare. The county director* shall recommend to the county board of public welfare the appointment ~~and fixing of salaries~~ of employes necessary to administer the functions of the department, subject to ~~the provisions of~~ sub. (6) and s. 49.50 (2) to (5) and the rules ~~and regulations~~ promulgated thereunder. *The county director shall make recommendations to the county board of supervisors who shall fix the salary of such employes.*"

I am of the opinion that ch. 154, Laws 1969, did not alter the authority of the State Department of Health and Social Services to establish statewide compensation standards for county welfare employes. As far as we are herein concerned, the only change effected by the amendment of sec. 46.22 (3), Stats., was to transfer, from the county board of public welfare to the county board of supervisors, the power to fix the salaries of county welfare department employes within the limits of the compensation standards adopted by the state department.

Your department has prescribed statewide compensation standards for county welfare employes for many years. In interpreting sec. 46.22, (3), Stats., as it previously existed, former attorneys general have recognized the

power of your departemnt to establish statewide compensation standards under sec. 49.50 (2) to (5), Stats. See 44 OAG 262 (1955), 46 OAG 137 (1957), 52 OAG 117 (1968).

Those opinions concluded that the authority of the county board of public welfare under sec. 46.22 (3), Stats., and the county board of supervisors under sec. 59.15 (2) (c), Stats., to fix the compensation of employes of the county welfare department was limited by any rules and regulations your department had adopted pursuant to sec. 49.50 (2) to (5), Stats.

In *Kenosha County C. H. Local v. Kenosha County,* (1966) 30 Wis. 2d 279, 140 N.W. 2d 277, the court referred to the limited power of the county board under sec. 59.15 (2) (c), Stats., and at p. 282 stated:

"The aforesaid language supports the respondents' assertion that it was the legislature's intention to place control of the compensation of county welfare workers in the hands of the public welfare department so as to facilitate the maintenance of a statewide program of public welfare, as well as to insure a centralization of administration in order to procure and retain federal financial grants.

"We share the following viewpoint expressed by the trial judge:

" 'When sec. 59.15 and sec. 46.22 are read together it seems evident that the authority and duty to determine wages and functions of employees has been vested by the legislature in the County Department of Public Welfare and not in the County Board of Supervisors.' "

The court held that the county board of public welfare had limited power with respect to fixing wages of county welfare workers, but that such power was subject to the statewide plan. At p. 283 the court stated:

" * * * The state is obliged to meet certain standards in regard to federally supported welfare programs. While such programs are administered on a county basis, they are subject to a statewide plan of which federal approval is required."

In amending sec. 46.22 (3), Stats., the legislature transferred any county fixing-of-salaries power from the county board of public welfare to the county board of supervisors. The power transferred in the last sentence is not made expressly subject to the provisions of sec. 49.50 (2) to (5), Stats. There was no reason to limit the power in this section. Sec. 59.15 (2) (c), Stats., expressly limits the power of the county board as follows:

"(c) The board may provide, fix or change the salary or compensation of any such office, board, commission, committee, position, employe or deputies to elective officers without regard to the tenure of the incumbent (except as provided in par. (d)) and also establish the number of employes in any department or office including deputies to elective officers, and may establish regulations of employment for any person paid from the county treasury, *but no action of the board shall be contrary to or in derogation of the rules and regulations of the department of health and social services pursuant to s. 49.50 (2) to (5) relating to employes administering old-age assistance, aid to dependent children, aid to the blind and aid to totally and permanently disabled persons or ss. 63.01 to 63.17.*" (Emphasis supplied.)

The legislature was aware of the limitation in sec. 59.15 (2) (c), Stats., as it expressly amended the same by ch. 366, s. 117 (2) (b), Laws 1969.

Failure of the legislature to delete the precedence language of the last sentence of sec. 49.50 (2), Stats., is additional grounds for concluding that the legislature did not intend to give the county board of supervisors a free hand in fixing the salaries of county welfare department personnel.

Your second question is whether such standards must include reasonable options available to the various counties.

The answer to this question is in the affirmative.

Your present county merit system compensation standards contain the following rules which are in part at least the basis of county option.

Rule PW-PA 10.25 (4) provides:

"(4) At least the minimum for the class shall be paid, but no county shall be precluded from paying in excess of the maximum provided in the salary schedule although no reimbursement shall be made on any amount of salary in excess of the maximum provided in the schedule."

Rule PW-PA 10.26 provides in part:

"(1) The County Board of Supervisors under Sec. 46.22 (3), Wis. Stats. shall establish a minimum for each class of position at any step within the range. Example: An agency may select Step (4) as the minimum for the Social Work Supervisor II-County classification, Step (3) as the minimum for the Social Worker V-County classification, and at the same time select Step (5) as the minimum for the Typist 1-County classification. Agencies are encouraged to select a minimum for each class of position which will enable them to successfully recruit for staff vacancies. In counties with court attached staff, the juvenile court judge shall establish a minimum for each class of position attached to the court."

Former sec. 46.22 (3), Stats., contemplated that the county board of public welfare have some degree of latitude in fixing salaries, and present sec. 46.22 (3), Stats., as amended by ch. 154, Laws 1969, and sec. 59.15 (2) (c), Stats., contemplate that the county board of supervisors exercise some power in that regard. Statewide standards without any options would leave the county board of supervisors powerless in the area, with the possible exception of granting, increasing or reducing merit increases recommended by the county director. Your present standards include a number of options, including those noted above, which would give meaning to the power granted county boards of supervisors in secs. 46.22 (3) and 59.15 (2) (c), Stats., and which are conducive to making the compensation standards workable in the several counties of the state which may vary in population, economic resources, employment needs or other material characteristics.

Your third question is whether the county board of supervisors, acting under sec. 46.22 (3), Stats., as amended by ch. 154, Laws 1969, must conform to the state standards,

choosing options which are available, in order to gain reimbursement from state and federal funds.

I am of the opinion that there must be compliance with the state standards in order to gain reimbursement and that a county cannot ignore the merit rule even where the county does not claim reimbursement. The federal laws and regulations cited above provide that reimbursement may be withheld for noncompliance.

Your fourth question is whether sec. 111.70, Stats., has any applicability to county welfare employes as it pertains to salary or fringe benefits. This statute deals with the right of municipal employes to organize and join labor unions and to bargain in municipal employment.

This question was answered in the affirmative in 52 OAG 117, 120, 121. The reasoning and conclusion reached in that opinion are applicable here.

Your Rule PW-PA 10.28 (7) provides:

"(7) When the County Board provides for across-the-board increases for all county employees, employees of the agency may be granted increases in accordance with this provision within the established range of their classifications and at intervals of less than one calendar year."

In order to maintain a proper relationship between the salaries of employes of various departments, welfare department employes have a legitimate interest in being represented in conferences and negotiations at the county level which deal with salaries and fringe benefits.

Your fifth question is whether your department can delegate the development of compensation standards to counties having a civil service system.

The answer to this question is "no."

The state can request the assistance, recommendations and cooperation of the county civil service agency in establishing the statewide standards. The county agency should be aware of special needs within the county. However, sec. 49.50 (5), Stats., is specific as to the functions which may

be delegated and formulation of the compensation standards to be applicable to county welfare department employes is not included. That statute provides:

"(5) COUNTY PERSONNEL SYSTEMS. In counties having a civil service system, the department may delegate to the civil service agency in such county responsibility for determining qualifications of applicant by merit examination, provided the standards of qualifications and examinations have been approved by the department and the department of administration. The personnel in such counties shall be exempt from such reexamination provided such personnel has qualified for present positions by examinations conducted pursuant to standards acceptable to the department."

The compensation plan which your department is authorized to promulgate is one which establishes *statewide standards* and a county does not have statutory authority to determine such standards. Sec. 66.30 (2), Stats., only empowers the named governmental units to "contract jointly * * * for any joint project, wherever *each portion* of the project is *within the scope of the authority*" of the contracting units. 48 OAG 231.

RWW:RJV

Claims Service Contract—Workmen's Compensation—A "claims service contract" lacking the element of indemnification is not a workmen's compensation insurance contract, is not in violation of applicable laws or regulations but nevertheless may be regulated if Insurance Commissioner determines public interest so requires.

July 30, 1970.

STANLEY C. DUROSE, *Commissioner*
Office of Commissioner of Insurance

Pabst brewing company (hereafter, Pabst), a domestic industrial corporation, obtained an order from the Depart-

ment of Industry, Labor and Human Relations (hereafter, ILHR), formerly the Industrial Commission, exempting Pabst from its obligation to insure payment of workmen's compensation benefits to its employes pursuant to sec. 102.28 (2), Stats. Pabst thereafter procured a contract of workmen's compensation insurance from Fireman's Fund Insurance Company (hereafter, Fireman's Fund), an insurance company licensed to operate in this state, providing "excess workmen's compensation insurance" respecting that amount of all workmen's compensation claims exceeding $25,000 as a result of any one occurrence. It is noted that under this insuring agreement Fireman's Fund incurs no liability for the satisfaction of claims by Pabst employes under workmen's compensation up to the retention limit of $25,000 per occurrence, such liability remaining solely in Pabst. However, with respect to Pabst's retention (retained liability of $25,000 or less) Fireman's Fund and Pabst have entered into a "claims service contract" under which Fireman's Fund agrees to (1) determine the amounts of such benefits and arrange for prompt payment thereof by or on behalf of Pabst, while specifying Fireman's Fund has no obligation to pay such amounts, (2) defend any proceeding against Pabst seeking such benefits and any suit against Pabst alleging such injury and seeking damages on account thereof, while, again, Fireman's Fund has no obligation to pay such amounts, (3) make such investigation, negotiation, and settlement of any claim or suit on behalf of Pabst as Fireman's Fund should deem expedient, while, again, Fireman's Fund has no obligation to pay any part of such benefits or damages, (4) pay all premiums on bonds to release attachments for an amount not in excess of $25,000, all premiums on appeal bonds required in any such defended proceeding or suit, while, again, Fireman's Fund has no obligation to apply for or furnish any such bonds, (5) pay all expense incurred by Fireman's Fund, all costs taxed against Pabst in any such proceeding or suit and all interest accruing after entry of judgment until there shall have been paid, or tendered, or deposited in court such part of such judgment as shall not exceed $25,000 as the result of any one accident or occurrence, and (6) reimburse Pabst for

all reasonable expenses, other than loss of earnings, incurred at the request of Fireman's Fund.

Under this claims service contract Pabst is obligated to reimburse Fireman's Fund upon demand for such amounts paid on behalf of Pabst together with "allocated loss adjustment expenses" (not exceeding $25,000) as a result of any one accident or occurrence. "Allocated loss adjustment expenses" is defined in this contract to mean all expenses paid by Fireman's Fund in connection with claims settlement which can be directly allocated to a particular claim, other than salaries and traveling expenses of insurance company employes, insurance company overhead, or fees paid to independent adjusters. The consideration which Pabst agrees to pay Fireman's Fund is composed of a "service premium" and a "loss adjustment premium." The "service premium" is to be determined by applying a rate of .00390 to each barrel of beer produced by Pabst in Wisconsin. The "loss adjustment premium" is declared to be 11.7% of the payments with respect to claims defended or settled by Fireman's Fund in accordance with its service contract obligations. The "loss adjustment premium" is, in fact, equal to that portion of the Wisconsin workmen's compensation rating formula allowed for claims administration by the Wisconsin Workmen's Compensation Rating Bureau in preparing its rate scale under secs. 205.03, 205.04, 205.05, 205.06, 205.07 and 205.08, Stats.

You ask:

Whether this claim service contract is in essence a contract of workmen's compensation insurance constructed, however, to evade, and in violation of, applicable law respecting policy form, rate regulation and premium tax requirements for workmen's compensation insurance.

Your concern over contractual validity, as I understand it, only relates to the "claims service contract" and not the "excess workmen's compensation insurance contract," except perhaps as it relates to the former.

The first issue, then, is—is the "claims service contract" a contract of insurance?

In 57 OAG 87, 90, it was stated:

"A contract of insurance is in its nature aleatory, voluntary, executory, conditional, and personal, and except as to life and accident, it is one of indemnity. * * *"

Also, see 44 C.J.S. Insurance, Sec. 1, p. 473; Sec. 223, p. 927.

Aleatory contracts have been defined as "those where performance on the part of one is conditioned on a fortuitous event." *Southern Surety Co. v. MacMillan Co.*, (1932) C.C.A. Okl., 58 F. 2d 541, 549.

Stated another way, it may be said that an insurance contract, with certain exceptions not relevant here, essentially involves a risk (related to an uncertain event, the happening of which may cause a loss) for which one party undertakes to indemnify the other party's loss for a stated consideration (premium).

Although the "claims service contract" above described does deal with a risk (workmen's compensation claims not over a certain amount) which could result in a loss to Pabst, the indemnification aspect appears to be absent. Fireman's Fund arranges for prompt payment of appropriate claims but the payment is to be made by or on behalf of Pabst; Fireman's Fund, by the contract's language, has no obligation to pay such amounts. The same disclaimer of liability on the part of Fireman's Fund exists with respect to its undertaking the defense of legal proceedings.

It is not clear what the parties intended to include as "reasonable expenses, other than loss of earnings" which Pabst might incur at the request of Fireman's Fund and for which Pabst is to be reimbursed by Fireman's Fund. However, since these expenses can only occur with Pabst's consent, it is difficult to see how this can constitute a risk of loss on Pabst's part.

Nor is it controlling that the "claims service contract" uses terms such as "loss adjustment premium" normally found in insurance contracts, any more than if the whole contract were called a "claims service insurance contract."

The question remains whether the contract in its entirety is in fact a contract of insurance. In this instance, I regard this as a close question.

However, because it lacks the "indemnification" characteristic, I conclude that the "claims service contract" you have described is probably not a contract of insurance.

Although it has been brought to my attention that this contract has in it certain elements which raise questions with respect to the unauthorized practice of law, I deem that a matter not appropriate for my consideration in this opinion and express no view thereon.

Further, as was pointed out above, the "claims service contract" does contain many characteristics peculiar to an insurance contract; and if it were an insurance contract it would, of course, be subject to premium tax. However, I deem it unnecessary, for the purposes of this opinion, to draw any conclusion, based on the information furnished me, as to whether it is constructed to evade premium tax or other statutory requirements. Likewise, the serious question of whether the "claims service contract" may be *ultra vires* the insurance company (a foreign corporation) is one not necessary for resolution here.

Since these two contracts, i.e., the "claims service contract" and the excess workmen's compensation insurance contract, are between the same parties, deal with the same subject matter and are potentially, if not actually interrelated, it is necessary to consider whether either of them, or more pertinently, the two together may be contrary to public policy.

Contracts are against public policy when they tend to injure the state or the public. *Hawkins Realty Co. v. Hawkins State Bank*, (1931) 205 Wis. 406, 236 N.W. 657. An agreement is against public policy if it violates some public statute. *Pedrick v. First National Bank of Ripon*, (1954) 267 Wis. 436, 66 N.W. 2d 154.

" * * * the general rule [is] that contracts repugnant to justice * * * or which are against the general policy of the law, are void."

Marshall v. Wittig, (1933) 213 Wis. 374, 379, 251 N.W. 439.

What is public policy in the area in which these contracts operate?

" * * * The principle underlying this [workmen's compensation] act recognizes a public interest in those engaged in the performance of services as employees, and such interest springs from the humane idea that an employee injured or incapacitated or who meets his death in the course of and while engaged in his employment should definitely be provided for by way of compensation based upon a uniform schedule. It is also further realized that the loss or damage incurred is an economic one, which should be borne by the industry in which the employee at the time of his injury is engaged. The measure is a beneficient one, springing from humane motives, and is founded upon sound economic doctrine, and for this reason the rule is universally applied wherever a compensation law has been enacted and is in operation, that its provisions shall be liberally construed to accomplish the beneficent purpose for which it was passed. These fundamental ideas must always be prominently borne in mind when issues raised under the act are to be determined."

Ronning v. Industrial Comm., (1925) 185 Wis. 384, 387, 20 N.W. 652.

All of the provisions of ch. 102, Stats., referred to as the "workmen's compensation act," including such sections as 102.28, 102.29, 102.30, 102.31 and 102.32 dealing with workmen's compensation insurance, and any administrative rules promulgated thereunder, are to be liberally construed to effect the beneficient and human purposes of the act. And those purposes are to protect the rights of the employe (or his beneficiary) who may be injured or meet death in the course of and while engaged in his employment and especially to provide for his definite compensation, the expense of which is to be borne by the industry in which the employe is engaged.

If an employer makes an improvident contract of insurance respecting his liability under the act, this, of course,

would not render the contract void as against public policy unless the contract had the effect of impairing the employer's ability to meet his responsibilities under the act. I have assumed, of course, that the excess workmen's compensation insurance contract meets statutory requirements and any rules, rates, filings, etc. under ch. 205, Stats.

However, in addition to the foregoing considerations of public policy, the Commissioner of Insurance has been given rather broad rule making power with respect to workmen's compensation insurance. Section 205.08 (8), Stats., gives him power to make reasonable rules necessary to enforce secs. 205.01 to 205.17, Stats. Also, he may make investigations, examinations and hold hearings with reference to any subject over which he has jurisdiction. Sec. 205.02 (2), Stats.

Insurers licensed to transact workmen's compensation insurance business are required to be members of the Wisconsin Compensation Rating Bureau (hereafter, Bureau). Sec. 205.03 (1), Stats. Although the Bureau is empowered to establish, maintain and administer rules, regulations, classifications, rates and rating plans to govern the transaction of workmen's compensation insurance business (sec. 205.03 (1) (a), Stats.), the Commissioner of Insurance has power to approve the Bureau's bylaws, (sec. 205.04 (1), Stats.), approve a minimum adequate pure premium for each classification under which such insurance is written and approve an expense loading in rates and rating plans (sec. 205.05 (4), Stats.) and approve all Bureau filings with respect to manuals of classifications, rules, rates and rating plans. Sec. 205.06, Stats. With respect to rate administration, the Commissioner of Insurance has certain additional powers. Sec. 205.08, Stats. With respect to rate making, due consideration is to be given to loss experience, catastrophic hazards, reasonable underwriting profit, dividends, etc., and "to all other relevant factors within and outside this state." Sec. 205.05 (1) (a), Stats. Rates may not be excessive, inadequate or unfairly discriminatory. Sec. 205.05 (1) (c), Stats.

Section 204.52, Stats., provides in part:

" * * * No insurer * * * shall pay, allow or give, or offer to pay, allow or give, directly or indirectly, as an inducement to insurance, or after insurance has been effected, any rebate, discount, abatement, credit or reduction of the premium named in a policy of insurance, or any special favor or advantage in the dividends or other benefits to accrue thereon, *or any valuable consideration or inducement whatever,* not specified in the policy of insurance, except to the extent provided for in applicable filing. * * * "

The purpose of regulating insurance rates, basically, is to promote the public welfare. See sec. 204.37, Stats.

I am unable to find any statute, administrative rule or Wisconsin case law indicating that the contract or contracts in question are prohibited or against public policy. This is not to say, however, that this would not be a proper subject for your investigation and, if you deem appropriate, regulation under the statutes above cited.

In addition to the authority vested in you by statutes cited above, I am of the further opinion that, upon investigation, you may determine that it would be in the public interest to commence a proceeding under the provisions of sec. 207.09, Stats., relating to unfair methods of competition and unfair or deceptive acts or practices by persons engaged in the business of insurance.

In my opinion, should your investigation reasonably lead you to determine that the public interest required it, the legislature has empowered you, through the use of appropriately promulgated rules, to regulate the use, by a workmen's compensation or other insurer of a "claims service contract" under certain circumstances, dependent upon the evidence you may develop.

Factors you might wish to take into account (although these are by no means exclusive) in ascertaining whether the public interest requires regulation of these contracts include: the effect such contracts may have upon approved rates, rating plans, classifications, bureau filings, loss experience, underwriting profit, dividends, whether such contracts may directly or indirectly cause rates to be unfairly

discriminatory, excessive or inadequate, whether the use of such a contract by an insurer is an unfair method of competition or an unfair or deceptive practice (which may include premium tax considerations), whether the use of a "claims service contract" together with an ordinary excess workmen's compensation insurance policy constitutes a valuable inducement not specified in the insurance policy and not provided for in the applicable filing, whether this is a prohibited activity under sec. 201.24 (1), Stats., [see 56 OAG 62], and other considerations aimed toward protecting the rights of employes, employers, insureds, insurers and other members of the public who may have a protective interest in this area.

I conclude that the "claims service contract" is not a contract of insurance, not in violation of applicable laws or regulations but is nevertheless an appropriate subject for your regulation, should you determine the public interest so requires.

RWW:JEA

Employment Agency—Dept. of ILHR—Employment agency counselors employed by a licensed employment agent must be licensed under secs. 105.01 and 105.05, Stats.

August 18, 1970.

E. E. ESTOWSKI, *Chairman*
Department of Industry, Labor and Human Relations

You have asked me whether ch. 105, Stats., requires your department to license private employment agency counselors. You state that counselors are generally employes of licensed employment agents whose duties are line function, instead of service function, in that they actively engage in the business of finding employment for parties seeking work and finding employes for those seeking workers and that they receive a commission or salary.

Section 105.01, Stats., as amended by ch. 444, Laws 1969, reads as follows:

"The term 'employment agent':

"(1) Means all persons who furnish to persons seeking employment, information enabling or tending to enable such persons to secure the same, or who furnish employers seeking laborers or other help of any kind, information enabling or tending to enable such employers to secure such help, or who keep a register of persons seeking employment or help as aforesaid, whether such agents conduct their operations at a fixed place of business, on the streets or as transients, and also whether such operations constitute the principal business of such agents or only a side line or an incident to another business.

"(2) Does not include:

"(a) Any employer who procures help for himself only or an employe of such an employer who procures help for him and does not act in a similar capacity for any other employer.

"(b) Any temporary help service defined as any person employing individuals to render part-time or temporary services to, for or under the direction of a 3rd person, if the person employing the individuals in addition to wages or salaries pays federal social security taxes, state and federal unemployment, contributions or taxes, carries workmen's compensation insurance as required by state law and maintains liability insurance covering the acts of its employes while rendering services to, for or under the direction of a 3rd person.

"(c) Any hiring hall operated by a bona fide labor union.

"(d) Any theatrical or booking agent."

Section 105.05 (1), Stats., as amended by ch. 444, Laws 1969, reads as follows:

"No person shall engage in the business of an employment agent for profit, or receive any fee, charge, commis-

sion or other compensation, directly or indirectly, for services as an employment agent, including modeling agencies which secure work for persons to act as live models or to model for photography, without first having obtained a license from the department of industry, labor and human relations and executing a bond as hereinafter provided. The license shall constitute a license from this state to operate as an employment agent for compensation and shall not be transferable to any other person or inure to the benefit of any person other than the licensee."

If a counselor-employe of an existing employment agent is not specifically exempt by subsecs. (a), (b), (c) and (d) of sec. 105.01 (2), Stats., he shall not engage in the business of an employment agent for compensation unless he shall have first obtained a license and executed a bond as required by sec. 105.05 (1), Stats. From the all inclusive phrase, "all persons," is excluded employers seeking help for themselves, temporary help service, any hiring hall operated by a bona fide labor union and theatrical or booking agent. An employe of a licensed employment agent has not been exempted.

The well known rule applicable here is that "When a statute is plain and unambiguous interpretation is unnecessary, and intentions cannot be imputed to the legislature except those to be gathered from the terms of the law." *Estate of Ries,* (1951) 259 Wis. 453, 459, 49 N.W. 2d 483; *Cartwright v. Sharpe,* (1968) 40 Wis. 2d 494, 508, 162 N.W. 2d 5. In construing a statute, the courts are not at liberty to disregard the plain, clear words of the statute. *State v. Pratt,* (1967) 36 Wis. 2d 312, 317, 153 N.W. 2d 18.

Therefore, it is my opinion that a private employment agency counselor who supplies information concerning "help of any kind," to persons seeking employment or to employers seeking laborers for compensation, must be licensed.

RWW:RGM

Computer Programs—Dept. of Adm.—Section 16.74, Stats., permits the sale of computer programs as surplus

provided the programs were not created for resale purposes. Sections 18.01 and 18.02, Stats., requires that a computer program, as public property, be made available to the public for examination and copying pursuant to proper regulations relating thereto. The increasing use of computers warrants extensive study into procedures dealing directly with the disposition and protection of state computer programs.

August 19, 1970.

WAYNE F. MCGOWN, *Secretary*
Department of Administration

You ask, in light of the installation of some rather sophisticated state computer programs in such areas as statistical analysis, civil engineering problem solving and data communications techniques, whether the state has the right to sell these programs and, if so, whether receipts from any such sale could be reappropriated to the developing agency.

General statutory provisions which would authorize the disposition of state property are found in secs. 16.74 (disposal of surplus items), and 18.01, Stats. (public access to official property and records).

The applicability of either of the aforesaid statutory provisions depends on the physical nature of a computer program. As I understand it, a computer program, in its physical sense, is the reduction of a process for the treatment of data onto computer punch cards or magnetic tape and, if desired, its verbalization on computer print-out sheets. The cost for developing such a program, in many instances, is substantial.

To begin with, it would appear that the program is physical property which draws virtually all of its basic value from ideas being reduced to tangible form rather than from the property itself, in much the same way as a book attains its value.

In *Hancock v. State,* (1966) (Tex Crim) 402 S.W. 2d 906, it was held that computer programs were "property" within the Texas theft statutes.

Provision for the sale of state property, not otherwise specifically dealt with, is found in sec. 16.74, Stats.

Section 16.74, Stats., states:

"16.74 Requisitions: disposal of surplus items. Except as otherwise provided in ss. 16.71 to 16.82 and in the rules adopted pursuant thereto, all supplies, materials, equipment and contractual services shall be purchased for and furnished to any office only upon requisition to the department. The department shall prescribe the form, contents, number and disposition of requisitions and shall prescribe rules as to time and manner of submitting such requisitions for processing. *It shall also provide rules for the declaration as surplus of supplies, materials and equipment in any agency and for the transfer to other agencies or for the disposal by private or public sale of supplies, materials and equipment. In either case due credit shall be given to the agency releasing same.*" (Emphasis supplied)

There appears to be no problem in defining computer programs as "supplies, materials or equipment" used in the handling of data. The difficulty exists in determining whether a computer program to be offered for sale is truly "surplus," which is defined in Websters New World Dictionary as "a quantity over and above what is needed or used." Creating additional print-outs of a computer program solely for the purpose of selling them would change the nature of the extra programs and preclude their sale as "surplus" within the terms of sec. 16.74, Stats. By definition, a computer program reduced to a physical state could be sold as "surplus" only if it was created for purposes other than its eventual resale. Section 16.74, Stats., does provide that "due credit shall be given to the agency releasing same." This would indicate that incremental costs incurred in creating a "surplus" program, i.e. software, overhead, and added computer printing time could be recovered by the developing agency to the extent of sale proceeds.

The sale of any item of this nature must also be viewed in light of statutory requirements providing for public access to state property for purpose of examination and copying.

Sections 18.01 (1) and (2), Stats., provide:

"18.01 (1) Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

"(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof ~~may prescribe~~ prescribes, examine or copy any of the property or things mentioned in sub. (1). Any person may, at his own expense and under such reasonable regulations as the custodian prescribes, copy or duplicate any materials, including but not limited to blueprints, slides, photographs and drawings. Duplication of university expansion materials may be performed away from the office of the custodian if necessary."

Subsection (1) defines the property subject to subsec. (2) as "all property and things . . . in the lawful possession of . . . [the state officer] . . ."

State ex rel. Youmans v. Owens, (1965) 28 Wis. 2d 672, 679, 137 N.W. 2d 470, held that the right to examine and copy public documents extends to items in the possession of the public officer, even though the same were not required by law to be filed or recorded by that officer. The broad definition found in subsec. (1) of sec. 18.01, Stats., would include a computer program reduced to physical property in the sense previously discussed.

Subsection (2) does provide for the establishment of reasonable regulations regarding the duplication of these programs. Proper charges related to copying costs could be made therefor and the proceeds secured by the copying agency.

Your inquiry also expressed the desire to recoup part of the large investment incurred in the development of any such computer program. Within the framework of the statutes previously discussed, recovery, from a practical standpoint, would be limited to the reasonable cost of reproduction and handling. Sale of surplus property under sec. 16.74, Stats., would enable the sale of a program at its market value. This fact should, however, be considered in light of the alternative right of a purchaser to obtain copies pursuant to the provisions of secs. 18.01 and 18.02, Stats., as previously discussed. Under such provisions charges would be limited to reasonable charges for reproduction and handling since the person making a demand under this section would be entitled to copy the item at his own expense if he so desired.

You further indicate that private industry has sought to purchase these programs with the intent to use them for profit-making purposes. As long as the state would continue to sell these programs at reproduction cost it would appear that their market value would approximate that cost plus whatever service value the private industry could offer. A similar situation exists in the federal government when major studies such as the Warren report are provided for publication by private publishing houses. Federal laws prohibit the copyrighting of any federal publication (17 U.S.C. sec. 8).

It is clear that the rapidly increasing use of computers and computer programs by the state has created unique legal and economic issues not previously contemplated by the legislature and those charged with supervising their development and use.

The substantial expenditures involved in developing these programs, and their substantial intrinsic value once created, warrant study into current uses and possible misuses of state computer output. Specifically, extensive and thoroughgoing analysis must be directed toward (a) legislation related to the treatment and disposition of state developed computer programs, and (b) protection of these programs from improper appropriation by establishing administrative regu-

lations and using appropriate copyright, patent and licensing procedures.

RWW:BAC

Stocks—State of Wis. Investment Board—Commingling of common stocks of various employe trust funds is not prohibited by sec. 25.17 (3) (f), Stats. The question of commingling of common stock belonging to the various employe trust funds is one which must be resolved by the State Treasurer in conjunction with and at the direction of the State of Wisconsin Investment Board and the trustees of each of the funds as a matter of business judgment.

September 4, 1970.

HAROLD W. CLEMENS, *Treasurer*

In the performance of your duties as treasurer of the State of Wisconsin Investment Board you have interpreted sec. 25.17 (3) (f), Stats., which reads:

"Every investment shall be held as an asset of the fund by which purchased and, except as otherwise provided by law, the loss or gain shall inure thereto."

as requiring segregation by funds of the securities deposited with you which constitute the assets of the various employe trust funds.

The particular trust funds with which you are concerned are the conservation wardens pension fund, state life fund, state teachers retirement fund, Milwaukee teachers retirement fund, Wisconsin retirement fund, and veterans trust fund. The assets of these funds are invested by the State of Wisconsin Investment Board and title taken in the name of the Board. In purchasing investments the Board takes delivery of the securities in the form of several certificates in denominations corresponding to the share of each fund in the particular investment. These certificates are then

deposited with you and are segregated by funds in your vaults.

The language of sec. 25.17 (3) (f), Stats., does not in itself prescribe physical segregation of funds but merely establishes the assets of each fund held by the Investment Board as separate trusts. Similarly, ch. 75, sec. 13, Laws 1967, which states:

" * * * The separate employe trust funds shall not be commingled by virtue of this act, but the moneys in each segregated employe trust fund shall continue to be administered on a segregated basis."

relates to administration of the funds, not the manner in which the assets of these funds are to be held.

The case law indicates a relaxation by the courts of the rules related to earmarking of trust assets and commingling of trust funds. Relaxation of the rules is also evident in the enactment of statutes permitting trustees to register trust investments in the name of a nominee. In those cases where a trustee registers investments in the name of a nominee, such investments are no longer identifiable as trust assets except in the books of the trustee. Thus the requirement of earmarking is eliminated in the interest of the economy of transfer achieved by such registration.

As to the funds here in question, ch. 386, Laws 1969, which created sec. 25.17 (7) (b), Stats., specifically authorizes that investments of the various trust funds may be purchased and held in the name of a nominee.

The anticipated use of this new procedure raises the question of whether the custodian, because of the provisions of sec. 25.17 (3) (f), Stats., must physically segregate the stock certificates purchased with the assets of each of the six employe trust funds or whether it may receive stock certificates which are incapable of being physically placed in the respective funds because they do not themselves reflect the number of shares owned by each of the funds. The latter method would result in economies in purchasing common stock, in the costs of custodial services and possibly in other ways.

It is my opinion that the keeping of records to show the ownership of the various funds in the common stock purchased for such funds by the State of Wisconsin Investment Board is sufficient compliance with the requirements of sec. 25.17 (3) (f), Stats., and that physical segregation of certificates is not a statutory requirement.

Though the use of a nominee does away with the strict requirement of earmarking trust fund assets, it does not necessarily permit commingling of the assets of the various funds. At best, it may be seen as recognition by courts and legislatures that deviation from the strict common law rule may be justified in certain instances where dictated by good business practice.

Similarly with respect to commingling, it is pointed out in II *Scott on Trusts,* sec. 179.2, p. 1434:

"Under some circumstances it may be reasonable to mingle the funds of separate trusts. Thus it is not improper for a trust company which holds funds of separate trusts to deposit them in a single account in another bank in its name as trustee, indicating on its own books the amounts which are allocable to the separate trusts; and it is not necessary that the trust company should make separate deposits in the other bank in its name as trustee for each of the particular trusts. The rule against the mingling of funds of separate trusts is not violated merely because the trustee in making investments combines trust funds. Thus a trustee may purchase for separate trusts corporate bonds secured by a single mortgage. He may in most states invest in participations in a mortgage or group of mortgages, and a corporate trustee may in most of the states invest funds of trusts administered by it in a common trust fund maintained by it."

This type of commingling is provided for by sec. 223.05 (1), Stats., which permits trust company banks to deposit funds of various trusts in one account in any bank to the credit of such corporation as trustee and sec. 223.055, Stats., which provides for the establishment of common trusts in the State of Wisconsin. As to the various trust funds under the control of the State of Wisconsin Investment Board, sec.

25.14 (1), Stats., authorizes commingling of temporary cash assets of these funds in the state investment fund when approved by the respective authorities controlling the investment of such trust funds.

While the statutes do not specifically authorize commingling of the common stock of the various trust funds, the Wisconsin Supreme Court in *Attorney General ex rel. Blied v. Levitan,* (1928) 195 Wis. 561, 219 N.W. 97, after pointing out that there was no statute which expressly conferred upon the Annuity Board (predecessor of the Investment Board) the power to join with other bondholders in a receivership proceeding, stated:

" * * * It would seem that this fund should enjoy the benefit of the same business management that private owners are privileged to accord their individual affairs.

"Having arrived at the conclusion that it is the duty of the Annuity Board to realize upon these securities, we should not read into the law any limitations upon the methods which the board in the exercise of sound business judgment may employ to that end." P. 564-565.

I conclude, therefore, that the question of commingling of common stock belonging to the various employe trust funds is one which must be resolved by you in conjunction with and at the direction of the State of Wisconsin Investment Board and the trustees of each of the funds as a matter of business judgment. Any determination must recognize the integrity of the individual funds as well as the benefits to be derived by the funds from the commingling of certain of their assets.

RWW:APH

Dividends—Life Insurance—Life insurance policy dividends left with the insurance to accumulate at interest beyond the expiration of the calendar year are not to be treated as dividends "paid in cash" under sec. 76.34 (2), Stats.

Because of long-standing administrative construction, current dividends applied to purchase additional paid-up insurance are not reportable as gross premiums and thus, not taxable under sec. 76.34 (2), Stats. However, accumulated dividends so applied are reportable and taxable.

September 9, 1970.

STANLEY C. DUROSE
Office of Insurance Commissioner

An opinion dated December 16, 1965 (54 OAG 201) stated that a domestic life insurance company having in excess of $750,000,000 of insurance in force must pay an annual license fee, under sec. 76.34, Stats., computed upon the basis of gross premiums received without any deductions for dividends applied to the purchase of additional paid-up insurance. The statute, as pointed out in the opinion (54 OAG 202) permits a deduction in only two instances, i.e., (1) dividends paid in cash before the expiration of the calendar year next succeeding the apportionment of such dividends and (2) dividends applied in part payment of premiums within a similar period.

You now ask:

(1) Are life insurance company policy dividends which, at the election of the policyholder entitled thereto, are left with the company to accumulate at interest for a period extending beyond the expiration of the calendar year next succeeding the apportionment thereof, but nevertheless which are and remain at all times the sole property of the policyholder and payable to him on demand, to be treated as dividends "paid in cash" for purposes of applying the provisions of sec. 76.34 (2), Stats.?

(2) If the answer to the foregoing is in the affirmative, would it be proper to allow as a credit against the annual license fee liability of a life insurance company, as computed under sec. 76.34 (2), Stats., the amount of any such dividend accumulation, less the earned interest portion thereof, subsequently withdrawn by the policyholder or applied at

his direction toward the purchase of additional paid-up insurance where the amount of any such accumulation so withdrawn or applied has been included in reliance by such company on previous interpretation and administration of the law by this department, in the computation of prior license fee liabilities under such statutes and which have been paid by such company?

You inform us that the insurance company concerned has, in the past, reported to the office of the Commissioner of Insurance, formerly the Department of Insurance (hereafter, referred to as OCI), the "full contract premium" on policies where the policyholder elected to permit his dividends to remain with the company and accumulate at interest and never deducted from such premiums any such accumulated dividends when later applied to the purchase of paid-up additional insurance. These purchases of paid-up additional insurance, however, were not reported to you for annual license fee computing purposes. The meaning of "full contract premium" in light of the OCI's position that a tax was payable on $547,134.36 in "premium considerations" used to purchase paid-up additional insurance which had not been reported by the company in its tax base in the years 1962 and 1963 (OCI letter dated August 3, 1965) will be discussed later.

You state that since 1927 the OCI "appears to have followed a uniform practice . . . of disallowing as a deduction from gross premiums . . . all funds accumulated out of dividend declarations which were not delivered into the hands of the policyholder prior to the calendar year next succeeding the apportionment, even though such funds were in point of fact apportioned to premium paying policies on the lives of residents of Wisconsin from the annual distribution of profits, savings, earnings or surplus." You assume that this treatment of accumulated dividends is grounded in the position that these funds were not "paid in cash" even though it is suggested these funds were "placed irrevocably at the disposal of the policyholder."

You have invited my attention to the fact that on January 10, 1928, the then insurance commissioner M. A. Freedy

sent out to all insurance carriers affected the following directive with respect to sec. 76.34, Stats.:

"Sec. 76.34 Stats., as amended by ch. 411 Laws 1927 effective July 20, 1927

Law as construed by the Wisconsin Department

"(1) The term 'gross premiums' in the statute means all full premiums stated in policies as consideration for insurance (without any deduction for commissions or anything else) including premiums for disability, double indemnity and other special benefits; and whether payable annually or otherwise.

"(2) All such premiums 'received in money or otherwise' must be included. It is immaterial in what form the premiums were received, whether in money or notes or charged as premium loans, or in any other manner which is recognized as a payment, but premiums waived under the operation of disability clauses in policies are not to be included.

"(3) The statute requires inclusion of all premiums, described in (1) and (2) above, received on 'policies or contracts of insurance on the lives of residents of this state'. This means that if at the time the premium was paid the insured was a resident of this state the premium should be included, although it may have been paid to an agent residing in another state, or direct to the Home Office, and regardless of where the insurance was written or how long the insured has resided in this state or by whom the premium was paid.

"(4) All premiums described in (1), (2) and (3) above, received within the calendar year preceding the making of the return, should be included.

"(5) In arriving at the basis upon which the tax is to be computed there may be deducted only such annual dividends on premium-paying policies as were paid in cash or applied in part payment of premiums, when such cash payment or application of the dividend as a premium payment was made before the expiration of the calendar year next succeeding the apportionment of the dividend. *So-called deferred or ton-*

tine dividends cannot be deducted. Dividends on paid-up policies or dividends on policies on which premiums have been waived during the year for which the report is made, due to disability claims, cannot be deducted. Dividends applied to purchase additional insurance cannot be deducted neither can dividends which have once been left for accumulation even though subsequently withdrawn under options in policies." (Emphasis supplied).

On March 8, 1929, Commissioner Freedy wrote one of the larger foreign insurance companies doing business in Wisconsin as follows (in part):

"In your statement of premiums for taxation, we note a deduction of $24,611.01 as dividends credited to policyholders which may be withdrawn in cash.

"Under our law dividends actually paid in cash during the year are deductible and only such cash dividends which have been withdrawn before the close of the calendar year subsequent to their apportionment. Dividends left to accumulate and later withdrawn in cash are not deductible.

"Dividends left to accumulate but not withdrawn in cash are not deductible."

In 1948, through routine audit of the records of a large New York company doing business in Wisconsin it was discovered that the company had been deducting current dividends left on "deposit" from gross premiums for tax purposes. The OCI sought recovery of delinquent taxes from the company based on this information.

The company, through its attorneys, submitted legal memoranda to the OCI maintaining such deduction was proper, arguing that these current dividends, left on "deposit" were the equivalent of those "paid in cash". The OCI firmly resisted this interpretation and ultimately the company paid over $170,000 in delinquent taxes and interest.

I conclude, however, upon the considerable evidence you have furnished me, that with the knowledge and approval of the OCI, the companies affected have consistently, from 1928 until 1964, not included among gross premiums re-

ported, amounts attributable to *current* dividends applied to purchase additional paid-up insurance and that during this period, *accumulated* dividends literally were never used to purchase additional paid-up insurance.

As a consequence of federal internal revenue reporting requirements, enunciated in 1962, which required payors of interest of $10 or more to one person to file reports of such payments, the life insurance companies gave their policyholders the opportunity, not theretofore available, to convert their dividend accumulations to paid-up additional insurance.

The substantial amount of conversions which followed (and which previously had at most been minimal) were at least partially responsible for the OCI's prescribing, in 1964, effective for the premium tax year 1964, a new reporting form which specifically called for the reporting, as a part of gross premiums, receipts relating to both kinds of additional paid-up insurance, i.e., (1) those derived from *current* dividends and (2) those derived from *accumulated* dividends. The same form permitted such current dividends to be deducted (thus, tax free) but prohibited the deduction of such accumulated dividends. Prior to 1963 the options (with respect to dividends) available to an insured under the policies affected and the extra, perhaps gratuitous options or benefits, if any, offered by the companies to the insureds were such that the amount of *accumulated* dividends applied to purchase additional paid-up insurance was, at most, trivial, and probably non-existent. Thus there was no occasion for the OCI to address itself to the question of whether these accumulated dividends so applied to purchase additional insurance were deductible from gross premiums, which is to say, not taxable. However, the federal internal revenue reporting requirements were such as to cause the companies affected to launch a program, offering to their insureds (no doubt for the first time) this option to convert accumulated dividends into additional paid-up insurance and actively inducing their insureds to exercise this option. This predictably resulted in substantial amounts of accumulated dividends being transformed into additional paid-up

insurance, particularly in the first year or two following the initiation of this company-promoted program.

Summarizing my view of the administrative interpretation given sec. 76.34, Stats., by the OCI, I conclude that (1) dividends merely left with the companies by the policyholders to accumulate have never been treated as "paid in cash" and have never been permitted as deductions for premium tax purposes; (2) prior to the reporting year 1964 companies did not report for tax purposes (as part of gross premiums) current dividends applied to purchase additional paid-up insurance and thus paid no tax on these; (3) prior to 1962 no (or no significant amount of) accumulated dividends were converted to additional paid-up insurance and thus no administrative interpretation arose on this question; (4) for 1964 and subsequent years *current* dividends used to purchase additional paid-up insurance were permitted as deductions from gross premiums (which now included such paid-up additions) and thus were not taxed, and (5) for 1964 and subsequent years *accumulated* dividends later applied to purchase additional paid-up insurance were not permitted as deductions from gross premiums (which included such paid-up additions) and thus were taxed.

You point out that prior to 1927 the law (sec. 206.36, Stats.) permitted certain life insurance companies to "declare" dividends which the companies would have no liability to pay for as long as 5 years, and which the companies treated as their own property until the end of the deferred payment period. In 1927, however, the law was amended so as to require that dividends be declared *and paid* annually. You suggest that the contemporaneous amendment of sec. 76.34, Stats., by ch. 411, Laws 1927, providing for the first time a deduction for dividends "paid in cash" was, in light of the foregoing, superfluous.

The reason for a law requiring an annual declaration of dividends instead of delayed or deferred distribution is not difficult to discover. It is aptly expressed in Insurance Principles and Practices, Riegel and Loman (Prentice-Hall, Inc.) 1942, at page 179:

"The greater part of the surplus is distributed to policyholders in a mutual company and also to participating policies in stock companies. The common practice now is to pay it in the form of an annual dividend. *In the past, not all companies saw fit to pay this sum as a dividend. Some allowed it to pile up until a huge surplus was accumulated. This usually led to extravagance on the part of the company, and to prevent the flagrant waste of policyholders' funds, some states have passed laws compelling distribution.*" (Emphasis supplied.)

But to ascertain why the legislature amended sec. 206.36, Stats., in 1927 so as to require annual distribution of dividends calls for a consideration of the history of the so-called semitontine (deferred dividend) type of policy and an analysis of the legislative efforts seeking to cope with related problems. So as not to unduly lengthen this opinion, I have treated these matters separately in an appendix attached hereto.

From this history and analysis, it is seen that the legislature dealt with two separate problems. One, the legislative elimination of any vestige of the unfair, abuse-ridden tontine-like practice whereby mutual (and some stock) life insurance companies were depriving policyholders of a fair and prompt return of their money—money being used by the companies (through the device of deferred dividends). Two, the legislative evolution of a system of exacting license fees or taxes from domestic life insurance companies, exceptionally large domestic life insurance companies and foreign life insurance companies.

It strains credulity to suggest that the legislature intended to equate the annual declaration of dividends with dividends "paid in cash". If that had been the intent, not only would the "paid in cash" language of sec. 76.34 (2), Stats., been surplusage but what possible meaning could be attributed to the language respecting dividends "applied in part payment of premiums"? If the legislature had intended to permit as a deduction from gross premiums *all* dividends annually apportioned (declared), no matter how long the

payment was delayed or no matter how ultimately disposed of, it could have and would have said so.

" * * * It is * * * a well-recognized rule of statutory construction that absurd results are to be avoided if possible. * * * "

Wisconsin Valley Improvement Co. v. Public Service Commission, (1960) 9 Wis. 2d 606, 615, 101 N.W. 2d 798.

It is a cardinal rule of statutory interpretation that statutes should be so construed that no word or clause shall be rendered surplusage. *Cook v. Industrial Commission,* (1966) 31 Wis. 2d 232, 240, 142 N.W. 2d 827.

The legislature does not act in a vacuum. It is presumed to know existing facts. *State v. Industrial Commission,* (1932) 207 Wis. 652, 242 N.W. 321. The legislature is presumed to have been aware of the then prevailing practice in the life insurance industry whereby dividends may be applied by the policy owner in one of four ways, i.e., paid in cash, applied in part payment of premiums, purchase of additional paid-up insurance or allowed to accumulate at interest with the company. That these four options existing prior to 1927 is clearly shown in *Cochrane, Insurance Commissioner v. National Life Insurance Company,* (1925) 27 Colo. 243, 235 P. 569. Knowing of these four alternatives then, the legislature in the exercise of its proper discretion on a matter of public policy, determined to permit two of these dividend alternatives (paid in cash and applied in part payment of premiums) as deductions from gross premiums and also thereby determined to exclude as deductions the other two (purchase of additional paid-up insurance and allowed to accumulate at interest). Moreover, to equate the legislative prohibition against deferred dividends and the requirement of annual dividend distribution with dividends "paid in cash" would render nugatory the entire last half of sec. 76.34, Stats., which reads "* * * after deducting therefrom all sums apportioned to premium paying policies on the lives of residents of this state from annual distribution of profits, savings, earnings or surplus which before the expiration of the calendar year next succeeding such apportionment have been either (1) paid in cash or (2) applied

in part payment of premiums." To say that all of this legislative language is of no consequence would run counter to the most basic principles of statutory construction. *Haas v. Welch,* (1932) 207 Wis. 84, 240 N.W. 789.

You have expressed concern as to the correctness of OCI's interpretation of sec. 76.34, Stats., because

(1) It brings about "double taxation" of premiums which appears inequitable;

(2) It may not be in accord with definitions of "Policy" and "premium" in sec. 206.01 (8) and (11);

(3) The retention of the dividends by the company for the benefit and profit of the policyholder is a condition whereby the policyholder has an irrevocable right to immediate possession of currency which may be sufficient to constitute "payment in cash".

The argument of "double taxation" was considered in the earlier opinion (54 OAG 201) where it was noted "The company claims that it is not required to pay a fee on these transactions * * * because it has already paid a fee based on the premiums for the policies involved." The opinion states (page 203) "The determination of the basis for the measurement of this fee for the license to transact business in the state is strictly a matter of legislative discretion." The opinion took into account, for example, the presumption against the existence of an intention on the part of the legislature to impose double taxation, until overcome by the express language of the statute. *Milwaukee Electric Railway & Light Co. v. Tax Commission,* (1932) 207 Wis. 523, 544, 242 N.W. 312. But it concluded that explicit statutory language did exist. I would underline, in this respect, that the legislature explicitly provided means by which so-called double taxation could be avoided. It is not necessary to decide whether the particular imposition is just or unjust, single or double, or to ponder the amorphous state of the law in Wisconsin with respect to taxation of insurance companies (see Wis. System of Taxation of Insurance Companies, by Robert D. Haase, Commissioner of Insurance, January 27, 1966). It is sufficient to know that no constitutional ques-

tion is involved here—that this is an area where the legislature's competence is not open to question, notwithstanding any apparent arbitrariness. *State ex rel. Atty. Gen. v. Wisconsin Constructors,* (1936) 222 Wis. 279, 285, 268 N.W. 238; *Milwaukee Electric Railway & Light Co. v. Tax Commission,* supra, p. 543.

On the question of the possibility of OCI's administrative interpretation being inconsistent with the statutory definitions of "policy" and "premium", I consider this apprehension not well grounded. Section 76.34, Stats., speaks of the 2% annual license fee being payable with respect to "gross premiums". Section 206.01 (11), Stats., defines "premium" as the payment stipulated in the policy to be made by the insured to the company during any one policy year." Section 206.01 (8), Stats., defines "policy" as "the contract issued by the company to the insured."

But the prefatory language of sec. 206.01, Stats., reads "In any statute relating to life insurance, *unless the context indicates otherwise,* the following words and phrases shall be understood in the sense herein set forth and defined." (Emphasis supplied.)

As I understand your question, you are concerned whether you and your predecessor have been correct in interpreting gross premiums as including money or consideration received by the company from the policyholder to purchase additional paid-up insurance, although accomplished through the conversion of dividends left with the company to accumulate at interest. In other words, some would argue that these moneys arising out of dividend accumulations having been left on deposit, so to speak, with the insurance company should not really be considered as a premium at all when used to buy additional paid-up insurance. This is because, so the argument goes, the policyholder has already paid his "full contract premium" as specified in the policy and his subsequent acquisition of additional coverage through application of dividend accumulations is really an exercise by the policyholder of a right that he purchased when he paid the premium specified in the policy. In any event, it is argued, there is nothing in this transaction to be counted

as part of gross premiums for annual license fee accounting purposes.

Chapter 76 is entitled "Taxation of Public Utilities and Insurance Companies". Section 76.34, Stats., deals with annual license fees to be charged companies, corporations or associations transacting the business of life insurance in this state. The meaning of "premium" has to be ascertained from its context in the "gross premium" language of sec. 76.34, Stats. A narrow construction of "premium" as that payment stipulated in the policy to be made in any one policy year would exclude, for example, a single payment purchase of paidup insurance, regardless of the source of the funds used to purchase such insurance. The theory that a dividend used to purchase more insurance is a "right" and not a "premium" fails to give due regard to the time factor as well as the uncertainty (at the time of the annual premium payment) of such a dividend-privilege ever coming into existence. Also it ignores the uncertainty (at the time of the annual premium payment) as to what if anything such a dividend-privilege may buy in terms of added coverage. Some companies, for example, take the position that the policyholder may only apply his accumulated (not current) dividends to purchase paid-up additional insurance if he can submit evidence of satisfactory physical condition. The dividend determination is made unilaterally by the company in most cases more than a year after the relevant premium payment by the policyholder of the relevant policy. Most companies, acting through their boards of directors, determining whether there shall be dividends and the amounts thereof, varying as to different types of insurance policies and affected by numerous other factors, are obviously several months behind, necessarily making retrospective allocations not only as to dividends but as to how much additional coverage such dividends could purchase. For example, a company operating on a calendar year fiscal basis would determine, say in January, 1970, the dividends attributable to all policies whose policyholders paid the annual premium stated in the policy in 1968 so that the company would have the policyholder's money for at least one year. And, of course, the policyholder's entitlement to a dividend depends

also on his continuing to be a policyholder at least up to the time of dividend allocation.

What is most relevant is what the legislature intended by "gross premiums" in sec. 76.34, Stats. In Life and Health Insurance Handbook, Greeg (Richard D. Irwin, Inc.) 1694, p. 130, it is said:

"The premium charged by a life insurance company, and that paid by the policyholder for the promises made, is called the *gross premium.* Conceptually, there are two basic steps in calculating gross premiums.

"First, the factors of mortality and interest are combined to produce what is called the *net premium.* Second, the gross premium is derived from the net premium by adding a factor called 'loading'. Loading is the provision for expenses. It also usually includes a provision for contingencies, *a margin for future dividends* in the case of participating insurance, and a margin for profit in the case of a stock company." (Emphasis supplied).

The Supreme Court of Ohio dealt with the questions as to whether dividends were intended by the legislature to be included as a part of "gross premiums". That court, in *State ex rel. Northwestern Mutual Life Insurance Company v. Tomlinson, Superintendent of Insurance,* (1919) 99 Ohio St. 233, 124 N.E. 220, 221, held that dividends were to be considered as a part of gross premiums, otherwise there would have been no occasion for the legislature to have allowed certain dividends to be deducted from gross premiums under certain conditions. That court said:

"For, if the legislators did not understand the clause 'amount of the gross premium and assessment receipts' to include 'dividends or surplus from previous payments allowed and used in the payment of current premiums,' why did they add the proviso that where the policy holders participate in the surplus and earnings of the company such dividends and surplus 'shall be deducted from such gross receipts?' *Why provide for their deduction if not included?*

"There is no other or possible explanation than that they contemplated the term 'amount of the gross premium and

assessment receipts' to include surplus and earnings used in the payment of premiums. * * * " (Emphasis supplied).

Although it is to be borne in mind that specific statutory language dealing with the taxability or deductibility of dividends may vary, it does appear that the weight of authority is against the allowance of dividends, generally, as deductions from gross premiums or gross income. See, for example, Insurance Law and Practice, Appleman, (1946) Vol. 19, sec. 10791, p. 409, 410.

The argument that the company makes to the effect that these dividends ought to be excluded from computation of gross premiums because they constituted a return of excess premium was considered by the Supreme Court of California and termed "specious". In *Northwestern Mutual Life Insurance Company v. Roberts, State Treasurer of California,* (1918) 177 Cal. 540, 171 Pac. 313, the court was construing tax-imposing language which appeared in the California Constitution which provided:

"Every insurance company . . . doing business in this state shall annually pay to the state a tax of 1½% upon the amount of gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state."

The insurance company argued that dividends should be considered "return premiums" and therefore deductible. The court said, at 171 Pac. 315, 316:

"It is, however, strenuously and elaborately argued * * * that the amounts of premiums periodically collected * * * is only increased above the bare cost of insurance in order to protect them and their members against such unforeseen contingencies or extraordinary outlays as might arise during any year; and that when these do not occur the excess above the ascertained cost of insurance is returned * * * under the name or form of dividends, but that it constitutes in fact a return of the excess of premiums collected, and hence should be included in the exemption provided for in the constitution. The argument is specious, and were it

founded entirely in fact is one which might well be presented to the legislature * * *."

Another way of describing the company's argument is that it is not really seeking a "deduction" for the dividends, it is merely seeking a "non-inclusion" of such dividends from gross premiums. This contention was dealt with by the U.S. Supreme Court in *Penn Mutual Life Insurance Company v. Lederer,* (1920) 40 S.Ct. 397, 252 U.S. 523, 64 L.Ed. 698. In that case the issue turned on the construction to be given certain provisions in sec. II G. (b) of the Revenue Act of October 3, 1913, c. 16, 38 Stat. 114, 172, 173, which provided how the net income of insurance companies should be ascertained for the purposes of taxation. In that case the court said, at 252 U.S. 526:

" * * * The Penn Mutual Company contends * * * that in figuring the gross income there shall be taken the aggregate full premiums received by the company less the aggregate of all dividends paid by it to any policyholder by credit upon a premium or by abatement of a premium and also of all dividends paid to any policyholder whether applied in payment of a premium or not. The non-inclusion clause * * * excludes from gross income those premium receipts which were actually or in effect paid by applying dividends. The company seeks to graft upon the clause so restricted a provision for what it calls non-including, but which in fact is deducting. all cash dividends not so applied."

Later, at 252 U.S. 536, the court said:

"It [the company] is seeking to have the aggregate of premiums actually received within the year *reduced* by an amount which the company paid out within the year; and which it paid out mainly on account of premiums received long before the tax year. What it seeks is not a non-inclusion of amounts paid in—but a deduction of amounts paid out.

"If the terms of the non-inclusion clause * * * standing alone, permitted of a doubt as to its proper construction, the doubt would disappear when it is read in connection with the deduction clause * * *. The deduction there prescribed is of 'the sums other than dividends paid within the year on poli-

cy and annuity contracts'. This is tantamount to a direction that dividends shall not be deducted. * * * "

It is my opinion that the most reasonable interpretation of sec. 76.34, Stats., is that gross premiums was meant to include premiums received from dividends used to purchase additional paid-up insurance and that dividends, whether current or accumulated, used to purchase such paid-up additional insurance, could not be taken as a deduction from gross premiums for tax purposes. This follows under the rule of statutory construction or maxim *expressio unius est exclusio alterius*. The express mention of one results in the implied exclusion of others. In this instance the legislature has expressly mentioned only two circumstances under which dividends may be deducted from gross premiums, which are (1) dividends paid in cash and (2) dividends applied in part payment of premium—in both cases the dividends must be paid or applied within one year of apportionment. By expressly authorizing these two types of dividend deductions the legislature has in effect stated that no other types of deductions are authorized. It goes almost without saying that the legislature obviously intended that gross premiums was intended to include premiums derived from the application of dividends, whether current or accumulated, as well as, for example, premiums partly paid from current dividends, otherwise the legislative language with respect to deductions would have been meaningless. There is ample public policy basis to explain the legislature's determination as to what should be included in the tax base and what should be permitted as a deduction. The long history of life insurance company operations with respect to participating policies speaks eloquently of a definite unwillingness on the part of the companies to promptly return to a policyholder the excess portion of the premium he has been charged and has paid. Obviously, the companies prefer to retain and use these funds and delay as long as they can the day when the refund is made to the policyholder of his excess premium. Undoubtedly to discourage this unfair treatment of the policyholder, the legislature, by way of premium tax relief, provided that the companies who were prompt and decisive in returning this excess

premium, that is, within one year paid in cash or applied in part payment of premium, should be permitted to deduct such payments or applications from gross premiums and thereby reduce their premium tax. No such reward was provided, however, for companies who retained the policyholder's money either in the form of so-called dividends left to accrue at interest or in the form of purchasing additional insurance with the same company. Nor was any reward provided for companies which delayed returning the policyholder's money longer than one year, even though such return might later be in cash or applied in part payment of a premium.

Thus, the legislative intent is trenchant. But what significance is to be attached to the administrative interpretation placed on the statute by the OCI—an interpretation not (on its face, at least) exactly consonant with the foregoing.

Administrative interpretation, while not conclusive, is an important makeweight in the construction of statutes where the statute is open to construction. *State ex rel. Lathers v. Smith,* (1941) 238 Wis. 291, 301, 302, 299 N.W. 43. It requires a very clear case, our court has held, to justify changing a construction of a law, conceded to be somewhat involved, which has been uninterruptedly acquiesced in for so long as fifty years. *State ex rel Bashford v. Frear,* (1909) 138 Wis. 536, 556, 120 N.W. 216. That case significantly involved an interpretation of the Wisconsin Constitution—and stressed that such interpretation had been the guide for many legislatures and all state officers having to do with the matter for many years, without any disturbance whatever till a question was raised. The U.S. Supreme Court has said that such administrative interpretations of statutes must be sustained unless unreasonable and plainly inconsistent with the statutes—that these contemporaneous constructions of the statutes should not be overruled except for weighty reasons. *Commissioner v. South Texas Lumber Co.,* (1948) 333 U.S. 496, 501, 68 S.Ct. 695, 698, 92 L.Ed. 831; *Commissioner v. Estate of Sternberger,* (1955) 348 U.S. 187, 199, 75 S.Ct. 229, 239, 99 L.Ed. 246. Administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent rea-

sons. *Norwegian Nitrogen Co. v. United States,* (1933) 288 U.S. 294, 315, 53 S.Ct. 350, 358, 77 L.Ed. 796. More pertinent to the situation before us is this statement: "Against the Treasury's prior longstanding and consistent administrative interpretation its more recent ad hoc contention as to how the statute should be construed cannot stand." *United States v. Leslie Salt Co.,* (1956) 350 U.S. 383, 396, 76 S.Ct. 416, 424, 100 L.Ed. 441. Another reason for giving extra authoritative weight to contemporaneous administrative interpretations is that judicial decisions usually lag so far behind administrative practices that business may long be transacted in reliance on administrative interpretations. Davis, *Administrative Law Treatise,* Vol. 1, sec. 506, p. 327. Of course, there have been instances where courts have nullified relatively longstanding (16 years) administrative interpretations or regulations. *Koshland v. Helvering,* (1936) 298 U.S. 441, 56 S.Ct. 767, 80 L.Ed. 1268. And, (7 year's) *Social Security Board v. Nierotko,* (1946) 327 U.S. 358, 369-370, 66 S.Ct. 637, 643, 90 L.Ed. 718. But these instances are decidedly in the minority and involve special considerations. See, for example, *Holton & Hunkel Greenhouse Co. v. State,* (1957) 274 Wis. 337, 344, 80 N.W. 2d 371; *Baltimore & Ohio Railway Co. v. Jackson,* (1957) 353 U.S. 325, 330.

Is sec. 76.35, Stats., open to construction? Does the statute manifest so clearly a specific legislative intent that no other interpretation is reasonable? The troublesome fact is that this statute *has* been construed (though, by no means wisely, in my opinion) for several decades by the state administrative department charged with its enforcement. This construction was consistent and unchallenged, according to the information you have provided me, from the time of its enactment in 1927 till 1964. That this construction went unchallenged is perhaps of no great import because this interpretation was so palpably beneficial to the regulated industry, from which normally any such challenge would originate. Nevertheless, this construction persisted through about 25 sessions of the legislature, and through the regimes of eight different insurance commissioners. That the

industry regulated undoubtedly came to rely on this construction is also not without significance.

Although I have the utmost difficulty in accepting this long-standing administrative interpretation (that current dividends applied to purchase additional paid-up life insurance are not taxable) as representative of legislative intent, I am not prepared to say that a court would hold such construction unreasonable under these circumstances. See, *Couch on Insurance*, 2nd Ed., Vol. 6, sec. 21:120, p. 629. Further, an argument of at least some persuasiveness can be made supporting this administrative interpretation to the effect that the application of current dividends (as opposed to accumulated dividends) to the purchase of additional paid-up insurance at least is in harmony with the legislative intent to the extent of requiring the companies to relinquish control of these dividends to the insured promptly (annually).

Of a different character is the administrative interpretation adopted in 1964 that accumulated dividends applied to purchase additional paid-up insurance must be reported as a part of gross premiums and may not be taken as a deduction from gross premiums and therefore are taxable. This interpretation, in my opinion, is consistent with legislative intent, for all of the reasons mentioned herein. It is only slightly attenuated by its apparent inconsistency with the earlier, longer-lived administrative interpretation with respect to current dividends. But that inconsistency is more apparent than real when analyzed in the light of historical legislative concern against prolonged deferment of dividend payments. In my opinion, therefore, this interpretation likewise is sustainable.

Because of my negative answer to your first question, it is not necessary to answer your second question.

Finally, because the questions you have raised present serious issues of public policy, which is the domain of the legislature and because the administrative construction which has been and probably will be applied to this statute may well be a matter meriting current legislative consideration, I respectfully invite your consideration to the advis-

ability of presenting this matter in the form of proposed legislation to the legislature.

RWW:JEA

APPENDIX

One readily sees the concern of state insurance commissioners with respect to deferred dividends in the proceedings of National Convention of Insurance Commissioners, 36th Sess. 1905, p. 84 (remarks of Eugene J. McGivney, Assistant Secretary of State, Louisiana):

"The use of the deferred dividend policy in a mutual company should be prohibited. It is a relic of the tontine system, and is in principle gambling and in practice, as experiences have proven, such a disappointment as to almost amount to a fraud. The purpose of a mutual life insurance company is not to have its members gambling on the misfortunes of its other members. The deferred dividend plan is the medium of building up large surplus funds, which are not required by law to earn any interest, and furnishes a ready means to make up losses from extravagance and waste. . . .

"Recommendations should be made for the passage of laws that would require an annual accounting to the policyholder of his equity in the earnings of the company and in this way a practical test would be had of the efficiency of the management. . . . ."

The New York Legislative Insurance Investigation Committee (usually referred to as the Armstrong Committee) Report, dated February 22, 1906, read, in part:

"It is the opinion of the committee that dividends should be distributed annually, being applied either in reduction of premiums or to the purchase of additional insurance, or paid in cash, at the option of the insured. No attempt should be made to disturb existing rights under existing contracts, but the issue of so-called deferred dividend policies in the future should be forbidden. . . . So far as existing policies are concerned, without impairing any of their obligations, the companies may be requested to file with the Superintendent of Insurance a similar statement showing the an-

nual dividends declared upon present annual dividend policies and the manner in which they have been computed, and also the share of any gains or surplus claimed to be held for eventual apportionment upon existing deferred dividend policies, and the manner in which the share has been arrived at. As deferred dividend policies mature and distributions are made, the company should be compelled to file a statement showing the amount distributed and the method of calculation adopted. This with free access to the courts to determine the propriety of the company's action will tend to the advantage of existing policyholders without affording any possible basis for the claim that the legislation has interfered with contract rights."

The history of Wisconsin's legislative treatment of annual distribution of dividends is given some light by the American Life Convention, Vol. I, Buley, (Appleton-Century-Crafts, Inc.) 1953 at p. 268:

"The report of the Armstrong Committee was submitted to the Senate and Assembly of the State of New York, February 22, 1906. . . . Some 15 subjects were covered. Among the more important recommendations of the Committee were . . . *annual distribution of dividends.* . . ." (Emphasis supplied).

and at p. 302 (Ch. VI, FORMATIVE YEARS, 1907-1910):

"Two of the midwestern states attempted a thorough overhauling of their insurance laws in 1907. One of them, Indiana, after quite a serious struggle, left its insurance law practically unchanged, while the other, Wisconsin, succeeded in creating something of a minor revolution. . . . "

and at pp. 306, 307:

"The Wisconsin legislature 'rushed in where angels feared to tread', and produced bills to fix insurance in all its details . . . all told there were some two dozen insurance bills introduced . . .

"Eight of the bills which had already passed the house were passed by the Senate in July. These included a 3 per cent gross premium tax (it had been 2 per cent), a bill to

govern the election of company officers, a bill to limit premiums, a bill to limit first year's expenses, a bill to limit salaries of company officers to $25,000, *and a bill to provide for annual apportionment of dividends.* The companies opposed the bills right up to the last day of the session. . . . The companies made a last effort before Governor J. O. Davidson. . . . The Governor finally signed the bills." (Emphasis supplied).

In order to appreciate the legislative situation in 1907, it is also necessary to consider the defeat sustained in a court action by Wisconsin Insurance Commissioner Host two years earlier. *Equitable Life Assurance Society v. Host,* (1905) 124 Wis. 657, 102 N.W. 579. Host, as commissioner, had decided on July 31, 1903, that Equitable was not complying with sec. 1952 of the Wisconsin Statutes (forerunner of sec. 206.36, Stats.) and threatened to revoke its license unless it complied. Section 1952, Stats., then read:

"Every life insurance company doing business in this state on the principle of mutual insurance . . . may make distribution of such surplus as they may have accumulated annually, or once in two, three, four or five years as the directors thereof may from time to time determine. In determining the amount of the surplus to be distributed there shall be reserved an amount not less than the aggregate net value of all the outstanding policies, said value to be computed by the American experience table of mortality with interest not exceeding four and one-half per cent."

The controversy was whether, under that section, Equitable could by contract with the citizens of Wisconsin, defer "distribution" for a longer period than five years. Commissioner Host maintained it could not. The Wisconsin Supreme Court, reversing the trial court, held that the use of the word "may" meant that the time of such distribution was permissive, not mandatory, that the directors were *not required* to distribute surplus (dividends) at least every five years and that Equitable had not violated any law of this state.

In prompt reaction to this decision, the 1905 Legislature (ch. 448) amended sec. 1952, Stats., by adding, at the end thereof, the following:

"Nothing in this section shall be construed to hereafter permit any such corporations to defer the distribution, apportionment or accounting of surplus to policyholders for a longer period than 5 years, and on all policies, hereafter outstanding, under the conditions of which the actual distribution is provided for at a definite or fixed period. The apportioned surplus shall be carried as a liability to the class of policies on which the same was accumulated."

The Wisconsin Attorney General in an opinion dated July 24, 1905, addressed to the Insurance Commissioner, stated:

"Immediately upon the settling of this controversy by the Supreme Court in the case of Equitable Life Assurance Society v. Host * * *, the legislature enacted that nothing in that section shall be construed to permit any mutual life insurance company to defer distribution for a longer period than five years.

"It seems to me that there can be but one conclusion * * * and that is, *that a form of insurance designed to build up and foster a system of forfeitures at the expense of the policyholder is prohibited in this state.*" (Emphasis supplied).

Some further indication of rising public awareness and distrust of the semi-tontine type (deferred dividend) policy in these years may be seen from a series of newspaper articles appearing in the *Chicago Record Herald* in 1905, written by Walter Wellman. Wisconsin Insurance Commissioner Zeno M. Host charged that the deferred dividend was the chief cause of all life insurance rapacity, dishonesty and general wickedness and advocated a law laying a heavy tax upon all deferred dividends carried by the companies. *Madison Democrat*, January 10, 1906.

In January 1906, Governor Robert M. LaFollette called the legislature into emergency session, stating "that Wisconsin take such action as shall make impossible a repeti-

tion in this state of what has occurred in New York." Wisconsin Legislature, Report of the Joint Committee of Senate and Assembly on the Affairs of Life Insurance Companies, 1906, 1907, p. 1-2. In its report the committee made clear that there was still deep dissatisfaction with the abuses inherent in the deferred dividend practice (pp. 144, 158):

"It is safe to assume that fully 90% of the policyholders have no knowledge of the sources of dividends received by them. * * * It is urged by officers of insurance companies, and some insurance experts that this return to the policyholder of a portion of excessive charges facilitates the writing of new business and satisfies the old policyholders. This, if so, can only be true when the solicited citizen and the policyholders do not know that the moneys returned are but a portion of excessive premium payments collected. Neither common experience nor the testimony taken before this committee justifies the belief that insurance agents, in laying before the prospective participating policyholder the dividends paid by his company, make a practice of informing him that these dividends represent but a portion of excessive charges collected from policyholders. * * * "

"There are several very clear indications that the premiums now charged are too large. Perhaps the most certain evidence is the insurance surplus which has been accumulated by insurance companies through the unreturned overcharges made in premiums on *deferred dividend policies.* * * * * " (Emphasis supplied).

Although the 1907 Legislature did not further amend sec. 1952, Stats., (the five year limitation on deferred dividend payments having been imposed by the 1905 Legislature) it did enact a number of provisions creating secs. 1952 a, b, c, d, e, f, g, h and i, of the statutes, which required, among other things, annual ascertainment of dividends (even though payment could be deferred), annual crediting of the share of each policy in the profits, savings, earnings or surplus, carrying the amount of such share as a distinct and separate liability to such policy, the filing with the Insurance Commissioner of an annual statement showing fully the method of ascertainment and apportionment of

surplus, the mailing by the company to each policyholder a statement of apportionment of surplus to the insured, the annual setting apart to policies as a class the amount of surplus attributable thereto, and a prohibition against diversion of any such surplus so set apart. The net effect of these onerous annual accounting requirements was to make it unfeasible or unprofitable for a company to do other than to adopt, as soon as possible, a system of annual dividend policies and annual dividend payments. All of these statutory provisions, with immaterial modifications, persisted up to the time the 1927 Legislature met. By the legislative act (ch. 148, Laws 1927) which amended sec. 206.36, Stats., (and which required such reporting as to accumulation and distribution of surplus as the commissioner may at any time require) these other subsections (by then renumbered secs. 206.37 to 206.44, Stats.) were repealed.

So that by the time the 1927 Legislature assumed the task of amending sec. 206.36, Stats., (which had remained intact since the 1907 legislative struggle) the impact of the other statutory provisions with respect to annual apportionment of surplus, referred to above had long since been achieved, i.e., the semi-tontine types of policy (deferred dividend) had been abandoned in the industry and annual dividends had taken their place. For an indication of the recent resurgence of the semi-tontine policy and for an excellent discussion of tontine and similar policies, see *Michigan Law Review*, December, 1963, Vol. 62, No. 2, 167-258, "the Regulation of Specialty Policies in Life Insurance" by Spencer L. Kimball and Jon S. Hanson.

For decades, Northwestern Mutual Life Insurance Company (a Wisconsin company) has enjoyed a prominent position nationally and a dominant role locally in the life insurance industry. In view of the abandonment of semi-tontine business by Northwestern in 1905 and the New York legislation prohibiting this type of insurance in 1906, most of the discussion relating to this by the 1906 Wisconsin Special Legislative Committee could be said to be academic. Northwestern, which even before this century was Wisconsin's largest mutual life company, had voluntarily "abandoned issuance of deferred dividend policies in June 1905". North-

western Mutual Life, a Century of Trusteeship, Williamson & Smalley [Northwestern University Press] 1957, p. 103, 129, 139. Also see Finance and Life Insurance, Dudley, 1916, p. 218. It is also significant, in view of this 1927 legislation, that the 1905 attorney general's opinion (above quoted) said in effect that these semi-tontine types of life insurance policies were prohibited in this state. Further, this was the interpretation of the Wisconsin Insurance Commissioner as published in 1908 report of the Commissioner of Insurance, Part II, p. 8: "The new laws * * * require annual dividends." The 1927 legislature, by ch. 148, removed the archaic language relating to distribution of surplus once in 1, 2, 3, 4 or 5 years and in its stead required, what already in practice existed, i.e., annual refunds of overpayment (dividends), permitting, at the same time, companies to make provision for any *existing* deferred dividend policies (no doubt, so as to avoid any constitutional question as to impairment of contracts). As indicated earlier, this same law simplified and no doubt modernized the annual reporting requirements, as related to apportionment of surplus.

Before proceeding to the next point, it may be well to give attention to the word "dividend" appearing frequently here. It is essentially a euphemism. It is not a share of the profits such as a stockholder might receive as a return on his investment. More accurately, as used here, it is a refund to the policyholder of a portion of an excessive gross premium. See *Northwestern Mutual Life Insurance Company Annual Statement for the year 1918, p. 11:* "The unrequired portion of premiums, erroneously called 'dividends'." Also, see the *Grim Truth About Life Insurance,* Hendershot, (G. P. Putnam's Sons) 1957, p. 52: "Where else can you go to purchase a product or a service and have the vendor admit (if pressed), at the outset, that you are being overcharged; and that, year by year, some effort will be made to give you back part of this annual overcharge (your money, that is) by a device which, by the strongest sort of semantics, is called a dividend?" Also, see the Insurance Commissioner in the U.S., Patterson, (Harvard University Press) 1927, p. 208: "There has been a decided tendency to extend the scope of insurance regulation so as to protect the interests

of the policyholders in the surplus of life insurance companies * * * since the amount of the policyholder's dividend is not specified in the policy * * * the attempt to control expenses and dividends is therefore an attempt to secure the policyholders not merely safety, but also (since the policy dividends are practically reductions of the premium charged) a fair rate of premium."

Also, see *Prudential Insurance Co. v. Green,* (1942) 231 Iowa 1371, 2 N.W. 2d 765, 772: ". . . all that the poor policyholder gets back is a part of the excessive premium that he pays. The refund, a so-called dividend, is nothing more or less than a refund of part of the excessive premium charged."

That the 1927 legislature, in considering S.B. 124 (which resulted in ch. 411, Laws 1927, amending sec. 76.34, Stats.) was concerned primarily with the revenue-producing effect of such a proposal is evidenced by a letter, dated May 20, 1927, from M. A. Freedy, Commissioner of Insurance, to C. E. Shaffer, Chief Clerk of the Wisconsin Assembly, in response to A. Res. 68, wherein Freedy set forth in detail the *gains* in taxes (annual license fees from insurance companies) to the state should the bill become law, as compared to the then law. Assembly Journal, 1927, pp. 1547-1551.

In 1925 domestic life insurance companies (no matter how large) were required to pay, as they had been for many years, their annual license fees for transacting business on the basis of their *gross incomes,* not on the basis of their gross premiums. Section 76.34, Stats., 1925. Domestic life insurance companies paid a license fee of 3% of *gross income* (except real estate rental income). Also, in 1925, foreign insurance companies were required to pay a flat $300 as an annual license fee, not related to any percent of gross income as was the case with domestic companies. In 1927 the legislature (ch. 411, Laws 1927) changed the flat $300 annual license fee for foreign companies, requiring them instead to pay as an annual license fee

"two per centum upon the excess of the gross premiums received in money or otherwise during the preceding calendar year on all policies or contracts of insurance on the

lives of residents of this state after deducting therefrom all sums apportioned to premium paying policies on the lives of residents of this state from annual distribution of profits, savings, earnings or surplus which before the expiration of the calendar year next succeeding such apportionment have been either (1) paid in cash or (2) applied in part payment of premiums."

As so amended, sec. 76.34 (2), Stats., has persisted in that same form to this day.

The same legislation left the basis for the annual license fee of domestic companies (percentage of gross income) unchanged but did slightly increase the percentage that such companies were to pay for the years 1927 (4%), 1928 (3¾%), 1929 (3½%) and 1930 (3¼%), and thereafter 3% (as before).

Senate Bill 124 as introduced in the senate on February 15, 1927, contained the language "If any such company, corporation or association is organized without the state of Wisconsin, it shall pay into the state treasury, as such annual license fee, 2 per centum upon the excess of the gross premiums received in money or otherwise during the preceding calendar year on all policies or contracts of insurance on the lives of residents of this state after deducting therefrom all sums apportioned to premium paying policies on the lives of residents of this state from *one* distribution of profits, savings, earnings or surplus which before the expiration of the calendar year next succeeding such apportionment have been either (1) paid in cash or (2) applied in part payment of premiums." (Emphasis added). As to that portion, Senate Amend. 1, adopted by the Senate March 22, 1927, substituted the word "annual" for the word "one" and this was the form in which that portion became law. Although legislative sources offer no explanation for this change, it apparently attracted no attention for the rather obvious reason that it merely stated unequivocally the legislative intent that the law now required annual (and not deferred) dividends (distribution of profits, etc.) which, as already demonstrated, had been the prevailing practice in the industry for some years.

There is nothing in the legislative history to show that the 1927 legislature had any reason to relate its activities in amending sec. 76.34, Stats., to its activities in amending sec. 206.36, Stats.

The insurance industry, of course, is understandably alert to its interest in pending legislation particularly that which may impose additional tax burdens on it and reacts accordingly. By way of explanation of the legislative process and evolving legislation in 1927, it is enlightening to observe:

"Undoubtedly the amount [of taxes] would have been greater had the company, in 1927, not been able to bring about a modification in the Wisconsin tax formula. This change had been accomplished with the cooperation of a joint legislative committee representing the Association of Life Presidents, the American Life Convention, and the Wisconsin Life Convention; it also had the approval of the State Commissioner of Insurance. In effect, this modification caused the outmoded $300 license fee for foreign companies to be abandoned and a flat 2% tax on Wisconsin premiums substituted for it. Since the reduction in rate for domestic companies resulted in revenue losses which exceeded the gains by the tax on foreign companies, the Wisconsin companies agreed to accept a 3% rate on total income, less various deductions for themselves. The savings for Northwestern in terms of Wisconsin taxes were partially offset by increased taxes in other states through the operation of the retaliatory laws. Nevertheless, the gross tax savings for 1927 had amounted to more than $200,000; this savings increased in subsequent years." Northwestern Mutual Life, A Century of Trusteeship, Williamson & Smalley (Northwestern University Press) 1957, p. 255.

It is also historically interesting to note that the obvious and very great disparity between the annual license fee required of domesic companies in Wisconsin and that required of foreign companies had been challenged by a domestic company as unconstitutional in *Northwestern Mutual Life Insurance Company v. State,* (1916) 163 Wis. 484, 155 N.W. 609, affirmed 38 S.Ct. 444, 247 U.S. 132, 62 L.Ed.

1025. The validity of the law was sustained. As will be seen, this disparity was eventually ameliorated by the legislature.

The use of gross premiums, instead of gross income, as a basis for determination of annual license fee was not new in insurance law. For over 20 years prior to 1927 fire and marine insurance companies had been paying a tax based upon a percentage of gross premiums. Sec. 76.30, Stats. Likewise, casualty and surety companies had been paying to the state a percentage of the gross premium received since 1909. Sec. 76.32, Stats.

In 1931, sec. 76.34 (1), Stats., was amended again by ch. 12, Laws 1931, so as to require domestic life insurance companies to pay as an annual license fee for the year 1931 and annually thereafter 3½% upon their gross incomes. This provision remained unchanged until 1953 when, by ch. 215, Laws 1953, the 3½% of gross income license fee was retained but a ceiling was placed upon such fees in relationship to what such a company would have paid if it had been operating as a foreign company, that is, for 1954, 150% of the foreign company license fee, for 1955, 125%, for 1956 and thereafter, 100%. Also, the provision was then added which required any domestic company having in excess of $750,000,000 of insurance in force to pay not less than the amount which would have been payable by it had it been operating as a foreign company. This is essentially the same form in which we find this law today (ch. 562, sec. 4, Laws 1961, removed some of the obsolete language).

Safety Standards—Department of Industry, Labor and Human Relations—The Department of Industry, Labor and Human Relations under sec. 101.10 (3) and (4), Stats., has the power to promulgate reasonable safety standards for the protection of employes while working in and around motor vehicles used on the job.

October 7, 1970.

E. E. ESTKOWSKI, *Chairman*
Department of Industry, Labor and Human Relations

You ask whether the Department of Industry, Labor and Human Relations has authority to promote its safety rules pertaining to motor vehicles to protect employes whose employment requires them to operate motor vehicles. As an example you state:

"It is noted that there is a high injury rate for workmen engaged in driving trucks and working in and about trucks and trailers. In 1969 this rate was 32.8 injuries per million man hours. It is noted that most of the injuries were not caused by traffic accidents but rather, from getting into or out of the truck, climbing into or under the truck to attach or detach equipment and loading or unloading products."

Section 101.06, Stats., known as "the safe place" statute, provides a standard for employers requiring them not only to provide "a place of employment which shall be safe" for both employes and frequenters but also to "furnish employment which shall be safe" for the employes and "adopt and use methods and processes reasonably adequate to render such employment * * * safe." See also *Rogers v. Oconomowoc,* (1964) 24 Wis. 2d 308, 315-316, 128 N.W. 2d 640.

Section 101.10 (3) and (4), Stats., gives the department the power to promulgate rules providing for safe employment as to employes. It is a general power limited only by the requirement that the standards adopted be reasonable. Section 101.10 (3) and (4), Stats., provides as follows:

"101.10 * * * It shall also be the duty of the industrial commission, and it shall have power, jurisdiction and authority:

" * * *

"(3) To investigate, ascertain, declare and prescribe what safety devices, safeguards or other means or methods of protection are best adapted to render the employes of every employment and place of employment and frequenters of every place of employment safe, and to protect their welfare as required by law or lawful orders, and to establish

and maintain museums of safety and hygiene in which shall be exhibited safety devices, safeguards and other means and methods for the protection of life, health, safety and welfare of employes.

"(4) To ascertain and fix such reasonable standards and to prescribe, modify and enforce such reasonable orders for the adoption of safety devices, safeguards and other means or methods of protection to be as nearly uniform as possible, as may be necessary to carry out all laws and lawful orders relative to the protection of the life, health, safety and welfare of employes in employments and places of employment or frequenters of places of employment."

It is apparent from your request that the very heavy use of motor vehicles in commerce in recent years and the increase in injuries unrelated to traffic accidents requires the department to inquire as to its authority to promote safety standards to protect its employe-operators of motor vehicles. It is my opinion the department under sec. 101.10 (3) and (4), Stats., has the power to promulgate reasonable safety standards for the protection of employes while working in and around motor vehicles used on the job. Such safety standards, of course, could be made to apply when the vehicle is at rest or moving or both under the statutory grant of power.

RWW:JPA

Implied Consent Law—Chemical Test for Intoxication— Under sec. 343.305 (1), Stats., the Implied Consent Law, where a law enforcement officer has reasonable grounds to believe that an unconscious person is guilty of driving while intoxicated, a blood sample may be taken, and the test results are admissible in evidence and may not be excluded by the trial court.

October 13, 1970.

GEORGE W. BENSON, *District Attorney*
Burnett County

You have asked for my opinion regarding tests for intoxication under the implied consent law where the driver is unconscious. You point out that this law provides that the blood test shall not be the first test administered. You state that frequently, following an accident, the driver is unconscious or too severely injured to make a breath or urine test practical or possible. You ask whether, under these circumstances, a blood test should be administered, and whether the results would be admissible in evidence. My answer to both questions is "yes."

Sec. 343.305 (1), Stats., reads:

"*Suspension of License on Refusal to Submit to Chemical Tests for Intoxication.* (1) Any person who drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, shall be deemed to have given consent to a chemical test of his breath, blood or urine, for the purpose of determining the alcoholic content of his blood if arrested and issued a citation for driving or operating a motor vehicle while under the influence of an intoxicant in violation of s. 346.63 (1) (a). The test shall be administered upon the request of a traffic officer. The law enforcement agency by which the officer is employed shall be prepared to administer 2 of the aforesaid 3 tests and may designate which of the aforesaid tests shall be administered. The blood test shall not be the first test administered by the agency. A person who is unconscious or otherwise incapacitated is presumed not to have withdrawn his consent under this subsection."

This section provides that a person, by driving upon the public highway, impliedly gives his consent to a chemical test of his breath, blood, or urine for the purpose of determining intoxication. The law enforcement agency must be prepared to administer two of these three tests, but the blood test shall not be the first test administered. However, an unconscious person is presumed not to have withdrawn his consent to a test.

These statutory provisions require that each police agency must make arrangements for and be prepared to furnish two tests. Of these tests which they are to be prepared to furnish, the first is not to be the blood test. If the first is the breath test, then the second may be urine or blood. If the first is the urine test then the second may be breath or blood. However, by the last sentence of the statute above quoted, the legislature has made it clear that a person, who is unconscious or otherwise incapacitated, is not to escape from his obligation to submit to a test. It is my opinion that where a person is incapable of submitting to the first test of breath or urine, designated by the agency, the agency may properly proceed to have a blood sample withdrawn in a medically approved manner. To conclude otherwise is to render the last sentence of the law meaningless.

It is my opinion that the results of such test are admissible in evidence and should not be excluded by the court. The law is clear that evidence obtained, even in violation of a statute, will not be excluded in a criminal case unless some constitutional right is also violated. An extensive discussion of this rule is found in *Ware v. State,* (1930) 201 Wis. 425, 230 N.W. 80. The most recent discussion of the rule is found in *State v. Hochman,* (1957) 2 Wis. 2d 410, 419, 86 N.W. 2d 446, where the court said:

"* * * Evidence illegally obtained will be suppressed or excluded in a criminal case only upon a showing that it was obtained in violation of a constitutional right. * * *"

The taking of a blood sample for evidentiary purposes violates no constitutional right of the accused. Where an arrest has been made, as required by the implied consent law, the taking of a blood sample is a search incidental to a valid arrest and is reasonable. *Schmerber v. California,* (1966) 384 U.S. 757; *Miranda v. Arizona,* (1966) 384 U.S. 436. For a further discussion of this problem see the fine article by James E. Hough at page 20 of the June, 1970, issue of the Wisconsin Bar Bulletin. Even where a search is not incidental to an arrest, the search may be made without a warrant if the law enforcement officer has probable cause to believe that evidence of crime will be found, and there is

reason to believe that the evidence will be lost or destroyed by delay. In *Chambers v. Maroney,* (1970) ____ U.S. ____, 90 S.Ct. 1975, the court approved such a search of an automobile, pointing out that the opportunity to search is fleeting since a car is readily movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Thus the court concluded an immediate search is constitutionally permissible. A similar exigency exists with respect to determining the alcoholic content of the blood where the normal body processes are rapidly removing the alcohol from the blood. Blood samples must be taken promptly to avoid the destruction of the evidence.

It is therefore my opinion that where a law enforcement officer has reasonable grounds to believe that an unconscious person is guilty of driving while intoxicated, a blood sample may be taken, and the test results are admissible in evidence and may not be excluded by the trial court.

RWW:AOH

Collective Bargaining—Teachers' Retirement Fund—The Teachers' Retirement Fund Bureau may treat contributions made by the Milwaukee Technical College on behalf of employes as proper employe contributions required by ch. 42, Stats.

October 22, 1970.

HARRY JOYCE, *Director*
Teachers Retirement Fund Bureau

The Milwaukee Technical College has negotiated and entered into a collective bargaining contract with the union acting for its employes which contract contains, among other provisions, a provision that the college will pay the employes' contributions to the State Teachers' Retirement Fund. You have asked my opinion whether your office may

treat these payments made by the college as employe contributions as required by secs. 42.40 and 42.41, Stats.

Your question presents a difficult issue to resolve. It is my opinion, if this issue were litigated, the court would hold that the Teachers' Retirement Fund Bureau may treat employe contributions made by the employer as valid employe contrbutions under ch. 42, Stats.

Subchapter IV of ch. 111, Stats., establishes the right of municipal employes and employers to confer and negotiate concerning "wages, hours and conditions of employment" and to reduce such negotiations to a binding contract.

Section 111.70 (2), Stats., provides:

"(2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, to affiliate with labor organizations of their own choosing and the right to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employers or their representatives on questions of wages, hours and conditions of employment, and such employes shall have the right to refrain from any and all such activities."

Section 111.70 (4) (i), Stats., provides:

"(i) *Agreements.* Upon the completion of negotiations with a labor organization representing a majority of the employes in a collective bargaining unit, if a settlement is reached, the employer shall reduce the same to writing either in the form of an ordinance, resolution or agreement. Such agreement may include a term for which it shall remain in effect not to exceed one year. Such agreements shall be binding on the parties only if express language to that effect is contained therein."

By virtue of the definitions contained in sec. 111.70 (1), Stats., defining municipal employer and municipal employe, sec. 111.70, Stats., Wisconsin's Municipal Government Employment Relations Act, is applicable to the Milwaukee Technical College and its employes.

Section 111.70, Stats., makes negotiations between a municipal employer and its employes legal and makes collective bargaining agreements reached thereby legally enforceable. *Local 1226 v. Rhinelander,* (1966) 35 Wis. 2d 209, 151 N.W. 2d 30.

Under sec. 111.70, Stats., municipal employes have the right to negotiate and contract on matters that are subjects of negotiation, i.e., matters that are within the purview of "wages, hours and conditions of employment," but municipal employes do not have the right to require municipal employers to negotiate or contract on matters that are prohibited by statute or otherwise illegal. *Joint School District No. 8 v. Wisconsin E. R. Board,* (1967) 37 Wis. 2d 483, 155 N.W. 2d 78.

Issue of Whether Employer Contribution to a Pension Fund on Behalf of Employes is a Negotiable Subject

Pension or retirement funds, their management and administration, and employer and employe contributions to such plans have long been held to be mandatory subjects of collective bargaining as coming within the terms of "wages" and "conditions of employment." See discussion at CCH Labor Law Reporter, par. 3020, especially par. 3020.85 et seq.

Further, it is evident from the holding and discussion in *Joint School District No. 8, supra,* that the phrase "wages, hours and conditions of employment" will be given a broad versus narrow construction. After pointing out that parties to collective bargaining could not contract provisions contrary to law, the court said (37 Wis. 2d 492):

"* * * But what is left to the school boards in respect to the school calendar is subject to compulsory discussion and negotiation. As stated in *Norwalk Teachers' Asso. v. Board of Education,* (1951) 138 Conn. 269, 277, 83 Atl. 2d 482, '. . . the plaintiff may organize and bargain collectively for the pay and working conditions which it may be in the power of the board of education to grant.' "

Therefore, I must conclude that employer contributions on behalf of employes to a pension or retirement fund is a proper subject of collective bargaining under sec. 111.70,

Stats., and consequently a proper subject to negotiate and contract unless prohibited by statute or otherwise illegal.

Issue of Whether the Employer Contributions on Behalf of the Employes are Prohibited by Statute or Otherwise Illegal

Section 42.40 (1) and (2), Stats., provides:

"(1) Each teacher who is a member of the separate group shall make a deposit in the retirement deposit fund equal to 6% of all compensation received for teaching service performed by such teacher.

"(2) Beginning on the first day of the first calendar quarter which begins after an agreement extending coverage under OASDHI to the members of the combined group under s. 42.241 becomes effective, each teacher who is a member of the combined group shall make a deposit in the retirement deposit fund equal to 4½% of all compensation received for teaching service performed by such teacher."

Section 42.41 (1), Stats., provides, in part, as follows:

"42.41 *Deductions from Salaries; payroll.* (1) Every employer shall deduct and withhold from the compensation as a teacher paid by such employer to each teacher on each payroll for each payroll period such per cent of the compensation of each teacher, as such teacher is required to deposit under s. 42.40. * * *"

These quoted sections from ch. 42 do not prohibit, by plain language, employers from making employes' contributions. The question remains, do these sections prohibit such contributions by implication.

In determining whether these sections prohibit municipal employers from making teachers' contributions to the Teachers' Retirement Fund, we must examine the purpose of the act. It is clear that the purpose of the act is to provide a retirement system for teachers and that it is not the purpose of the act merely to make deductions from compensation paid to teachers. Such purpose militates against a construction by implication that the quoted sections of the statute exclude another method of funding the retirement

system. In short, employes' contributions made by the employers do not defeat the purpose of the act.

Further, the contract provision for employes' contributions being made by the employer does not produce an illegal result. In fact, such a provision serves the interest of both the employes and employer, since the employes will realize an effective wage increase which will not be subject to current taxation, and the employer is able to provide an effective wage increase at less expense than were it to grant the same effective "take-home" increase taking into consideration current income tax deductions.

It may be argued that the language in the quoted sections are mandatory, and that the words ". . . teacher . . . shall make a deposit . . .," constitute a mandatory duty on the part of the teacher. However, I construe this language as being mandatory only from the standpoint of initiating funds into the retirement fund but not mandatory to the exclusion that the employe contributions cannot be introduced into the retirement deposit fund by some other means.

In *Muskego-Norway C.S.J.S.D. No. 9 v. WERB,* (1966) 35 Wis. 2d 540, 151 N.W. 2d 617, the court held that another rule of statutory construction must be applied in considering the relationship of sec. 111.70, Stats., to other sections of the statutes. The court held that sec. 111.70, Stats., insofar as is possible, should be harmonized with other sections of the statutes. The court held as follows (35 Wis. 2d 556):

"The provisions of sec. 111.70, Stats., apply to the authority of school districts to the same extent as the authority of other municipal governing bodies. Section 111.70 was enacted after secs. 40.40 and 40.41 and is presumed to have been enacted with a full knowledge of preexisting statutes. Construction of statutes should be done in a way which harmonizes the whole system of law of which they are a part, and any conflict should be reconciled if possible." (citations omitted)

And further, in *Joint School District No. 8 v. Wisconsin E. R. Board, supra,* the court said (37 Wis. 2d 493-494):

"It is argued that the new duties placed upon school boards by sec. 111.70, Stats., must be strictly interpreted to exclude the school board's legislative powers under ch. 40. However, in *Muskego-Norway v. Wisconsin Employment Relations Board,* (1967) 35 Wis. 2d 540, 151 N.W. 2d 617, this court undertook to state the relationship between various sections of ch. 40 and sec. 111.70 and took the view that since sec. 111.70 was enacted after ch. 40 it was presumed to have been enacted with full knowledge of the preexisting statutes and thus the statutes should be harmonized by construction. We must therefore reject a strict interpretation of sec. 111.70 so as to favor ch. 40."

In this case, ch. 42, Stats., was in existence when sec. 111.70, Stats., was enacted, and the same legal presumption must apply—that the legislature was aware of ch. 42 when it passed sec. 111.70, Stats.

Section 111.70, Stats., exists for the purpose of enabling municipal employes and municipal employers to negotiate and contract on questions of wages, hours, and conditions of employment and ch. 42 (as it pertains to the issue at hand) exists for the purpose of establishing and maintaining a teachers' retirement pension. By recognizing the alternative method of introducing monies into the fund negotiated and agreed upon by the Milwaukee Technical College, effect is given to both sections, sec. 111.70 and ch. 42, Stats.

It is my opinion that, if this issue were litigated, the court would probably conclude that the language in secs. 42.40 and 42.41, Stats., does not preclude employes' contributions to the teachers' retirement fund made by employers as valid employe contributions.

Issue of Whether Milwaukee Technical College Possesses Authority to Negotiate the Provision in Question

There remains the question: does the Milwaukee Technical College have the authority to make the contributions in question? In my opinion, a court would answer this question in the affirmative.

In *Local 1226 v. Rhinelander,* (1966) 35 Wis. 2d 209, 151 N.W. 2d 30, the City of Rhinelander argued that municipali-

ties were not granted the statutory authority to negotiate and enter into collective bargaining contracts providing for binding arbitration of grievances. The court specifically addressed itself to this argument, rejected it, and held that the authority existed by virtue of sec. 111.70, Stats.

And in *Joint School District No. 8, supra,* although no statutory authority existed specifically authorizing school boards and the teachers' representatives to negotiate and contract concerning the school calendar, the court held that school boards had the authority to negotiate and contract the school calendar by virtue of sec. 111.70, Stats., except on subjects prohibited by statute.

I previously stated that the issue is a close one. I believe that a court, in considering this issue, would consider that the contract provision under discussion does not violate any prohibition established by law and does not operate to the harm, detriment, or increased obligation of any person, entity or unit of government, and, in fact, produces a result desired by the Milwaukee Technical College and its teachers.

RWW:WHW

Municipal Bus Transit System—Wisconsin Retirement Fund—Employes hired by the manager of the Madison Transit System pursuant to a management contract between the city and the manager are employes of the city for purposes of those programs administered by the Department of Employe Trust Funds under subch. I of ch. 41 and subch. II and VI of ch. 40, Stats. (1969).

October 27, 1970.

C. M. SULLIVAN, *Secretary*
Department of Employee Trust Funds

You request my opinion as to whether personnel engaged in the operation of the municipal bus transit system in the City of Madison are employes of the City of Madison for

purposes of the Wisconsin Retirement Fund. Excluded from this opinion are those executive and administrative personnel who are employed by and receive salaries from American Transit Corporation, rather than from the transit system.

Following acquisition by the City of Madison of the Madison Bus Company, the city entered into a contract with American Transit Corporation, a Missouri corporation dated April 10, 1970, whereby American Transit Corporation or a subsidiary to be formed by American Transit would provide management and supervisory services in the operation of a bus transit system in the City of Madison. Such contract provides at paragraphs 3 and 12:

"3. Manager shall provide the management and supervisory services necessary for the operation of the Transit System. Such management and supervisory services shall include (but shall not be limited to) the following: executive and administrative management of the Transit System; supervision of all personnel, whether employed directly by Sub or City or other entity; * * *"

"12. During the term of this Contract, American shall provide sufficient executive and administrative personnel as shall be necessary and required to perform its duties and obligations under the terms hereof, including a Resident Manager who shall be responsible for the day-to-day operations of the Transit System, and who shall be selected with approval by the City and supervised and directed by American and who shall serve only with consent of the City. The Manager shall also cause to be employed during the term of this Contract either by Sub or directly by City, sufficient operating personnel, including but not limited to, drivers, mechanics, supervisors, maintenance and other shop personnel, office and administrative personnel, as required from time to time. The cost of and compensation payable to all personnel employed in the operation of the Transit System shall be an obligation of and paid by City with the exception of the salaries of the Resident Manager and such executive and administrative personnel as shall be necessary and re-

quired to perform American's duties and obligations under the terms of this Contract."

Thereafter common council of the City of Madison adopted a resolution on May 7, 1970, which reads:

"WHEREAS, the American Transit Corporation submitted three management proposals to the City of Madison for the management of the Madison Bus Company property; and

"WHEREAS, two of these management proposals included a provision that all employees of the Madison Bus Company be rehired by the American Transit Corporation through a subsidiary corporation; and

"WHEREAS, the City of Madison accepted the second management proposal of the American Transit Corporation which included this hiring provision;

"THEREFORE BE IT RESOLVED that the Common Council of the City of Madison requests the American Transit Corporation, through its subsidiary corporation (Madison Service Corporation), to hire all such employees as private employes of this service corporation.

"BE IT FURTHER RESOLVED that any bargaining agreement reached between American Transit Corporation and Teamsters Local No. 695 regarding its employees under a bargaining agreement with it be submitted by American Transit Corporation to the Common Council of the City of Madison for its approval.

"BE IT FURTHER RESOLVED that all salaries, wages, benefits and conditions of employment contained in such contract be made effective as of May 11, 1970, when approved by the Common Council of the City of Madison."

In view of the provisions of the foregoing resolution to the effect that employes engaged in the operation of the Madison Transit System are to be hired as private employes of the service corporation, you have requested my opinion as to the status of such employes with respect to the Wisconsin Retirement Fund, the public employes Social Security Fund and the Municipal Group Life Insurance Program administered by the Wisconsin Group Insurance Board.

It is my opinion that employes other than the previously specified executive and administrative personnel hired by American Transit Corporation under the management contract with the City of Madison for the operation of a bus transit system in the City of Madison are in fact employes of the city, not of the managing corporation for purposes of those programs administered by the Department of Employe Trust Funds. The City of Madison is a participating municipality under the provisions of sec. 41.05, Stats., (1969). Section 41.07 (2) (a), Stats., (1969), provides that persons who become employes of a participating municipality are subject to the provisions of the Fund upon completion of the applicable probationary period. Employe is defined in sec. 41.02 (6) and (12), Stats. (1969), as follows:

"(6) 'Employe' means any person who:

"(a) Receives earnings as payment for personal services rendered to or for the benefit of any participating municipality.

"* * *

"(12) The definition of employe shall not include persons:

"* * *

"(d) who are employed under a contract involving the furnishing by such persons of more than their personal services.

"(e) who are customarily engaged in an independently established trade, business or profession and whose services to a participating municipality are not compensated for on a payroll of that municipality."

Since employe is defined as a person who receives earnings as payment for personal services rendered "for the benefit of any participating municipality," the subject employes are employes under sec. 41.02 (6), Stats., regardless of whether they are or are not paid on a regular city payroll. The predecessor statute, before amendment by ch. 33, Laws 1965, required, in defining employe, that his name appear on a regular payroll of the municipality. Sec. 66.901 (4), Stats. (1963). The first page of the appendix to Senate

Bill 62 (which when passed became ch. 33, Laws 1965) states the purpose of the amendment deleting the "regular payroll" requirement in these words:

"Sec. 1. S.66.901 (4) (a) of the statutes presently acts to deny retirement benefits to some employes simply because their earnings are paid in the form of fees or by means of a special payroll procedure. Employes who meet all other requirements for participation in the retirement program are thus denied such participation on purely technical grounds. The proposed amendment to this section would act to provide retirement coverage for any person who has legal status as an employe, regardless of the method of compensation; all such employes, of course, would have to meet all other requirements for retirement participation as presently set forth in the statutes.

"Sec. 2. The change proposed by this section is part of the change discussed under sec. 1 above. The repeal of s.66.90 (4) (b) is necessary to give effect to s.66.90 (4) (a) as amended.

"Sec. 3. This section would create two new paragraphs in support of the change discussed under Section 1 above. The effect of the two paragraphs is to make it clear that an employe-employer relationship would not exist as between any municipality and an independent contractor or self-employed person, and thus continue to exclude such persons from participation in the retirement fund."

Since, therefore, payment is for personal services rendered "for the benefit of" a participating municipality, the mode of payment is immaterial. The subject employes are not excluded by sec. 41.02 (12), Stats., as independent contractors since they do not furnish more than personal services nor are they "customarily engaged in an independently established trade."

The Wisconsin Supreme Court in *Prentice v. ILHR Department,* (1967) 38 Wis. 2d 219, 223, 156 N.W. 2d 482 set forth the following tests for determining whether an employer-employe relationship exists:

"* * * the principal or primary test for determining if an employer-employee relationship exists is whether the alleged employer has a right to control the details of the work. We have also pointed out there are subsidiary and secondary tests which should also be considered, among which are: (1) the direct evidence of the exercise of the right to control; (2) the method of payment of compensation; (3) the furnishing of equipment or tools for the performance of the work and; (4) the right to fire or terminate the relationship. * * *"

The management contract between the City of Madison and the management corporation contains the following provisions:

"2. * * * City will obtain and provide and furnish for the operation of the Transit System, real estate, office, garage and storage facilities, motor coaches, shop and garage equipment, office equipment and all other properties, assets and facilities which the City deems necessary or appropriate for the operation of the Transit System. * * *"

"4. All services to be rendered by Management under paragraph three (3) or otherwise under this contract shall be subject to the supervision and control of City. The advice of Manager shall be only a recommendation, and the final decision shall be made by City through its appropriate officials."

"8. All gross operating revenues derived from the operation of the Transit System shall be the property of City, and periodically at reasonable times, Manager shall cause the same to be deposited in a depository designated by and pursuant to the written instructions of the City."

"9. All gross operating expenses, and all other costs, expenses, liabilities, damages, losses, claims and charges of every kind and description, without limitation, arising out of, incurred in, or attributable to the operation of the Transit System, and all related operations and business activities shall be the sole obligation and responsibility of the City with the exception of the salary of the Resident Manager and such administrative and executive personnel costs (ex-

cept, however, as provided in paragraph 11 hereof) as may be necessary for Manager to perform the duties and obligations required by this Contract to be supplied by the Manager. . . In no event shall Manager be obligated to lend or advance funds to the City to meet its obligations under this Contract. An arrangement will be entered into which is mutually agreeable to the parties providing for the advancement by City to Sub of sums of money sufficient to meet its payroll and other day-to-day expenses. It is not anticipated that Sub or American will advance payroll monies against funds later to be forthcoming from City."

"12. During the term of this Contract, American shall provide sufficient executive and administrative personnel as shall be necessary and required to perform its duties and obligations under the terms hereof, including a Resident Manager who shall be responsible for the day-to-day operations of the Transit System, and who shall be selected with approval by the City and supervised and directed by American and who shall serve only with consent of the City. The Manager shall also cause to be employed during the term of this Contract either by Sub or directly by City, sufficient operating personnel, including but not limited to, drivers, mechanics, supervisors, maintenance and other shop personnel, office and administrative personnel, as required from time to time. The cost of and compensation payable to all personnel employed in the operation of the Transit System shall be an obligation of and paid by City with the exception of the salaries of the Resident Manager and such executive and administrative personnel as shall be necessary and required to perform American's duties and obligations under the terms of this Contract."

"18. The obligation of Manager to commence its services or the City to accept Manager's services under the terms hereof and this Contract shall be conditioned upon Manager or City completing arrangements with the bargaining representative for the employees who are to be hired by the Transit System including, but not limited to, the assumption, if appropriate, by Sub, of any existing collective bargaining agreement between said employees and Sub's predecessor, it being understood that all compensation, payments and any

amounts payable and liabilities incurred under the terms of any bargaining agreement during the term of this Contract or upon any expiration thereof, shall be operating expenses of the Transit System to be an obligation of and satisfied by the City, provided the City has first approved of the terms and conditions of any such agreement."

The foregoing provisions make it clear that the right of control of the employes in question resides in the City, that the City is directly responsible for the compensation of such employes and that the City is to provide the tools and equipment for the performance of the work. By applying the tests set forth in *Prentice v. ILHR, supra,* it becomes apparent that these employes should be regarded as employes of the City of Madison for purposes of the Wisconsin Retirement Fund.

Inclusion in the group life insurance program provided by the Group Insurance Board under sec. 40.20, Stats. (1969), is largely dependent upon the status of the municipal employe under the Wisconsin Retirement System. Section 40.20 (6) (a), Stats. (1969), defines as eligible employes: "The personnel of any participating municipality as defined in sec. 41.02 (5), Stats., who meets the requirements of sec. 40.11, Stats., other than state employment." Section 40.11 (2) (a), Stats. (1969), requires that the employe be on a regular payroll of the state or an agency controlled by the state, and is occupying a position under the Wisconsin Retirement Fund. There can be no doubt but that the employes of the Madison Transit System meet these criteria and are eligible for participation in the group life program.

Similarly, subch. VI of ch. 40, Stats. (1969), which governs inclusion of employes under the public employes social security fund relates such inclusion to participation in the Wisconsin Retirement Fund under sec. 40.41 (2), Stats., requiring the conclusion that such employes must be included by the City of Madison in its reports to the public employes social security fund.

RWW:WMS

Collective Bargaining—Joint Committee on Finance—The collective bargaining agreement between the University of Wisconsin and the Teaching Assistants Association is valid.

The Joint Committee on Finance lacks jurisdiction to set aside the agreement.

The agreement is not a rule that might be reviewable by the Joint Committee to review administrative rules.

November 17, 1970.

WALTER G. HOLLANDER
Joint Committee On Finance

On May 12, 1970, at an executive session of the Joint Committee on Finance, the following resolution was passed concerning an employment relations contract entered into by the University of Wisconsin, Madison, and the Teaching Assistants Association:

"That the agreement between the University of Wisconsin Madison Campus and the Teaching Assistants Association be referred to the attorney general for a formal opinion.

"The Attorney General is requested to address himself to the question of the legality of the agreement under Wisconsin Law, and the power or jurisdiction of the Joint Committee on Finance to set aside agreement or contracts of this nature, and whether the agreement could be considered an administrative rule and subject to referral to the Administrative Rules Committee for review."

I. FACTUAL BACKGROUND

It will be helpful in considering the request of the Joint Committee to briefly review some of the salient facts leading up to the execution of the collective bargaining agreement.

The Teaching Assistants Association purportedly is made up of a majority of the teaching assistants and similarly situated personnel, such as research assistants, lab assis-

tants, etc., employed by the University of Wisconsin. There are a number of teaching assistants and similarly situated personnel who are not members of the Teaching Assistants Association.

In 1969 the University of Wisconsin agreed to voluntarily recognize the Teaching Assistants Association as a representative of the teaching assistants, considered collectively, for the purposes of negotiating wages, hours and conditions of employment if the Teaching Assistants Association achieved a certification as the majority representative in an election conducted by the Wisconsin Employment Relations Commission. Upon the election results and majority certification by the Wisconsin Employment Relations Commission, the University voluntarily recognized the association as the representative of the teaching assistants. The recognition was voluntary since both parties, the Teaching Assistants Association and the University of Wisconsin recognized that because teaching assistants were unclassified employes, they did not come under the protection or regulation of any existing labor legislation. The University of Wisconsin agreed to negotiate and contract within the purview of subch. V, ch. 111, the State Employment Labor Relations Act, as though it were applicable.

After a considerable period of negotiation, an impasse was reached, and the Teaching Assistants Association and its members engaged in a strike and concomitant activity. The Regents, represented by this office, brought an action against the Teaching Assistants Association and its members asking for a judgment declaring the strike to be illegal and for an injunctive relief against the continuing strike and concomitant activity. The Circuit Court for Dane County adjudged the strike to be illegal and granted the state's request for injunctive relief.

While the illegal strike was still in progress, the Teaching Assistants Association and the University of Wisconsin reached final agreement and executed a written collective bargaining agreement covering the terms and conditions of employment negotiated and agreed upon. The agreement was subject to ratification by the Board of Regents since

both the Teaching Assistants Association and the University of Wisconsin executives recognized and properly assumed that no contract of this nature would be legal unless ratified by the Regents. The Regents subsequently did ratify the collective bargaining agreement.

II. LEGALITY OF THE AGREEMENT

The collective bargaining agreement entered into by the University of Wisconsin and the Teaching Assistants Association is lengthy and contains many provisions covering a variety of subjects. It is impossible to give a final and definite opinion on such a contract since it is impossible to conceive of all possible situations or challenges that might raise a question concerning its legality. As a general proposition, it is my opinion that the contract is legal and binding under Wisconsin law.

I am aware of the questions concerning the legality of the contract discussed by the Joint Committee on Finance on May 12, 1970. I will address this opinion specifically to those areas of concern.

A. *Definiteness Of The Agreement*

As a proposition of general contract law, a contract must be definite in terms and conditions in order to be valid and legally enforceable. However, it has long been legally accepted that collective bargaining agreements cannot be considered within the purview of this general legal proposition. As stated in 48 Am. Jur. 2d, Labor and Labor Relations, sec. 1204:

"A collective bargaining agreement is a compilation of diverse provisions, some providing objective criteria which are almost automatically applicable, some providing more or less specific standards which require reason and judgment in their application, and some doing little more than leaving problems to future consideration with an expression of hope and good faith. It is not an ordinary contract; it is sui generis. [1] Central to the peculiar status and function of a

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[1] Defined in *Black's Law Dictionary*: "Of its own kind or class; i.e., the only one of its kind; peculiar."

collective bargaining agreement is the fact, dictated * * * by circumstance * * *, that it is not in any real sense a simple product of a consensual relationship. But more than this, a collective bargaining agreement is an attempt to erect a whole system of industrial self-government. It constitutes a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate, and is therefore more than a contract. It covers the whole employment relationship and calls into being a new common law—the common law of a particular industry or of a particular shop." (Footnote citations omitted).

In fact, because of this impossibility to provide in the contract all of the possible rules governing the conduct of the parties and their rights under the collective bargaining agreement, such agreements normally provide for grievance procedures for settling disputes under the contract or interpreting its terms, and this is the case of the contract under consideration.

I have examined the collective bargaining agreement under consideration and conclude that the contract is sufficiently definite and certain to satisfy the legal requirements of certainty in a collective bargaining agreement.

B. Authority of the Board of Regents of the University of Wisconsin To Enter Into a Collective Bargaining Agreement With the Teaching Assistants Association

Section 36.03, Stats., provides that the Regents of the University of Wisconsin "* * * shall possess all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law, * * *." Under *State v. Regents of the University of Wisconsin,* (1882) 54 Wis. 159, 11 N.W. 472, the powers of the Regents must appear either by express statutory language or by fair implication therefrom. The language of the quoted portion of sec. 36.03, Stats., is very broad and the hiring of personnel to carry on the instructional duties of the University of Wisconsin, by necessity, must be within the implied powers and duties of the Regents. Therefore, the Regents clearly have the authority to enter into individual contracts for the purpose of ob-

taining instructional personnel, including professors, instructors, teachers or teaching assistants.

In this case, we are dealing with a collective bargaining agreement, which may be defined as a contract between the employer and employes, considered collectively, setting forth the terms and conditions of employment for a specific period of time.

While a collective bargaining agreement may not be directly equated with an employment contract, it is a contract which establishes the framework and standards of the individual employment contracts. Therefore, it is within the delegated powers of the Board of Regents to enter into the collective bargaining agreement under consideration since it becomes an integral part of the process of contracting for personnel to carry out the instructional duties of the University.

C. *Capacity Of The Parties To Contract*

1. Teaching Assistants Association

There is no labor relations legislation applicable to the parties to the contract. The state is not an employer within the meaning of the National Labor Relations Act[2] and the teaching assistants are not employes entitled to the rights granted by the State Employment Labor Relations Act, subch. V, ch. 111, Stats., since they are not classified employes.[3] Therefore, the teaching assistants do not have a statutory right to legally compel recognition as a collective bargaining representative for the collective bargaining unit or to legally compel collective bargaining.

However, the teaching assistants, considered collectively have a constitutionally protected right to organize or become members of a union and petition government as their em-

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[2]29 USC 152 (2)

[3]Sec. 111.81 (12), Stats., provides: " 'State employe' includes any employe in the classified service of the state, as defined in sec. 16.08, * * *."

Sec. 16.08, subs. (2) (d) and (3) (a), Stats.., places "[a]11 presidents, deans, principals, professors, instructors, research assistants, librarians and other teachers * * * in the university and state colleges," within the unclassified service.

ployer, on matters concerning their conditions of employment.[4] And this union may represent its members on these matters since employes legally may do through a representative what they could do personally on their own behalf. The United States Supreme Court noted in *National Labor Relations Board v. Jones & Laughlin Steel Corporation,* (1937) 301 U.S. 1, 81 L.Ed. 893, 57 S.Ct. 615, that legislation was not required to give employes their right to organize a union, their right to assert their desires, and the right to do these things through a representative. These are fundamental rights, and legislation protecting these rights is merely recognition thereof.

Therefore, there is nothing illegal about, nor is legislation necessary to authorize, the existence of the Teaching Assistants Association as an organization representing its members on matters concerning employment conditions.

2. Regents of the University of Wisconsin

While the absence of applicable employment relations legislation leaves the University immune from legal compulsion to recognize a collective bargaining representative or to bargain with it,[5] the absence of applicable legislation does not render recognition or collective bargaining illegal. Such recognition is a recognition of the fundamental rights already noted and collective bargaining is an adjunct to individual employment contracts. The Board of Regents of the University of Wisconsin is a legal entity given "body corporate" status and we have already discussed its authority to enter into contracts as being within its delegated powers. *State v. Regents of the University of Wisconsin, supra.*

In my opinion, the Board of Regents, having been given "body corporate" status, has the legal capacity to bargain and contract collectively even in the absence of applicable

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[4] *McLaughlin v. Filendes,* (1968) 398 F. 2d 287 (7 Cir.); *AFSCME v. Woodward,* (1969) 406 F. 2d 137 (8th Cir.); and *Atkins v. City of Charlotte,* (1969) 296 F. Supp. 68 (West. Dist. of N.C., 3 Judge Court).

[5] While the University could legally refuse to grant *formal* recognition, as an arm of government, it could not constitutionally refuse to hear grievances even though it is under no legal obligation to redress grievances.

labor legislation. Enabling legislation is not necessary in addition to that already in existence.

The mere fact that the employes involved are in the unclassified service and therefore not covered by labor legislation does not imply that the Board of Regents may not contract—even collectively—with these employes. A restriction by implication on the legislative grant of the jurisdiction to the University in this instance is unwarranted.

The long standing presidential executive order authorizing collective bargaining by the federal government with federal employes in the absence of applicable labor relations legislation is precedent for this proposition.

Subchapter V of ch. 111, Stats., the State Employment Labor Relations Act, in directing collective bargaining by the state as an employer, is not so much a grant of power to state agencies, departments, etc., as it is a mandate to exercise authority they already have, and an implied prohibition against the exercise of this authority is unwarranted merely because subch. V does not compel the exercise of the authority in this particular case. See *State ex rel. Warren v. Reuter,* (1969) 44 Wis. 2d 201 at 221, 170 N.W. 2d 790.

We have already noted that there is no labor relations legislation applicable to the parties. Legislation is necessary to provide: (1) that a representative is the exclusive representative for *all* members of the collective bargaining unit, and (2) that the collective bargaining contract establishing the wages, hours and conditions of employment binds *all* members of the unit;—whether or not all members of the collective bargaining unit have designated the representative to bargain and contract for them.

Without legislation, the common law of agency applies and an agent cannot bind a person with whom he has no principal-agent relationship. Thus, in this case nonassociation members of the collective bargaining unit are not bound by the agreement made by the association with the University.

It is true that the University can unilaterally establish wages, hours and conditions of employment, and under the

contract, it can still do so. And we may assume it will do so under the terms of the collective bargaining agreement. Of course, this will have the practical effect of setting the same terms for the nonunion members. However, the collective bargaining agreement cannot cut off any rights that the nonunion members have, if they have any, as would be the case in the private employment sector where labor legislation is applicable.

It is impossible to visualize at this time any practical problems that might arise as a result of this peculiar aspect of the contractual relationships of the parties involved. It is my opinion, that, as between the teaching assistants who are not members of the Teaching Assistants Association and the University of Wisconsin, there is no collective bargaining agreement. However, this does not affect the legality of the contract as between the University and the Teaching Assistants Association and its members.

D. *Validity of Agreement Executed While The Members of The Union Engaged in an Illegal Strike*

A contract is not invalid merely because one of the parties to it engaged in illegal activity during its inception or execution unless the illegal activity was of a nature and so conducted as to constitute duress.

If a contract is voidable for duress, it is so only after the party asserting duress can satisfactorily prove that his act of entering into the contract was not his own, but was another's imposed upon him through fear which deprives him of freedom of will.[6] And the state of the mind of the party claiming duress is a greater factor in determining whether duress occurred than is the means by which the party was compelled to enter into the contract.[7]

I am aware of the history of the negotiations, the illegal strike, and final "negotiation" which culminated in an executed contract.

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[6]17 Am. Jur. 2d, Contracts sec. 153.

[7]17 Am. Jur. 2d, Contracts sec. 153; *Galusha v. Sherman*, (1900) 105 Wis. 263, 81 N.W. 495.

The University of Wisconsin and the Teaching Assistants Association had reached a tentative agreement on most of the provisions of the contract prior to the commencement of the strike activity. The contract that was finally entered into during the illegal strike differed very little from the terms of the tentative agreement and the University of Wisconsin personnel who negotiated the contract have opined that the final agreement was less onerous to the University than the tentative agreement reached prior to the strike. Further, the history of the negotiations considered together with the final contract strongly indicate that the University executive personnel felt no undue compulsion to enter into the contract as a result of the strike activity.

These facts do not suggest legally cognizable duress.

Regardless, a contract is not automatically void because of duress. It is only voidable after the party claiming it first asserts it and then proves the elements of duress just discussed. Therefore, it is impossible for me to conclude that the contract under consideration is void as a matter of law because it was executed during the illegal strike.

III. AUTHORITY OF JOINT COMMITTEE TO SET ASIDE THE CONTRACT

The Joint Committee on Finance, as any entity created by the legislature, has only those powers granted by legislation or that fairly may be implied therefrom.

Secs. 13.09-13.11, Stats., which create and delineate the powers and duties of the Joint Committee on Finance, do not give to it any authority that could be construed as jurisdiction or power to set aside a contract entered into by the Board of Regents, who have such authority.

IV. REVIEWABILITY OF THE CONTRACT BY ADMINISTRATIVE RULES COMMITTEE

Section 13.56 (2), Stats., provides:

"The [Legislative Joint Committee for Review of Administrative Rules] shall promote adequate and proper rules by agencies and an understanding upon the part of the public

respecting such rules. It may hold public hearings to investigate complaints with respect to rules if it considers such complaints meritorious and worthy of attention and may, on the basis of the testimony received at such public hearings, suspend any rule complained of by the affirmative vote of at least 6 members. If any rule is so suspended, the committee shall as soon as possible place before the legislature, at any regular session and at any special session upon the consent of the governor, a bill to repeal the suspended rule. If such bill is defeated, or fails of enactment in any other manner, the rule shall stand and the committee may not suspend it again. If the bill becomes law, the rule is repealed and shall not be enacted again unless a properly enacted law specifically authorizes the adoption of that rule. The committee shall make a biennial report to the legislature and governor of its activities and include therein its recommendations."

In the definitions section of ch. 227, Stats., sec. 227.01 (3), Stats., the legislature provided:

" 'Rule' means a regulation, standard, statement of policy or general order (including the amendment or repeal of any of the forgoing), of general application and having the effect of law, issued by an agency to implement, interpret or make specific legislation enforced or administered by such agency or to govern the organization or procedure of such agency."

The collective bargaining agreement under consideration does not fall within this definition of a rule, even under a liberal construction, and therefore, is not reviewable by the Joint Administrative Rules Committee pursuant to sec. 13.56, Stats.

RWW:WHW

Collective Bargaining—Sick Leave Compensation—A county ordinance implementing a collective bargaining agreement providing for the payment to county employes, upon their leaving government employment, compensation

for accumulated sick leave, earned both before and after the effective date of the ordinance is valid. Secs. 59.07, 59.15, and 111.70, Stats., discussed. Applicability of 39 OAG 314 limited.

November 19, 1970.

WILLIAM L. SEYMOUR

Corporation Counsel, Walworth County

You relate that Walworth County has engaged in collective bargaining with a union representative of a portion of Walworth County employes and that one of the matters ultimately negotiated was a provision that Walworth County would pay its employes compensation for one-half of accumulated sick leave when they leave county service. Pursuant to sec. 111.70 (4) (i), Stats.,[1] the county board has passed an ordinance implementing the collective bargaining agreement including the provision for payment for unused sick leave. The collective bargaining agreement and ordinance make no distinction between sick leave earned before the enactment of the ordinance and that earned subsequently and it is clear that the collective bargaining agreement and ordinance intended to make provision for all accumulated sick leave whether earned before or after the enactment of the ordinance. Before the enactment of this ordinance, accumulated sick leave lapsed upon the termination of employment.

You ask for an opinion on the validity of this aspect of the ordinance. In my opinion, this provision of the ordinance is valid under Wisconsin law.

Wisconsin's law on bargaining in municipal employment, subch. IV, ch. 111, Stats., (sec. 111.70, Stats.) was created by ch. 509, Laws 1959 and amended by ch. 663, Laws 1961.

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[1]Sec. 111.70 (4) (i), Stats. Agreements. "Upon the completion of negotiations with a labor organization representing a majority of the employes in a collective bargaining unit, if a settlement is reached, the employer shall reduce the same to writing either in the form of an ordinance, resolution or agreement. Such agreement may include a term for which it shall remain in effect not to exceed one year. Such agreements shall be binding on the parties only if express language to that effect is contained therein."

Section 111.70 (2), Stats., established the right of municipal employes to be represented by "labor organizations * * * in conferences and negotiations with their municipal employers * * * on questions of wages, hours and conditions of employment * * *."[2]

The first issue evident is whether the subject matter of the provision in question is one within the purview of "wages, hours and conditions of employment."

The subject of sick leave, its creation, structure and administration is, and has been for a considerable period of time, a common and accepted subject of collective bargaining and collective bargaining agreements.[3] The fact that sick leave has been one of the traditional subjects of collective bargaining points to the conclusion that it falls within the concept of "wages, hours and conditions of employment." Further, we have found no authority or even a suggestion that the matter of sick leave is not a subject within the meaning of "wages, hours and conditions of employment."

In *Local 1226 v. Rhinelander,* (1966) 35 Wis. 2d 209, 151 N.W. 2d 30, the court held that a municipal employer has the power and authority to enter into collective bargaining agreements on any subject relating to "wages, hours and conditions of employment" unless prohibited by statutes. Under sec. 111.70 (1) (a), Stats., counties, being political subdivisions of the state, are municipal employers.

Thus, unless the provision under consideration was enacted in excess of authority of the county board or is contrary to the provisions of a statute, or otherwise illegal, it is valid.

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[2]Sec. 111.70 (2), Stats.

[3]F. Beatrice Brower & Arax Simsarian, "Paid Sick Leave in Union agreements," *Management Record,* October 1948; Harland Fox, "Paid Sick Leave and Group Insurance," *Management Record,* February 1955; Raymond Krah, *Administrative Control of Sick Leave* (Chicago: Civil Service Assembly, Personnel Report No. 544, (1954); Henry S. Rosenbloom, "Paid Sick Leave Provisions in Major Union Contracts, 1959," MLR, October 1960; *Collective Bargaining Negotiations and Controcts,* Vol. 2 (BNA), 62:901 et seq.: *Labor Policy and Practice,* Vol. 4—Personnel Management (BNA), 209: 253, 225: 751 et seq.; and cases listed under *Labor Relations Cumulative Digest and Index* (BNA) sec. 116.25.

Authority of County Boards To Enact Ordinances Relating To Collective Bargaining Subjects.

In *Rhinelander,* supra, the court held that the city of Rhinelander had the authority to enter into a collective bargaining agreement which included a binding arbitration of grievances clause. In that case, Rhinelander argued that there was no specific statutory authority granted to municipal corporations permitting them to enter into binding arbitration agreements in employment contracts. The court specifically rejected this argument and held that the authority to enter into such agreements existed by virtue of sec. 111.70, Stats.

Also, see *Joint School District No. 8 v. Wisconsin E. R. Board,* (1967) 37 Wis. 2d 483, 155 N.W. 2d 78, where the court held that school districts had the authority to collectively bargain the school calendar with its employes' representative. Again it should be noted that there is no specific statutory authority permitting school boards to negotiate the school calendar, other than the general authority to negotiate conferred in sec. 111.70, Stats.

County boards have been given rather broad powers in employing personnel and fixing their wages, hours and conditions of employment.

Sec. 59.07, Stats.:

"The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language:

" * * *

"(5) General Authority. Represent the county, have the the management of the business and concerns of the county in all cases where no other provision is made, apportion and levy taxes and appropriate money to carry into effect any of its powers and duties."

Further, sec. 59.15 (2), Stats., provides in part:

"Appointive Officials, Deputy Officers and Employes. (a) The board has the powers set forth in this subsection and

sub. (3) as to any office, board, commission, committee, position or employe in county service (other than elective offices included under sub. (1), supervisors and circuit judges) created under any statute, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which lie within the county or any portion thereof and the powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language.

" * * *

"(c) The board may provide, fix or change the salary or compensation of any such office, board, commission, committee, position, employe or deputies to elective officers without regard to the tenure of the incumbent (except as provided in par. (d)) and also establish the number of employes in any department or office including deputies to elective officers, and may establish regulations of employment for any person paid from the county treasury, * * *.

"(d) The board or any board, commission, committee or any agency to which the board or statutes has delegated the authority to manage and control any institution or department of the county government may contract for the services of employes, setting up the hours, wages, duties and terms of employment for periods not to exceed 2 years."

I conclude, when sec. 111.70, Stats., is read in connection with these cited sections of the statutes conferring rather broad authority on county boards, that the Walworth County Board has the authority to collectively bargain the provision in question and incorporate the same in an ordinance giving binding effect to the provision.

Legality Of The Provision—Statutory Preemption

In *Joint School District No. 8,* supra, the court held that the school board could bargain subjects of "wages, hours and conditions of employment" as long as the subject was not preempted by law. The court noted that several aspects of the school calendar were governed by specific statutory provisions and said (Loc. cit. 37 Wis. 2d 492):

"These items determined by statute, of course, cannot be changed by negotiation. But what is left to the school boards in respect to the school calendar is subject to compulsory discussion and negotiation. As stated in *Norwalk Teachers' Assn. v. Board of Education,* (1951)138 Conn. 269, 277, 83 Atl. 2d 482, ' . . . the plaintiff may organize and bargain collectively for the pay and working conditions which it may be in the power of the Board of Education to grant. ' "

I am unaware of any statutory preemption precluding the counties' authority to grant or administer sick leave or pay for any unused portion thereof upon termination of employment.

Legality Of The Provision—Public Policy

There remains the question whether the questioned provision of the collective bargaining agreement and ordinance is void as being contrary to public policy.

In 39 OAG 314 (1950) it was stated county boards did not have the statutory authority to pay additional bonuses for services previously performed and for which compensation had already been paid. If this former opinion is currently valid, it might be argued that the provision now under consideration would not enable the county to pay for sick leave earned prior to the collective bargaining agreement and ordinance.

However, the Supreme Court in *State ex rel. Holmes v. Krueger,* (1955) 271 Wis. 129, 72 N.W. 2d 734 issued after this earlier attorney general's opinion, essentially negates the validity of this former opinion. In this case, the court reiterated its earlier holding in *Sieb v. Racine,* (1922) 176 Wis. 617, 187 N.W. 989, that the constitutional provision[1] prohibiting extra compensation for services performed and paid for was applicable only to officers or contractors who were paid out of the state treasury. The court stated that

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[1]Art. IV, sec. 26, Wis. Const., in part: "The legislature shall never grant any extra compensation to any public officer, agent, servant or contract, after the services shall have been rendered or the contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office. * * *"

the public policy prompting this contitutional provision would be applicable to county or municipal governments only if specific statutory provision were made therefor.

In *Holmes,* supra, the court also reiterated its decisions in *Dudgeon v. Levitan,* (1923) 181 Wis. 326, 193 N.W. 499 and *State ex rel. Thomson v. Giessel,* (1953) 265 Wis. 558, 61 N.W. 2d 903 (also, issued after 39 OAG 314) which held that legislation, such as the type we are considering, would be construed to serve a public purpose if the increase in salary or other benefits arguably could serve the objective of making public service more desirable, and in that case, such legislation would not be illegal.

Further reason exists for the inapplicability of 39 OAG 314. That opinion issued at a time when sec. 59.07, Stats., did not grant the broad power that it now does. Compare the following from Rev. Stats. 1949, with the comparable current section set forth earlier in this opinion.

"59.07. The county board of each county is empowered at any legal meeting to:

" * * *

"(5) Apportion and order the levying of taxes as provided by law, and direct the raising of such sums of money as may be necessary to defray the county charges and expenses and all necessary charges incident to or arising from the execution of their lawful authority."

Since there is no legislation making Art. IV, sec. 26, applicable to county employes and since the provision in question may be construed to serve a public purpose, I conclude that 39 OAG 314 is not applicable to this issue.

RWW:WHW

Lobbying—State Bar of Wisconsin—The State Bar is an agency of the state within the meaning of sec. 13.62 (4) (b). The State Bar is not a "principal" and need not register and an employe doing lobbying is not a "lobbyist" and need

not register or be licensed under the lobby law unless activities relate to proposed legislation affecting the statutory powers, duties or appropriation of the Bar or unless employe lobbies on bill affecting his pecuniary interest.

December 7, 1970.

PHILIP S. HABERMANN, *Executive Director*
State Bar of Wisconsin

You ask my opinion as to whether the State Bar of Wisconsin must register itself and its employes under secs. 13.60-13.71 of the statutes regulating lobbying.

You point out that prior to the integration of the Bar in 1956 the Wisconsin bar association did register. You also point out that subsequent to integration, probably in 1961, the attorney general was asked whether the Bar and its employes were required to register as lobbyists under the above-quoted sections of the statutes. You say that you were advised at that time that the State Bar of Wisconsin is a quasi-governmental unit and an official agency of the Supreme Court, and that you are not required to and should not register under the lobbying law.

We have not been able to locate any correspondence or record of the previous advice given and, therefore, we are treating the question as one of first impression.

Although your request does not set out specific fact situations, I am going to assume that the conduct you refer to as "lobbying" falls within the definition found in sec. 13.62 (1), Stats., which reads as follows:

" 'Lobbying' means the practice of promoting or opposing the introduction or enactment of legislation before the legislature or the legislative committees or the members thereof."

The mere fact that certain activities constitute lobbying does not mean that they are necessarily regulated by the lobbying statute. Unless clearly proscribed by statute, lobbying activities are permitted without regulation. Some

types of lobbying are prohibited, i.e., corrupt means (sec. 13.60, Stats.), contingency contracts (sec. 13.66 (1), Stats.), on the floor during sessions without invitation (sec. 13.71, Stats.), state or federal employes or officials with a pecuniary interest unless registered as a lobbyist (sec. 13.70, Stats.), and as a "lobbyist" lobbying for hire without being registered or as a "principal" permitting a lobbyist to lobby on legislation affecting the "pecuniary interest" of the principal (sec. 13.66 (1), Stats.). Even these restrictions upon the practice of lobbying are effective only during legislative sessions and between the general election and regular legislative sessions (sec. 13.66 (3), Stats.).

The lobbying statutes are criminal statutes and, therefore, must be construed most favorably to a defendant in any case of doubt or ambiguity. *United States v. Slaughter*, (1950) 89 F. Supp. 876; *Rische Construction Co. v. May*, (1961) 15 Wis. 2d 123, 112 N.W. 2d 165; and *State v. Wrobel*, (1964) 24 Wis. 2d 270, 128 N.W. 2d 629.

In addition, because the lobbying statutes are clearly ambiguous, construction is necessary and other well-recognized rules of statutory construction, including long-standing interpretation, must be observed. It appears appropriate at this point to look at the legislative history of the lobbying statutes and the construction placed on these statutes by the courts or previous attorneys general.

LEGISLATIVE HISTORY

The legislature first enacted a law regulating lobbying with the passage of ch. 243, Laws 1899. That law required that every person, corporation or association employing a person to act as a "counsel or agent to promote or oppose in any manner, the passage by the legislature of any legislation affecting the *pecuniary interests* of any individual, association or corporation as distinct from those of the whole people of the state, or to act in any manner as a legislative counsel or agent in connection with any such legislation * * *" (emphasis supplied) must register within one week of such employment the name of the person so employed with the secretary of state. The secretary of state

kept two legislative dockets, one known as the "docket of the legislative counsel before committees" and the other as the "docket of legislative agents."

Legislative counsel were defined as persons employed to appear before a committee of the legislature for the purpose of making an argument or examining witnesses. The legislative agent docket contained the names of all agents employed for any purpose in connection with any legislation affecting the pecuniary interests of the employer.

Section 7 of the act provided: "This act shall not apply to any municipality or other public corporation."

Therefore, it appears that when the act was first passed it was not intended that government employes be required to be registered as lobbyists by their employer.

By sec. 1, ch. 472, Laws 1905, state officers, agents, appointees and employes were first regulated under the lobbying laws. That section provided in part as follows:

"* * * No officer, agent, appointee, or employe, in the service of the state of Wisconsin, or of the United States, shall attempt to influence any member of the legislature to vote for or against any measure pending therein, affecting the pecuniary interests of such person, excepting in the manner authorized herein in the case of legislative counsel and legislative agents."

The above provision remains in sec. 13.70 (1), Stats., with the only change being the word "lobbyists" substituted for the last five words of the sentence.

There were no substantive changes in the lobbying law from 1905 to 1933, when sec. 346.295, Stats. (now 13.72, Stats.) relating to compensation for published articles on legislation was added. In 1924 the statutes were renumbered and until 1947 were found in secs. 346.20 to 346.29, Stats. That portion of the lobbying law above quoted which had been enacted by sec. 1 of ch. 472, Laws 1905, was found in sec. 346.27, Stats.

Senate Bill 572, which became ch. 609, Laws 1947, repealed and recreated secs. 346.20 to 346.29, Stats., and made num-

erous changes and additions to the lobbying law. Chapter 696, Laws 1955, changed the numbering of the statutes from ch. 346 to ch. 13, but made no substantive changes in the law. Chapters 66, 433 and 659, Laws 1965, made changes in form but not substance.

Among the additions to the lobbying law created by ch. 609, Laws 1947, was sec. 346.025, Stats. (now 13.62, Stats.) which provided definitions for seven terms used in the lobbying laws. Two of these definitions, "principal" in sec. 13.62 (4), (b), Stats., and "lobbyist" in sec. 13.62 (2), Stats., are important in considering the question which you have presented. These statutes read as follows:

"13.62 (2) 'Lobbyist' means any person who engages in the practice of lobbying for hire except in the manner authorized by s. 13.70. Lobbying for hire includes activities of any officers, agents, attorneys or employes of any principal who are paid a regular salary or retainer by such principal and whose duties include lobbying."

"13.62 (4) 'Principal' means:

"(a) Any person who engages a lobbyist or other person in connection with any legislation, pending before the legislature or to be proposed, affecting the pecuniary interest of such person, corporation or association.

"(b) Any board, department, commission or other agency of the state, or any county or municipal corporation, which engages a lobbyist or other person in connection with any legislation pending or to be proposed affecting the statutory powers, duties or appropriation of such agency, county or mnuicipal corporation."

Early drafts of Senate Bill 572 of 1947, which are contained in the records of the Legislative Reference Bureau, would have spelled out specifically the exception of municipalities and public corporations found in sec. 346.26, Stats., prior to 1947 by excluding municipal and public corporations from the definition of "principal" now found in sec. 13.62 (4), Stats. The fifth draft of the bill added sec. 346.205 (4), (b), Stats., present sec. 13.62 (4) (b), Stats., thereby specifically including state agencies within the term "principal"

where they engage a "lobbyist" within the meaning of sec. 13.62 (2), Stats., in connection with legislation affecting statutory powers, duties or appropriations of such agencies.

STATUTORY CONSTRUCTION AND LEGISLATIVE INTENT

It is apparent from previous opinions of the attorneys general of this state and from a decision of the United States Supreme Court that lobbying laws in general have been enacted to regulate and expose lobbyists who practice "for hire" and principals who have a pecuniary interest in the legislation being considered. At one time the practice of lobbying for hire was considered to be against public policy. See *Chippewa Valley & S. R. Co. v. Chicago, St. P., M. & O. R. Co.*, (1889) 75 Wis. 224, 243, 44 N.W. 17, and *Bryan v. Reynolds*, (1856) 5 Wis. 200, 68 A.D. 55. However, this rule applied only in the field of contracts and was not effective in exposing those who were trying to influence legislation for pecuniary gain.

It does not appear, however, that lobbying laws have been construed to limit governmental officials and employes in activities defined as "lobbying" except where their "pecuniary interests" are concerned or where the legislature has specifically restricted those activities. The laws have not been held to apply to situations where the interests of the whole people of the state are involved as distinct from private interests.

In 1910 OAG 772 at 773 the attorney general, in holding that members of the Anti-Saloon League did not have to register as lobbyists, advised the secretary of state as follows:

"To require registration, two things must appear: the person must be employed and he must be employed to oppose or promote legislation affecting the *pecuniary interests* of his employer or some individual, association or corporation as distinct from the interest of the whole people of the state." (Emphasis supplied.)

In 1 OAG 187, 189 (1913), the attorney general, in commenting on sec. 4482h, which required twenty-five copies

of written statements filed with legislators to be filed with the secretary of state, said:

"From the foregoing excerpts from the Anti-Lobbying Law it is very plain that the legislature intended to regulate the practices of those endeavoring to influence legislation for a *pecuniary consideration* paid to them by those having a special or pecuniary interest therein."

The attorney general gave an opinion to the Board of Control in 16 OAG 141 (1927), involving appearances by members and employes of the State Board of Control before a legislative committee considering a bill to curtail or change an industry of the Wisconsin State Reformatory.

After quoting sec. 346.27, Stats., and emphasizing the words "employed for pecuniary consideration" and "affecting the pecuniary interests of such person," the opinion states in part as follows:

"The anti-lobbying law was intended to regulate the practices of those attempting to influence legislation for a *pecuniary consideration.* This statute does not in any manner limit or restrict the activities of citizens of the state or officials or employes of the state having no pecuniary interest in legislative matters pending before the legislature. *It is highly commendable for officials or employes of the state to appear before committees, giving them the benefit of argument, facts, and conditions within their knowledge concerning state institutions for the purpose of affecting legislation, so long as they have no pecuniary interest personally in the legislation pending.*" (Emphasis supplied.)

The Federal Regulation of Lobbying Act became effective August 2, 1946. It is now secs. 261 through 270, Title 2, U.S. Code. Coverage under these provisions has been limited by the United States Supreme Court to those persons who solicit, collect or receive contributions of money or other thing of value and then only if the principal purpose of either the persons or the contributions is to aid in or influence the passage or defeat of any legislation by Congress. *United States v. Harriss,* (1954) 74 S.Ct. 808, 347 U.S. 98 L.Ed. 989.

Where a person engages himself "for pay or for any consideration" for the purpose of attempting to influence the passage or defeat of congressional legislation he must register with the clerk of the house and secretary of the senate and provide information which is similar to that required by Wisconsin law. However, as it applies to the question being considered herein, sec. 267 (a), 2 U.S.C.A., provides in part as follows:

"* * * The provisions of this section shall not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation; nor to any public official acting in his official capacity; * * *."

It should be noted that the Wisconsin act is different in that a state agency may be a "principal" within the meaning of the lobbying law where the legislation involves the statutory powers, duties or appropriations of that agency. Also, there is no federal provision equivalent to sec. 13.70 (1), Stats., which limits activities of public officials concerning legislation affecting the pecuniary interests of such persons.

IS THE BAR AN ASSOCIATION UNDER SEC. 13.62 (4) (a), STATS., OR A STATE AGENCY UNDER SEC. 13.62 (4) (b), STATS.?

It has been argued that because of its peculiar makeup—that is that while it is an arm of the Supreme Court its members are practicing attorneys—the Bar is not a state agency but rather an association as it is described in sec. 256.31, Stats.

The legislature passed sec. 256.31, Stats., in 1943. It provided for the Supreme Court's integrating the Bar. The term "association" was used by the legislature but not as a generic term. The Supreme Court later held that the provisions of sec. 256.31, Stats., were not binding on the court and that it was but an expression of public policy by the legislature. *Integration of Bar Case,* (1943) 244 Wis. 8, 11 N.W. 2d 604, 12 N.W. 2d 699; *In re Integration of Bar,* (1946) 249 Wis. 523, 25 N.W. 2d 500.

In *In re Integration of Bar,* (1956) 273 Wis. 281, 77 N.W. 2d 602, the Supreme Court ordered the integration of the Bar after two earlier denials. The validity of the integration was attacked by a practicing lawyer who objected, among other issues, to the use of his mandatory fees for legislative purposes by the bar as impinging upon his First Amendment freedoms.

In sustaining the validity of the integrated bar in *Lathrop v. Donohue,* (1960) 10 Wis. 2d 230, 239, 102 N.W. 2d 404, the court answered the plaintiff's criticism of the legislative activities of the State Bar as follows:

"This court takes judicial notice of the activities of the state bar in the legislative field since its creation by this court in 1956. *In every instance the legislative measures advocated or opposed have dealt with the administration of justice, court reform, and legal practice. Neither the above-quoted by-laws nor the stated purposes set forth in section 2 of Rule 1 for which the Bar was integrated would permit the State Bar to be engaged in legislative activities unrelated to these three subjects.* * * * (Emphasis supplied)

"* * * A voluntary association is free to take a stand on any proposed legislation in any field it deems desirable. This is not true of the State Bar which must confine its activities in legislative matters to those authorized by the rules and by-laws promulgated by this court."

The court went on to conclude that in ordering the integration of the Bar it was exercising the police power in order to improve the administration of justice. As to the status of the State Bar as an agency of the state, the court said, at p. 243: "The State Bar is a public agency the same as the judicial council. One has been created by the court and the other by the legislature but each was created by state action as a state agency to serve a public purpose."

Prior to integration, the voluntary Wisconsin Bar Association, as an entity, became a "principal" within the meaning of sec. 13.62 (4) (a), Stats., whenever it engaged a "lobbyist" in connection with legislation affecting the "pecuniary interest" of the Association. At that time the voluntary Bar

Association was free to take a stand on any proposed legislation. This is no longer true, as the court pointed out above, since the Bar is no longer an association within the meaning of sec. 13.62 (4) (a), Stats., but is a state agency within the meaning of sec. 13.62 (4) (b), Stats., and is controlled in that the Supreme Court determines by rules and bylaws in which legislative activities the Bar is allowed to participate.

It appears apparent from the *Lathrop* case that our Supreme Court has settled two matters which have some relation to the question you have submitted. First, the State Bar is a state agency created to serve a public purpose. Secondly, the court anticipates that the State Bar will engage in "legislative activities" where such activities concern the *administration of justice, court reform, and legal practice.*

The Wisconsin Supreme Court decision was affirmed by the United States Supreme Court in *Lathrop v. Donohue,* (1961) 367 U.S. 820, 62 L.Ed. 1191, 81 S.Ct. 1826. Rehearing was denied. 82 S.Ct. 23.

Having concluded that the Bar is a state agency, it must be further concluded that the Bar could become a principal within the meaning of sec. 13.62 (4) (b), Stats., if it engages a lobbyist or other person, including one of its officers, agents, attorneys or employes to lobby in connection with legislation pending or to be proposed which affects the statutory powers, duties or appropriations of the Bar. In such case not only would the Bar as a principal be required to register and file reports but would also be required to have its lobbyist do the same and the lobbyist would have to be licensed.

I feel compelled to point out, however, that if the Bar did permit its officers, agents, attorneys or employes to lobby concerning the statutory powers, duties or appropriations of the Bar it would appear to be in violation of the restrictions placed upon "legislative activities" of the Bar by the Supreme Court.

It is obvious that the Supreme Court will take jurisdiction under its general supervisory powers over the integrated

bar should any violations of the restrictions placed on "legislative activities" occur. See *Axel v. State Bar,* (1963) 21 Wis. 2d 661, 124 N.W. 2d 671.

Thus, although all other state agencies are free to lobby on any matters not related to their own statutory powers, duties or appropriations, the Bar may lobby only in regard to legislation dealing with the administration of justice, court reform and legal practice.

One other point deserves attention before reaching a conclusion on this opinion. Section 13.66 (1), Stats., provides in part as follows:

"No principal shall authorize or permit any lobbyist employed by him to practice lobbying in respect to any legislation affecting the pecuniary interest of such principal until the lobbyist is duly licensed and the name of such lobbyist is duly entered in the file."

It has been intimated by some that if legislation could affect the statutory legal fees of a member of the Bar, such as probate fees, the above statute would apply to the Bar as a principal. I must reject such contention. The test under that statute would be whether the "pecuniary interest" of the State Bar as a separate entity was to be affected. The mere fact that a legislative bill might in some way have an influence on individual lawyers pecuniary interest would not be controlling.

In *Lathrop v. Donohue,* supra, at p. 239, the court seems to have settled the question with the following language:

"The plaintiff complains that certain proposed legislation, upon which the State Bar has taken a stand, embodies changes in substantive law, and points to the recently enacted Family Code. Among other things, such measure made many changes in divorce procedure, and, therefore, legal practice. We do not deem that the State Bar should be compelled to refrain from taking a stand on a measure which does substantially deal with legal practice and the administration of justice merely because it also makes some changes in substantive law."

CONCLUSION

The State Bar being an agency of the state may permit its officers, agents, attorneys or employes to engage in "lobbying" as that term is defined in sec. 13.62 (1), Stats., without registering itself and its lobbyists so long as the lobbying does not concern the statutory powers, duties or appropriations of the State Bar as an individual and separate entity. The State Bar is further limited in such activities by the Supreme Court's interpretation of the bylaws governing the State Bar to matters before the legislature concerning the administration of justice, court reform and legal practice.

Employes of the State Bar need not register or be licensed if their activities fall within the above limitations; except, that if any bill would affect the pecuniary interests of that person he could not "* * * attempt to influence any member of the legislature to vote for or against any (such) measure * * *" without first being duly registered and licensed as provided in sec. 13.70 (1), Stats.

RWW:LLD

Public Records—Blood Tests—Under sec. 346.71 (2), Stats., blood test records of the coroner are not confidential. The admissibility of such records is limited by sec. 966.20 (3), Stats.

December 18, 1970.

ALVIN L. WOODMANSEE, *District Attorney*
Iowa County

Your predecessor in office asked for my opinion whether sec. 346.71 (2) Stats., prohibits county coroners from releasing the results of blood tests conducted pursuant to that statute.

This section provides that the coroner shall require that a blood specimen be withdrawn from the body of certain persons who die in automobile accidents and reads in part:

" * * * The blood so drawn shall be forwarded to a laboratory approved by the state board of health for analysis of the alcoholic content of such blood specimen. The coroner causing the blood to be withdrawn shall be notified of the results of each analysis made and shall forward the results of each such analysis to the state board of health. The state board of health shall keep a record of all such examinations to be used for statistical purposes only. The cumulative results of the examinations, without identifying the individuals involved, shall be disseminated and made public by the state board of health."

The State Board of Health, now the Division of Health of the State Department of Health and Social Services, has approved the State Laboratory of Hygiene for the purpose of conducting these blood alcohol tests. The blood samples obtained at the direction of the coroner are sent to this laboratory. This laboratory conducts the tests and prepares a report of the results. The laboratory keeps a copy of this report and sends a copy to the coroner and a copy to the Division of Health. In the hands of the coroner, such report is a public record which may be freely inspected and copied by any member of the public, as provided by sec. 18.01, Stats. The coroner is free to reveal the contests of such report. However, it is possible that he could refuse public access to such information if he felt that the harmful effect of publication would outweigh the benefit to be gained by making such information available. *State ex rel. Youmans v. Owens,* (1965) 28 Wis. 2d 672; *Beckon v. Emery,* (1967) 36 Wis. 2d 510.

In the hands of the Division of Health, such report would likewise be subject to public inspection, except that the legislature, by the enactment of sec. 346.71 (2), Stats., has chosen to prohibit this. The statute provides that the Division of Health shall keep a record of all such examinations to be used for statistical purposes only. That agency is required to make public the cumulative results of such examinations without identifying the individuals involved. These Division of Health records are confidential in the sense that they may be used only for statistical purposes without identifying the persons involved. They may not be used for any

other purpose. This statute protects these records from public inspection, subpoena, or testimonial divulgence in court or administrative proceedings. In 57 OAG 187, at page 189, my predecessor in office stated in regard to such records:

"It is obvious the legislature intended that the record concerning the alcoholic content of blood taken from persons deceased as a result of automobile accidents in this state would not be made public, but would be used only for 'statistical purpose'. The language used in the statute is sufficient to deny public access to such records. * * *"

While this may have been the intention of the legislature, it is my opinion that this statute imposes the cloak of confidentiality only on the records of the Division of Health. This statute does not provide that the coroner's records of these examinations shall be confidential. Thus a coroner may release the results of such examinations. However, sec. 966.20 (3), Stats., provides that such evidence shall not be admissible in any civil action brought against the deceased or his estate as a result of any act of the deceased.

RWW:AOH

Physicians—Department of Regulation and Licensing— Unlicensed foreign graduate physicians who act as surgical assistants or helpers at the operating table directly aiding a licensed surgeon in surgical procedures are in violation of sec. 448.02 (1), Stats., for practicing surgery without a license. Licensed surgeons who permit such unlicensed persons to act as surgical assistants or helpers also violate sec. 448.02 (1), Stats., as parties to a crime and are guilty of unprofessional conduct within the meaning of sec. 448.18, Stats.

December 24, 1970.

THOS. W. TORMEY, JR.
Department of Regulation and Licensing

You ask my formal opinion concerning the use or hiring of unlicensed foreign graduate physicians as "operating room technicians" or "assistants in surgery" when they do not in fact hold a license or other proper certification from the Medical Examining Board.

You indicate that these individuals act as surgical assistants or helpers at the operating table, presumably for consideration. They directly aid the surgeon in the surgical procedures by using instruments to clamp vessels, to hold or retract tissues, aid in closing the wound, and perform other related services.

You ask whether these unlicensed foreign graduate physicians, who are doing work which amounts to that of an intern or resident trainee, are violating any of our statutes relating to the practice of medicine or surgery. I assume they have not been licensed as foreign graduates under sec. 448.03 (2), Stats.

Section 448.02 (1), Stats., formerly 147.14 (1), Stats., provides as follows:

"No person shall practice or attempt or hold himself out as authorized to practice medicine, surgery, or osteopathy, or any other system of treating the sick as the term 'treat the sick' is defined in s. 445.01 (1) (a), without a license or certificate of registration from the examining board, except as otherwise specifically provided by statute."

Section 445.01 (1) (a), Stats., formerly 147.01 (1) (a), Stats., provides:

" 'Treat the sick' means to examine into the fact, condition or cause of human health or disease, or to treat, operate, prescribe or advise for the same, or to undertake, offer, advertise, announce or hold out in any manner to do any of the aforementioned acts, for compensation, direct or indirect, or in the expectation thereof."

The practice of medicine, which includes the use of medicine and drugs for the purpose of either curing or alleviating bodily diseases, is to be distinguished from the practice of surgery, which is confined to manual operation usually

performed by surgical instruments or appliances. 70 C.J.S. *Physicians and Surgeons* sec. 1, p. 815; 29 OAG 148 (1940). Thus a person could participate in the practice of surgery by performing acts which might not constitute the practice of medicine.

There is no statutory definition of the practice of surgery nor is there a definition of the practice of medicine. Hence these terms must be construed "according to common and approved usage" of the language. Sec. 990.01, Stats. *Webster's Third New International Dictionary* defines surgery as "a branch of medicine that is concerned with diseases and conditions requiring or amenable to operative or manual procedures."

Generally speaking, a person may not practice or attempt to practice medicine or surgery, or any other system of treating the sick, without a license from the Board, except as otherwise specifically provided, such as the practice of chiropody, chiropractic, nursing, and physical therapy, all of which involve treating the sick to some extent within the meaning of the statutory term above quoted. Another exception is found under sec. 448.04, Stats., formerly sec. 147.151, Stats., which provides that a temporary educational certificate, issued annually and which may be renewed annually for not more than four years, may be issued by the Board for postgraduate educational training in a teaching hospital in either medicine or surgery. The holder of such a certificate may, under the direction of a person licensed to practice medicine or surgery in this state, perform services which ordinarily would be prohibited to an unlicensed person.

Even before the passage of sec. 147.151, Stats., the courts recognized that hospital internship did not constitute the illegal practice of medicine, nor did nurses' training in a hospital constitute illegal practice of nursing. *Nickley v. Eisenberg,* (1931) 206 Wis. 265, 239 N.W. 426.

The avowed purpose of sec. 448.04, Stats., permitting temporary educational certificates, as enacted by ch. 604, Laws 1953, is stated in subsec. (2), thereof, as follows:

"The purpose of this section is solely to provide opportunities in this state for the post-graduate education of certain persons having training in medicine and surgery satisfactory to the examining board, without compliance with the licensure requirements of this chapter. Nothing herein contained shall be construed as changing in any respect the requirements for licensure to practice medicine and surgery in this state. The violation of the provisions hereof by the holder of such a certificate shall constitute cause for the revocation thereof."

The legislature has prohibited any person from practicing medicine or surgery or treating the sick except with a license from your board or as otherwise specifically provided by the statutes of this state. Unless a person has a license in one of the categories set out by statute, it is illegal to engage in any of the activity prohibited without licensure.

This office gave your board an opinion in 43 OAG 114 (1954) in response to a question concerning a graduate of an unapproved foreign medical school who was not eligible for licensure in Wisconsin. Your board questioned whether this person could be employed by a state agency in an "administrative capacity" where the duties would require that he do "some consultation work" in connection with the position. Your board was advised as follows:

"If, on the other hand, his duties would require him to perform any act for which a license is required by ch. 147, Stats., then he could not lawfully perform such act without a license. When you say 'we understand that he would also be required to do some *consultation* work in connection with this position,' we infer you mean 'consultation' in the professional sense. If it is intended that the subject shall professionally counsel either laymen or doctors for purposes of treating the sick, such consultation would be unlawful without a license."

In the instant case the foreign graduates are assisting in surgical procedures, which you have described as being akin to the functions of an intern or resident trainee. I must conclude that if consultation by a foreign graduate not licensed in this state is the illegal practice of medicine then assisting

in the surgical procedures you describe would be the illegal practice of surgery.

In answer to your first question, therefore, individuals who act as assistants or helpers at the operating table where they directly aid the surgeon in the surgical procedures by using instruments to clamp vessels, to hold or retract tissues, and aid in closing the wound, are practicing surgery within the meaning of sec. 448.02 (1), Stats., and must be licensed in an appropriate category by the Board, or by the Board of Nursing if the person acts as a surgical nurse.

Because your board is responsible for the discipline of your licensees, I feel compelled to comment on the conduct of medical doctors who permit unlicensed persons to perform surgical acts. The Joint Commission on Accreditation of Hospitals, an organization which includes the American College of Physicians, the American College of Surgeons, the American Hospital Association, and the American Medical Association as its members, has adopted a standard concerning surgical assistants. Under this standard, in any procedure with unusual hazard to life there must be a qualified physician present and scrubbed as first assistant. In order to avoid violating sec. 448.02 (1), Stats., such assistant would have to be a physician duly licensed by your board.

Since the illegal practice of medicine and surgery is a crime under our statutes, any person who intentionally aids and abets the commission of such crime, or is a party to a conspiracy with another to commit it, is a party the same as the person committing the crime, in accordance with sec. 939.05, Stats.

In *State v. Paul,* 56 Neb. 369, 76 N.W. 861 (1898), an unlicensed physician who was practicing with and under the direction of a licensed physician was guilty of violating the medical practice act. In *Gobin v. State,* 9 Okl. Cr. 201, 131 P. 546 (1913), the court cited the *Paul* case and upheld the conviction of both Gobin, an unlicensed physician, and Freeman, a licensed physician with whom he practiced. The court sustained Freeman's conviction on the ground that

he aided and abetted another to violate the medical practice act.

In a 1961 case, *Magit v. Board of Medical Examiners*, 17 Cal. Rptr. 488, 366 P. 2d 816 (1961), the Supreme Court of California determined that it was unprofessional conduct for Dr. Magit, a director and chief anesthesiologist of the Beverly Hills Doctors Hospital, to employ Francisco Rios, Luciano Celori, and Ahmet Ozbey to assist him in the practice of medicine and paying them salaries knowing they had no licenses which authorized them to practice medicine in California. They were all medical graduates, Rios having a medical degree from a school in Mexico, Celori from a school in Italy, and Ozbey from a school in Turkey. However, they were not licensed to practice any of the healing arts in any of the states. The court summarized the law on the subject at page 820 as follows:

"In the absence of some statutory basis for an exception, such as those with respect to nurses and persons engaged in medical study or teaching, one who is not licensed to practice medicine or surgery cannot legally perform acts which are medical or surgical in character, and supervision does not relieve an unauthorized person from penal liability for the violation of statutes which, like section 2141 of the code, prohibit the unlicensed practice of medicine. (State v. Cornelius, 200 Iowa 309, 204 N.W. 222, 223; State ex rel. Collet v. Scopel (Mo.) 316 S.W. 2d 515, 519; State v. Young (Mo. App.) 215 S.W. 499, 501; State v. Paul, 56 Neb. 369, 76 N.W. 861, 862; Gobin v. State, 9 Okl. Cr. 201, 131 P. 546, 547, 44 L.R.A., N.S., 1089.)"

The allowing of unlicensed persons to participate in surgical procedures, as you have described, by a physician and surgeon licensed by your board would constitute unprofessional conduct within the meaning of sec. 448.18, Stats.

You ask a second question regarding the legality of similar activity on the part of persons known as physicians' aides. You say that schools are training these aids for work with pediatricians, surgeons, inhalation therapists, and other medically related professions. You wonder whether this type of work is regulated by any statutory provision.

I would need more information as to the specific functions and duties of these aides before I could give you a definite opinion on whether their functions may constitute the illegal practice of medicine.

It is impractical to attempt to lay down a rule or guide as to what conduct would and what would not constitute treating the sick without a complete statement of facts as to precisely what the subject will be required to do. We shall be glad to give this question further consideration if the board is able to specify with particularity what the duties of these various positions will be.

RWW:LLD

Teachers Retirement Fund—National Emergency—A war or national emergency has existed within the meaning of sec. 42.45 (3), (4), Wis. Stats. (1969), relating to the Wisconsin Teachers Retirement Fund, between September 16, 1940, and December 31, 1946, and from June 25, 1950, to the present time. A war or national emergency has existed within the meaning of sec. 42.81 (12), Wis.Stats. (1969), relating to the Milwaukee Teachers Retirement Fund from September 16, 1940, to the present time.

December 29, 1970.

ROBERT P. LOGAN
Retirement Research Committee

You request my opinion on the following question relating to teaching experience credit and deposits under the teacher retirement funds:

"During what period or periods since September 16, 1940, to date, has a war or national emergency existed within the meaning of secs. 42.45 (3), (4) and 42.81 (12) of the 1969 Wisconsin Statutes?"

Section 42.45, Stats. (1969), concerns the State Teachers' Retirement Fund, while section 42.81, Stats. (1969), concerns

the Milwaukee Teachers' Retirement Fund. The material portions of such statutes read:

"42.45 (3) Any member who left the teaching profession in Wisconsin from a position in which he was making or in which he had been compelled to make required deposits * * * to serve, and who served, the United States or any of its allies in World War I, in World War II, *or after June 25, 1950 and during a period of national emergency* or under P.L. 87-117, * * * who teaches in Wisconsin after August 4, 1951, in a position in which such member is compelled to make required deposits * * *, shall be credited with teaching experience for the time so served, of which not to exceed 4 years shall be credited as teaching experience in the public schools, the state colleges or the university in this state, * * *."

"42.81 (12) In determining the teaching service record and computing the amount of annuity payable under this subchapter the board shall credit each applicant for annuity with time absent on leave from teaching duty while serving in the military or naval forces of the United States, * * *, during any war, *or during a period officially proclaimed to be a national emergency* or * * * under P.L. 87-117; and the board shall credit each applicant for annuity, serving as aforesaid, with a sum equivalent to the total amount which would have been reserved *from and after September 16, 1940,* from the salary of such applicant for payment into the retirement fund if such applicant's teaching duties had not been interrupted by such service, * * *."

Credit is provided under the State Teachers' Retirement Fund for service, for the purposes of the subject question, during World War II and after June 25, 1950, during any period of national emergency. The legislature did not set a specific date for the beginning of World War II in sec. 42.45 (3), Stats. (1969), but such date was specified in sec. 42.81 (12), Stats. (1969), relating to the Milwaukee Teachers' Retirement Fund and in sec. 41.08 (2) (a), Stats. (1969), relating to the Wisconsin Retirement Fund. September 16, 1940, the date of the Selective Training and Service Act of 1940 was so specified in such statutes in these words:

"41.08 (2) (a) Prior service credits pursuant to sub. (1) (a) 1. shall be granted for periods of service in the armed forces of the United States during World War II, *which shall include such service subsequent to September 16, 1940* * * *"

"42.81 (12) * * * the board shall credit each applicant for annuity, serving as aforesaid, with a sum equivalent to the total amount which would have been reserved *from and after September 16, 1940*, from the salary of such applicant for payment into the retirement fund if such applicant's teaching duties had not been interrupted by such service, upon proof of such service being furnished to the board."

It therefore appears that the legislature intended September 16, 1940, the effective date of the Selective Training and Service Act of 1940, to be the starting date of World War II for retirement fund purposes. I am aware of nothing which would indicate any intention that a different starting date be used for the Wisconsin Teachers Retirement Fund. I therefore conclude that the starting date of World War II as used in secs. 42.45 and 42.81, Stats. (1969), is September 16, 1940.

The ending date of World War II, for the purposes of the teachers retirement funds is not specified in the statutes. Section 45.35 (5a), Stats., defines the World War II "war period" for veteran benefit purposes as between August 27, 1940, and July 25, 1947. I am aware of no Wisconsin court cases which define the specific starting and ending dates of World War II. Terms such as "duration of the war" and "during the existing war" have, however, been discussed by the courts of other states.

The phrase "duration of the war" is discussed in *Syquia v. United States,* (1954) 124 F. Supp. 638. The court defined the ending date of such term, as used in federal statutes containing a grant of power to the government, by stating that the courts have uniformly held that powers so granted continue until the signing of the formal peace treaty or some other equivalent act. This court further held, however, that the same definition of "duration of the war" is

not applicable to cases involving the interpretation of contracts, stating at p. 641:

"When a lease of real estate or a contract contains a provision that the tenancy or performance is to continue 'for the duration of the war,' 'until the conclusion of the war,' 'until the end of the war,' and even 'until the final treaty of peace has been signed,' the majority of courts have held that in the absence of evidence that a different meaning was assigned to the phrase by both parties, such phrases are to be interpreted as they are commonly understood by laymen, and that such commonly understood meaning is 'until actual hostilities have ceased.' The practical effect of these decisions has been that in cases involving leases containing such phrase the courts have held that there is a presumption that the parties intended the leases to last only until the cessation of actual hostilities and for whatever additional definite period is provided for in the leases."

and further at p. 645:

"As the case now stands, plaintiffs are suing on leases which contained the phrase 'duration of the war' to define the terms thereof, and in the absence of convincing proof that the parties were speaking of 'war' in its political rather than in the sense of actual and open hostilities, the term of the leases ended no later than six months after September 2, 1945, the date of the Japanese surrender to the United States."

In *Burger v. Employees Retirement System*, (1951) 101 Cal. App. 2d 700, 226 P. 2d 38, 40, the California court was asked to interpret a charter amendment which suspended a provision requiring that the pensions of retired municipal employes be reduced by any amounts employes earned from private employment "during the existing war." The court accepted the presidential proclamation of December 31, 1946, as declaring the end of hostilities and stated at pp. 39-40:

"Plaintiff points out that in the presidential proclamation of December 31, 1946 the president stated: *'Although a state of war still exists,* it is at this time possible to declare * * * that *hostilities have* terminated.' (Emphasis supplied)

"That a technical state of war continued to exist after this presidential proclamation, and still exists, is unquestionable. If the decision of this appeal depended necessarily on the termination of the war in a technical sense the judgement herein could not stand. But many decisions recognize that in a popular sense a war is terminated with the surrender or capitulation of the enemy and that in that sense the termination of all hostilities is the termination of the war."

The general rule of statutory construction is that words of statutes are to be given their ordinary and commonly understood meaning. *Telemark Co. Inc. v. Department of Taxation,* (1965) 28 Wis. 2d 637, 137 N.W. 2d 407. A war in the popular sense ends upon cessation of all hostilities. The final agreement to end hostilities with an enemy in World War II was signed on September 2, 1945. However, the hostilities which mark the period of a war may continue after agreements to end hostilities are signed just as hostilities may close before final treaties of peace are signed. The question of when the hostilities of World War II ended is one of fact and it is indicated that hostilities continued until December 31, 1946, by the fact that it was not until that date that the President of the United States proclaimed the cessation of hostilities. I therefore construe World War II as used in the subject teachers retirement statutes to encompass the period from September 16, 1940, to December 31, 1946.

Section 42.45 (3), Stats. (1969), provides credit for service in the armed forces "after June 25, 1950, and during a period of national emergency." National emergencies were proclaimed by the President of the United States on September 8, 1939, proclamation No. 2352, 4 F.R. 3851, 54 Stat. 2643, on May 27, 1941, proclamation No. 2487, 6 F.R. 2617, 55 Stat. 1647, and on December 16, 1950, proclamation No. 2914, 15 F.R. 9029, 64 Stat. A. 454. The national emergencies of 1939 and 1941 were terminated by proclamation No. 2974, April 28, 1952, 17 F.R. 3813, 66 Stat. c 31, while the national emergency of 1950 has not been terminated by the President and remains in effect today. The question which then arises is whether the term "national emergency," when used in the statutes relating to teachers retirement, means something

other than an emergency declared and terminated by the President of the United States. "National emergency" is not defined in the Wisconsin statutes or case law. However, in *Brown v. Bernstein,* (1943) 49 F. Supp. 728, 731, the court examined examples of federal legislation containing various phrases similar to and used synonymously with "during the existence of war or of a National Emergency" stating:

"It is to be noted with emphasis that the matter of a national emergency is, and always has been, left to the judgment of the President. This has been expressly and repeatedly confirmed in many statutes giving the President varied powers whenever in his judgment a national emergency exists. * * *"

I therefore construe "national emergency" as used in secs. 42.45 (3) and 42.81(12), Stats. (1969), to be an emergency declared by the President of the United States and existing until duly terminated by him.

It is therefore my opinion that credit is available under sec. 42.45 (3), (4), Stats. (1969), relating to the Wisconsin Teachers Retirement Fund from September 16, 1940, to December 31, 1946, and from June 25, 1950, to the present time.

Under sec. 42.81 (12), Stats. (1969), relating to the Milwaukee Teachers Retirement Fund, credit is provided commencing on September 16, 1940, during any war and during any national or limited national emergency. Since as I have previously shown above, national emergencies have been in effect during all times between September 16, 1940, to the present time, credits are available under the specific terms of this statute for this entire period.

Therefore it is my opinion that a state of war or national emergency has existed within the meaning of section 42.81 (12), Stats. (1969), from prior to September 16, 1940, to the present time.

RWW:WMS

Welfare Records, Confidentiality Of—Social Security—Function of county agency in furnishing information to public regarding social security aid recipients is nondiscretionary and limited under sec. 49.53 (2), Stats. County welfare boards are an integral part of county administration and entitled to full access to case records. Advisory committees are not. Access to information concerning individual social security aid recipients by county board of supervisors is limited by its limited role in administration of the aid programs. Sec. 49.53 (1), Stats. Exclusions of sec. 48.78, Stats., relating to confidentiality of child welfare records apply to advisory committees but not to county welfare boards. The statute does not preclude release of non-identifying data to such committees.

December 30, 1970.

WILBUR J. SCHMIDT, *Secretary*
Department of Health and Social Services

You have raised a number of questions involving an interpretation of statutes pertaining to the confidentiality of welfare records. Most of them concern sec. 49.53, Stats., relating to social security aid programs. You note that this statute has taken on an increasing significance because of interest generated by taxpayers and recipients through their respective organized groups.

You also ask what information is available to county welfare boards and their advisory committees under sec. 48.78, Stats., which relates to the confidentiality of child welfare records.

Section 49.53, Stats., reads as follows:

"Limitation on giving information. (1) The use or disclosure of information concerning applicants and recipients of aid to families with dependent children, aid to the blind, old-age assistance and aid to totally and permanently disabled persons for any purpose not connected with the administration of the programs, except as provided under sub. (2), is prohibited. Any person violating this section

may be fined not less than $25 nor more than $500 or imprisoned in the county jail not less than 10 days nor more than one year or both.

"(2) (a) Each county agency administering aid to the blind, aid to families with dependent children, old-age assistance or aid to totally and permanently disabled persons shall maintain a monthly report at its office showing the names and addresses of all persons receiving such aids together with the amount paid during the preceding month, but nothing herein contained shall be construed to authorize or require the disclosure in such report of any information (names, addresses, amounts of aid or otherwise) pertaining to adoptions, to aid furnished to or in behalf of unmarried mothers pursuant to s. 49.19 (4) (d) and (g), or to aid furnished for the care of children in foster homes pursuant to s. 49.19 (10).

"(b) Such report shall be open to public inspection at all times during regular office hours and may be destroyed after the net succeeding report becomes available. Any person except any public officer, seeking permission to inspect such book shall prove his identity and shall be required to sign a statement setting forth his address and his reasons for making such request and indicating that he understands the provisions of par. (c) with respect to the use of the information obtained. The use of a fictitious name is a violation of this section. Within 72 hours after any such record has been inspected, the agency shall mail to each person whose record was inspected a notification of that fact and the name and address of the person making such inspection. The agency shall keep a record of such requests.

"(c) It is unlawful to use any information obtained through access to such report for political or commercial purposes. The violation of this provision is punishable upon conviction as provided in sub. (1)."

Before considering your specific questions, it might be well to review background material to provide a setting for an interpretation of this statute.

The statute seeks to safeguard information gained by the county agency from recipients in connection with the appli-

cation process as well as information from independent sources concerning the recipient after application has been made. Basically, the secrecy provisions of the statute are for the benefit of the recipient and may be waived by him under certain circumstances. 46 OAG 316. Case records contain social, medical and economic information. Personal evaluations made by a caseworker to assist in rendering services to the client are contained in narrative entries. Privileged medical reports are often obtained where physical capacity is an eligibility factor. Family relationships may include not only marital history, but adoptions, paternity matters and foster home circumstances as well. This type of information is also protected by other confidentiality statutes.

It should be clear that the case record is not a document available for public inspection. Indeed, the interest in the confidentiality of the case record has been recently held to extend beyond the welfare recipient. *Ruth Banner, et. al. v. Eugene Smolenski, et. al.*, U.S. D.C. of Mass., Aug. 7, 1970 (CCH Poverty L.Rep. par. 11, 947).

The confidentiality statute has undergone a significant policy change since its inception thirty years ago. At that time the Federal Social Security Act required that states wishing to participate in the federal funding of the social security aid programs provide that welfare records be confidential except for purposes directly connected with the administration of the programs. The Wisconsin statute followed this mandate.

In 1949 the attorney general ruled that sec. 49.53, Stats., prohibited the furnishing of names and addresses of social security aid recipients to the assembly, since that body was legislative rather than administrative in character. The opinion noted that the confidentiality statute did not preclude the supplying of statistical data. 38 OAG 251.

Subsequently, the attorney general ruled that the names of recipients and amounts of assistance received by them could not be furnished to the county board or to individual supervisors in absence of an unusual situation. 39 OAG 205.

In 1951 a federal court considered an Indiana statute which required county welfare boards to file a welfare report showing names, addresses and amounts of payments with the county auditor. The report was to be open to the public during office hours of the auditor. The administrator of the Federal Social Security Act cut off federal funds to the State of Indiana on the basis of non-compliance with federal requirements. The state brought suit. The court held that it could not set aside the determination of the administrator. *The State of Indiana v. Ewing*, 99 F. Supp. 734 (District of Columbia 1951).

In the wake of this federal court decision, congress amended confidentiality requirements by providing that federal funds would not be denied states in the categorical aid programs if legislation prohibited the use of welfare records for commercial or political purposes. Sec. 618 of the Revenue Act of 1951, 65 Stats., 569. The amendment was sponsored by Senator Jenner of Indiana.

Wisconsin liberalized the confidentiality restrictions by creating subsec. (2) of present sec. 49.53, Stats. See ch. 185, Laws 1953.

In light of the Jenner amendment, it appears that rules and regulations of the Department of Health, Education and Welfare and the statutory provisions of the State of Wisconsin may be more restrictive than necessary to meet congressional requirements. For discussion of this matter see *Finance Committee of Falmouth v. Falmouth Board of Public Welfare*, (1963) 345 Mass. 579, 188 N.E. 2d 848.

Your questions concern the degree of access to welfare records by various groups. I will take up those questions in the sequence that they were raised in your opinion request.

You ask what information may be released to the public and what is the extent of agency responsibility in this area.

Members of the public are not involved in the administration of the four categorical aid programs. They are entitled to information regarding recipients only to the extent specified by subsec. (2). There are no exceptions under the statute or the rules.

It is to be noted that the subsection imposes no burden with respect to disclosure. It merely prohibits use of welfare information for political or commercial purposes.

County agency responsibility in this matter was broadly outlined in my informal opinion to you dated May 9, 1969. The function of the county agency in supplying information to members of the public under paragraph (b) is purely ministerial and nondiscretionary. The public is entitled to such information under the conditions set forth by the statute even though the use to which that information is ultimately applied may result in a violation of paragraph (c). Possible violations should be referred to the district attorney. Whether a referral warrants prosecutions rests in the discretionary province of the county prosecutor. The responsibility of determining whether conduct crosses the line of demarcation drawn by a criminal statute for prosecutive purposes is neither a function of the county agency nor the state department.

You request my comments as to the status in the administration of the categorical aids of (1) the county welfare board, (2) advisory committees that may be appointed by the welfare board pursuant to sec. 46.22 (2), (d), Stats., and (3) the county board of supervisors. You ask what part of the case record is available to each.

The county welfare board is the local supervisor of the county welfare agency. Section 46.21 (2), Stats., relating to populous counties provides in part that:

"Such board shall be charged with supervising the operation . . . by the director . . . of . . . [the] department of public welfare created by s. 49.51 (2) (a) . . . ."

Sec. 46.22 (2) (c), Stats., relating to other counties requires the board to:

Supervise the working of the county department of public welfare and [it] shall be a policy-making body determining the broad outlines and principles governing the administration of the functions, duties and powers assigned to said department under s. 46.22 (4) and (5)."

It should be obvious that the board cannot discharge its managerial function if information concerning categorical aid programs is withheld under the guise of the confidentiality statute, and for that reason I am of the opinion that the county welfare board is entitled to full access to case records kept by the county agency.

Committees appointed by the county welfare boards, either under sec. 46.22 (2) (d), Stats., or federal rules, function strictly in an advisory capacity to the boards. They are limited to the specific purpose for which they are created. They do not advise the county agency. No administrative responsibility devolves upon them. Thus, these committees are not entitled to examine case records. Any information supplied to them should be stripped of data that is identifiable with particular recipients.

The position of the county board of supervisors is very remote with respect to the "administration" of the categorical aid programs. The local supervisory function is uniquely vested in the county welfare board and overall supervision is with the state department. Secs. 46.206 and 49.50, Stats. Traditionally, case records have not been available to the governing body of the county. It appears to me that established practice is in keeping with the spirit and intent of the statute, particularly in view of the fact that there has been legislative acquiescence in this practice for more than twenty years.

Information to which the county board of supervisors is entitled must be determined on a case-to-case basis as provided by statute. For example, reports on old-age assistance liens are provided by the district attorney under sec. 49.26, Stats. Petitions may be filed by the county for a fair hearing under sec. 49.50 (8), Stats., involving eligibility of general relief recipients for categorical aids. Audits and administrative review reports may be made to the chairman of the board under sec. 46.206 (1), Stats.

Fiscal information regarding categorical aid programs comprise part of the annual county budget which must carry the imprimatur of the county board. As stated in rule PW-PA 20.17 (3) (b):

"The use or disclosure of financial information secured by proper public officials from the records of the county treasurer or county clerk in connection with fiscal governmental functions is deemed to be for a purpose directly connected with the administration of the social security aids within the meaning of section 49.53, Wis. Stats."

The board of supervisors in populous counties also have an overall local policy function in the categorical aid programs.

Section 46.21 (2) (h), Stats., reads:

"Rules and regulations adopted by and policies established by such board of public welfare shall be subject to change by the county board of supervisors, but only by a two-thirds vote of the members-elect thereof."

Based on the foregoing, it should be clear that county boards have distinct statutory duties in connection with the categorical aid programs. Information concerning recipients which relate to these duties is obviously within the meaning of "administration" as used in subsec. (1) of the statute. As stated by the court in construing the meaning a word used in the state employes retirement fund:

". . . we feel that the act should be studied in its entirety, and that an ordinary, common-sense meaning should be given to the various sections and to the words used therein to make them effective to carry out the general plan."

State ex rel. Morse v. Christianson, (1952) 262 Wis. 262, 266.

The position of the county board in relation to the programs and the confidentiality statute is peculiarly equivocal. The program has federal requirements and regulations which control state and local application. *Kenosha County C.H. Local v. Kenosha County,* (1966) 30 Wis. 2d 279, 140 N.W. 2d 277 stands for the anomalous proposition that a county welfare board has more authority than the board of supervisors in personnel matters relating to the programs. (Partially changed by ch. 154, Laws 1969).

Although I am of the opinion that the county board of welfare because of its managerial function is entitled to full access to case records, the position of the board of supervisors in the programs does not warrant such access.

On the other hand, the county board is entitled to information in connection with administration as permitted by sub. (1). The extent of that information will vary in specific circumstances on a need-to-know basis and founded upon legal authority. So-called fishing expeditions clearly transcend statutory prescription in this matter.

A final comment should be made concerning this particular confidentiality statute. Subsection (2) provides a penalty for misuse of information by a member of the public. In contradistinction, sub. (1) imposes a penalty for mere disclosure if not connected with purposes of administration. The proscription runs against officials outside of the county agency as well as employes of that department. Use or disclosure of information contained in these records may violate sec. 49.53 (1), Stats., regardless of the original reason for inspection. Executive sessions appear to be a necessity when dealing with matters protected by confidentiality statutes.

Your remaining question is what information, if any, may be furnished to county welfare boards or its advisory committees under the limitations of sec. 48.78, Stats., relating to the confidentiality child welfare records. This statute provides:

"Confidentiality of records. Records kept or information received by the department, *county agencies specified in s. 48.56*, licensed child welfare agencies, licensed day care centers and licensed maternity hospitals regarding individuals in their care or legal custody shall not be open to inspection or their contents disclosed except by order of the court. This section does not apply to the confidential exchange of information between these agencies or other social welfare or law enforcement agencies regarding individuals in the care or legal custody of one of the agencies." (Emphasis supplied)

County agencies specified in sec. 48.56, Stats., include "a county welfare department authorized by the county board

under sec. 46.22 (5) (g), Stats., to provide child welfare services."

The county department of public welfare "consists of a county board of public welfare, a county director of public welfare, and necessary personnel." Sec. 46.22 (1), Stats.

Accordingly, county welfare boards, as part and parcel of county departments authorized to administer child welfare services, are entitled to access to confidential information under sec. 48.78 Stats., but such information must be kept confidential within the provisions of the statute. This interpretation appears to be consistent with the literal provisions of the statute as well as the statutory functions and duties of county welfare boards.

Committees appointed by the county welfare board are purely advisory in character. They are not enumerated in secs. 48.78 or 48.56, Stats., as an exempted agency. Hence, they are completely barred to child welfare files as provided by the confidentiality statute. Moreover, it is extremely doubtful that they have sufficient standing to obtain a court order which would permit an inspection of such records. On the other hand, there can be no objection to supplying such committees with statistical data which does not identify individuals for purposes of advising the board as to policy matters. The confidentiality statute was designed to protect individuals from humiliation and embarrassment. It was not meant to stifle all degrees of inquiry.

RWW:WLJ

Housing Code—Counties—Authority of a county to enact and enforce a minimum standards housing code discussed in reference to secs. 59.97 and 59.07 (51), Stats.

December 31, 1970.

CHARLES M. HILL, *Secretary*
Department of Local Affairs & Development

The following opinion is in response to an inquiry from your predecessor asking whether a county may adopt and enforce a county housing code, either as a separate ordinance or as an integral part of a county building code. This question is apparently prompted by the fact that federal law makes such local legislation a requirement for the eligibility of local governments to certain federal loans or grants. For instance, 42 U.S.C.A. Sec. 1451 (a), p. 96, provides that in entering into certain contracts and for the purposes of certain grants, the Secretary of Health, Education and Welfare of the United States is to give consideration to the extent to which local public bodies have undertaken positive programs:

"* * * (through adoption, modernization, administration, and enforcement of housing, zoning, building and other local laws, codes and regulations relating to land use and adequate standards of health, sanitation, and safety for buildings, including the use and occupancy of dwellings) * * *."

More specifically, many federal grants have been made contingent on whether the applicant has developed a "workable program" for community improvement, and 42 U.S.C.A. Sec. 1451 (c), pp. 97-98, provides in part, that no such program will be certified or re-certified unless:

"* * * (A) the locality has had in effect, for at least six months prior to such certification or recertification, *a minimum standards housing code, related but not limited to health, sanitation, and occupancy requirements,* which is *deemed adequate* by the Secretary [of Health, Education and Welfare], and (B) the secretary is satisfied that the locality is carrying out an effective program of enforcement to achieve compliance with such housing code * * *." (Emphasis added.)

Although the above quoted provisions convey a general understanding of what constitutes a housing code, they also point to the apparent flexibility of the term. Thus, while the federal law indicates that a housing code must at least relate to health, sanitation and occupancy requirements, it is also apparent that such an ordinance may include regula-

tions more usually identified with zoning or building codes as well as other regulations.

In addition, inasmuch as the federal law places the ultimate determination as to what constitutes an "adequate" housing code in the hands of federal officials, the term is obviously dependent to some degree upon federal interpretation.

However, a housing code appears to be essentially a focusing of the various police powers which a governing body may already possess on the area of housing. This appraisal appears to be consistent with the views expressed in commentaries on the subject. For instance, an article entitled, "Enforcement of Municipal Housing Codes," 78 Harvard L.Rev. (1965), 801, 803, describes the history of such codes as follows:

"Traditionally, housing regulations have been embodied in a variety of specialized municipal codes, such as health, building, and zoning codes. To simplify this complex legal scheme, regulations pertaining to structural soundness, fire safety, maintenance, sanitation, and occupancy were sometimes integrated into a single encompassing 'housing code.' Prior to the passage of the Housing Act of 1954, few cities had enacted such a separate code. That act required any city applying for federal urban renewal assistance to have a plan for code enforcement as part of its 'workable program'; * * * "

See also 40 Am. Jur. 2d, Housing Laws and Urban Redevelopment, p. 1067, Sec. 8. Likewise, the report of the National Commission on Urban Problems to the congress and to the President of the United States, entitled "Building the American City," House Document No. 91-34 (1968), contains a general definition of a housing code, at p. 274, which appears to follow the same general concept:

"* * * WHAT IS A HOUSING CODE?

"A housing code is an application of State police power put into effect by a local ordinance setting the minimum standards for safety, health and welfare of the occupants of housing. * * *"

Concern because of confusion as to what a housing code is and what it should do may have motivated the commission to furnish this further description:

"* * * It covers three main areas:

"(1) The supplied facilities in the structure, that is, toilet, bath, sink, etc., supplied by the owner;

"(2) The level of maintenance, which includes both structural and sanitary maintenance, leaks in the roof, broken banisters, cracks in the walls, etc.;

"(3) Occupancy, which concerns the size of dwelling units and of rooms of different types, the number of people who can occupy them, and other issues concerned on the whole with the usability and amenity of interior space.

"* * *"

The foregoing suggests that any conclusion as to whether counties possess power to enact and enforce a housing ordinance depends in large measure on the extent to which counties are authorized to promulgate health rules and adopt and enforce regulations such as those normally contained in sanitation, building and zoning ordinances.

Section 59.97 (4), Stats., grants counties general zoning powers outside the limits of incorporated cities and villages for "* * * the purpose of promoting the public health, safety and the general welfare * * *." See also secs. 59.07 (16) (zoning building inspector), 59.07 (16m) and (68) (fees), 59.971 (zoning of shorelands on navigable waters) and 59.99 (county zoning adjustment board), Wis. Stats. It also appears that since one of the important objects of comprehensive zoning is that of public health and sanitation, a certain amount of overlapping may exist between health or sanitation regulations and zoning regulations. 7 McQuillin, *Municipal Corporations,* (1968 Rev. ed.) p. 51, Sec. 24.219.

It must be recognized, however, that generally county zoning is not only limited to the unincorporated parts of the county but also, with the exception of shoreland zoning ordinances enacted under sec. 59.971, Stats., are ineffectual in those towns which have either refused to approve the basic

county zoning ordinance, pursuant to sec. 59.97 (5) (c), Stats., or have filed effective disapprovals in reference to amendatory county zoning ordinances under the procedure set forth in sec. 59.97 (5) (k), 1967 Stats., since renumbered sec. 59.97 (5) (e) 6 Stats., by ch. 55, Laws 1969, and amended by ch. 481, Laws 1969. It should also be appreciated that county zoning is subject to preemption in those areas of the county where a city or village exercises its extra territorial zoning power under sec. 62.23 (7a), Stats., and may be limited by such provisions as sec. 60.74 (7) and (8), Stats., which authorize towns to enact separate zoning ordinances under certain circumstances. In addition, of course, in those counties which fail to adopt a county zoning ordinance as provided by sec. 59.97, Stats., the zoning power remains in the towns. Sec. 60.74 (1), Stats.

The above discussion points up the weaknesses of the county zoning power as an effective tool or general authority for the promulgation of county housing code provisions. However, *building codes* are also said to bear a substantial relation to and tend to promote the public health, safety or general welfare, 13 Am. Jur. 2d, *Buildings*, p. 267, sec. 2, and they too are legislative enactments which normally rest upon the police power. 8 McQuillin, *Municipal Corporations*, (1965 Rev. ed.) p. 441, sec. 25.138.

Section 59.07, Stats., sets forth the general powers of a county board, "* * * which shall be broadly and liberally construed and limited only by express language * * *." Sub. (51) of the statute provides as follows:

"(51) BUILDING AND SANITARY CODES. Adopt building and sanitary codes, make necessary rules and regulations in relation thereto and provide for enforcement of such codes, rules and regulations by forfeiture or otherwise. Such codes, rules and regulations shall not apply within cities and villages which have adopted ordinances or codes concerning the same subject matter."

The line of demarcation between the two types of regulation, i.e., zoning and building codes, is not easily defined, though it has been suggested that the distinction is found in the measure of the public interest sought to be protected.

American Sign Corporation v. Fowler (Ky. 1955) 276 S.W. 2d 651, 654. In *Village of Wind Point v. Halverson,* (1968) 38 Wis. 2d 1, 155 N.W. 2d 654, our court discusses this difficulty at some length, beginning as follows at p. 8 of the opinion:

"The dividing line between a zoning regulation and a building code regulation is not easily drawn. These are two closely related facets of police power regulation. Both are designed to promote public safety, health and welfare.

"Authorities agree that there is a difference between building codes and zoning ordinances, but do not agree on the exact difference. One author defines the distinction in these words:

" 'Zoning ordinances prescribe the permitted and prohibited uses of land within the particular district. Building and housing codes and ordinances, on the other hand, have a more restrictive application to the use of lawfully existing buildings within zoned areas, and reach a field of regulation with respect to the construction and maintenance of buildings lawfully situated in a zoned area, as such construction and maintenance relate to the comfort, health and safety of those who occupy such buildings.' 3 Yokley, *Zoning Law and Practice* (3d ed.), p. 137, sec. 25-1."

One further aspect of the *Halverson* case, supra, which appears to relate to the question here under consideration, is the court's holding that a village ordinance requiring building setback lines (a typical zoning provision) could be validly enacted either as a zoning ordinance *or* as a building restriction or part of a building code. In so concluding, the court points to its previous liberal construction of the police power of a city or village to enact building regulations. This decision would appear to have some significance when considering the fact that there are apparently fewer statutory limitations on the power of a county to enact building and sanitary codes than on its power to enact zoning ordinances. In light of this decision, it is reasonable to conclude that the court would probably allow counties to enact regulations of the same nature as treated in the *Halverson* case, as building code regulations rather than as zoning code provisions,

even though such action would avoid the town approval requirement which would otherwise be applicable to county zoning ordinances adopted pursuant to sec. 59.97, Stats.

The foregoing appears to indicate that counties not only possess statutory authority to enact ordinances called "housing codes," under their authority to enact building and sanitary codes, but that, at least to the extent that the courts are willing to recognize that such regulations naturally tend to overlap the fields of public health and zoning, such housing codes may also include provisions which are more usually found in public health and zoning ordinances.

I do not mean to suggest, however, that Wisconsin counties possess the same powers as Wisconsin cities and villages in the enactment of such housing codes. It must first be appreciated that the exercise of the police power of the county over housing, by recourse to its statutory authority to regulate zoning, buildings and sanitation, may not always be exercised in the same measure as might otherwise be appropriate in large, more densely populated urban areas. 13 Am. Jur. 2d, *Buildings*, p. 268, sec. 2 and p. 296, sec. 30. See also *Bonnett v. Vallier*, (1908) 136 Wis. 193, 204, 116 N.W. 885.

In addition, counties generally lack authority to utilize the broad variety of enforcement options relating to the regulation of substandard housing conditions which are made available to cities, villages and towns by statute. For instance, sec. 66.05, Stats., grants broad powers to municipalities to declare buildings so old, delapidated, or out of repair as to be dangerous, unsafe, unsanitary or otherwise unfit for human habitation, occupancy or use; to order such buildings to be repaired or razed and removed; to placard such premises against use until repaired, and to enforce such orders by court action. In addition, sec. 66.05 (8), Stats., authorizes direct court action by cities and villages against deteriorated, blighted or dilapidated buildings. However, the term "municipality," as defined by sec. 990.01 (22), Stats., and as used in sec. 66.05, Stats., does not include counties. Furthermore, although counties possess general authority to institute actions against public nuis-

ances under ch. 280, Stats., sec. 280.21, Stats., which specifically declares buildings determined to be so old, etc., under sec. 66.05 (1), Stats., to be public nuisances, is of little practical use to counties.

Similarly, sec. 280.22, Stats., created by ch. 299, Laws 1969, provides that, in counties having a population of 100,000 or more, an action may be commenced to declare real property a public nuisance and to appoint a receiver for certain of such property if it is in violation of those provisions of a municipal building code which concern health or safety or of an order of the *county health department, county health commission,* or municipal health board or officer. However, only the city, village or town in which such property is located or a tenant may commence an action under that section. Likewise, counties are not included within the terms of the Urban Renewal Act, sec. 66.435, Stats., which specifically authorizes municipalities to prepare a workable program and establishes a procedure for the compulsory repair, rehabilitation, closing, demolition, removal and for the prevention and elimination of housing conditions which tend generally to be inimical to the welfare of residents.

In addition, the variety of combinations of public health authorities possible within a county and the degrees of decentralization of this function which are possible, would also appear to make the effective utilization of the personnel and statutory authority of a county health agency in any county housing code enforcement program improbable or impossible at present in most counties. See discussion of various applicable statutes in 57 OAG 245 (1968) at p. 247.

Finally, a county is further limited in the options available to enforce housing regulations by virtue of the language used in sec. 59.07 (51), Stats. Although this section provides for enforcement of county building and sanitary codes by forfeiture "or otherwise," such language must be interpreted in light of the established rule in Wisconsin that, "unless an act is established to be a nuisance per se or threatens to destroy property rights, an injunction will not issue" to aid enforcement of an ordinance. *Village of*

Wind Point v. Halverson, supra, at p. 11. See also *Caeredes v. Platteville,* (1933) 213 Wis. 344, 353, 251 N.W. 245. Thus, in *Miller v. Foster,* (1943) 244 Wis. 99, 11 N.W. 2d 674, legislative authority to enforce the provisions of a building code by "other necessary means" was not considered sufficiently specific to enable recourse to equitable relief.

In summary, then, considering a minimum standards housing code as simply a collection, in one comprehensive code, of various provisions relating to buildings which could normally be enacted under the general authority granted counties to adopt building, sanitary or zoning ordinances, it would appear that counties have statutory authority to enact a code. Whether a housing code is adopted as part of the county building code or as a separate ordinance is not considered of importance as long as the power being exercised is properly exercised and identified. I must emphasize, however, that such conclusion is subject to the significant limitations discussed above, including the fact that all of these powers are normally exercised only over a portion of the county and that counties do not possess the variety of enforcement options and specific statutory authorizations which are available to most Wisconsin municipalities when dealing with inadequate housing. Moreover, whether a county housing code, adopted within the confines of the above discussed statutory authorities, would be deemed "adequate" by federal standards must, of course, remain a question for the federal government.

RWW:JCM

Federal Assistance Contracts—Redevelopment Authority —Obligations, including notes, issued by a redevelopment authority under sec. 66.431, Stats., to evidence a direct loan from the federal government are subject to the provisions of said statute which limit the interest rate thereon to 6% per annum.

December 31, 1970.

CHARLES M. HILL, SR., *Secretary*
Department of Local Affairs and Development

You have requested my opinion as to whether a redevelopment authority organized and existing under the Blight Elimination and Slum Clearance Act, sec. 66.431, Stats., is authorized to obtain a direct loan from the federal government and issue notes in evidence thereof which carry an interest rate in excess of 6% per annum.

The necessity for such opinion request results from the fact that you have been advised that the Secretary of the Department of Housing and Urban Development has established an interest rate for new and amendatory federal assistance contracts in excess of 6% per annum. Apparently there are four pending contracts for federal aid which would be affected by the recent increase in interest rates applicable to such federal money. The four pending contracts involve approximately $2 million.

The Department of Housing and Urban Development apparently will not proceed to approve and execute such contracts unless they are advised that sec. 66.431, Stats., authorizes Wisconsin redevelopment authorities to pay the current "going interest rate" most recently established. It is my understanding that such rate has been established at 6⅞% for federal assistance contracts authorized during the six-month period ending December 31, 1970.

Section 66.431 (5) (a) 4.a., Stats., provides the basic authority to borrow money and issue evidence of such indebtedness, to apply for financial assistance, and to enter into contracts or agreements with the federal government. Under this provision, redevelopment authorities are authorized:

"4. a. To borrow money and issue bonds; to execute notes, debentures and other forms of indebtedness; and to apply for and accept advances, loans, grants, contributions and any other form of financial assistance from the city in which it functions, from the federal government, the state, county, or other public body, or from any sources, public or private for the purposes of this section, and to give such

security as may be required and to enter into and carry out contracts or agreements in connection therewith, and to include in any contract for financial assistance with the federal government for or with respect to blight elimination and slum clearance and urban renewal such conditions imposed pursuant to federal laws as the authority deems reasonable and appropriate and which are not inconsistent with the purposes of this section."

Section 66.431 (4) (j), Stats., provides that unless the context clearly indicates otherwise, the term "bonds" as used in sec. 66.431, Stats., is defined as follows:

"(j) 'Bonds' means any bonds (including refunding bonds), notes, interim certificates, certificates of indebtedness, debentures or other obligations."

Section 66.431 (5) (a) 4. c., Stats., which relates more specifically the powers of redevelopment authorities to issue bonds, provides, in part, as follows:

"c. To issue bonds from time to time in its discretion to finance its activities under this section, including, without limiting the generality thereof, the payment of principal and interest upon any advances for surveys and plans, and shall have power to issue refunding bonds for the payment or retirement of such bonds previously issued by it. Such bonds shall be made payable, as to both principal and interest, solely from the income, proceeds, revenues, and funds of the authority derived from or held in connection with its undertaking and carrying out of projects under this section; provided that payment of such bonds, both as to principal and interest, may be further secured by a pledge of any loan, grant or contribution from the federal government or other source, in aid of any projects or activities of the authority under this section, and by a mortgage of any such projects, or any part thereof, title to which is in the authority. * * * Bonds issued under this subsection shall be authorized by resolution of the authority and may be issued in one or more series and shall bear such date, be payable upon demand or mature at such time, bear interest at such rate, not exceeding 6 per cent per annum, * * * as is provided by the resolu-

tion, trust indenture or mortgage issued pursuant thereto. * * * "

The contract with the federal government which is apparently required of the local redevelopment authority in reference to each new urban renewal project, is designated a "Loan and Capital Grant Contract" and consists of Part One and Part Two (Forms HUD-3155a and HUD-3155b). This contract provides, among other things, for at least four different kinds of "obligations" to secure loans made for project purposes: "preliminary loan obligations" or "project temporary loan obligations" and "project loan payment obligations" or "project definitive loan obligations." Preliminary loan and project loan payment obligations evidence nonfederal loans which may be authorized under the subject contract if the interest rate thereon would be lower than that established by the government for its project temporary or project definitive loan obligations.

Your question as more specifically framed by the foregoing facts and law, then, is whether it clearly appears from the context of sec. 66.431 (5) (a) 4., Stats., that the term "bonds" referred to therein, and to which the 6% interest limitation applies, relates solely to what are more formally and specifically referred to and known as bonds, or whether the term includes notes and other obligations by virtue of the much broader definition of bonds sets forth in sec. 66.431 (4) (j), Stats.

I am satisfied that the 6% interest rate limitation set forth in sec. 66.431 (5) (a) 4. c., Stats., is applicable to notes issued in evidence of a direct loan obtained from the federal government under sec. 66.431, Stats. I believe the foregoing statutes so indicate with sufficient clarity. The term "bonds" is generally defined by the statute to include notes. The statute further provides that "bonds" may not carry an interest rate greater than 6% per annum.

In light of the definition set forth in sec. 66.431 (4) (j), Stats., the context of that particular portion of the statute which uses the term "bond" must clearly indicate that the legislative definition is not applicable before such definition may be put aside in favor of some other meaning. If the

legislature had intended that the 6% interest limitation not be applicable to the variety of "obligations" possible under sec. 66.431, Stats., unless the "obligation" amounted to what is more generally known as a bond, it could easily have so provided. However, in light of the foregoing statutory definition, I find it difficult to conclude that it was the legislative intent to allow a redevelopment authority to finance its project at interest rates in excess of 6% per annum as long as it always issued "notes" rather than "bonds," but that as soon as it issued what is more generally termed bonds, the 6% interest limitation applied.

Further, to conclude otherwise than plainly appears on the face of the statute would lead to results which hardly could have been intended. For instance, initial, but substantial obligations (notes) would be issued at interest rates greater than 6% only to find that it is not possible to issue a final and permanent obligation (bonds) to finance the project and retire the outstanding notes because of the 6% interest limitation.

In light of the foregoing, it is my opinion that obligations, including notes, issued by a redevelopment authority acting under sec. 66.431, Stats., to evidence a direct loan from the federal government are subject to the provisions of the statute which limit the interest rate thereon to 6% per annum.

As previously pointed out, the above described federal contract does contain a provision which would apparently allow those redevelopment authorities which are currently operating under its provisions to obtain financing at rates which are lower than those established by the federal government, by going to local lending institutions. Some redevelopment authorities have apparently been able to continue operations by obtaining financing in this manner at interest rates of 6% or less. However, if interest rates continue to rise, it may not be possible to obtain financing at such rates in the future.

The question of the 6% interest rate limitation and its application to notes issued by a housing authority in evidence of direct loans from the federal government, also

arises in reference to sec. 66.40 (14), Stats. In my judgment, sec. 66.40, Stats., contains the same general concept as previously discussed herein insofar as financing is concerned and should be treated in the same manner.

Fortunately, the interest rate difficulties referred to above have been temporarily alleviated by the recent adoption of the "Emergency Home Finance Act of 1970" (Public Law 90— , 91st Congress, S3685, approved July 24, 1970), which reads, in part, as follows:

"EMERGENCY RELIEF FROM INTEREST RATE CONFLICT BETWEEN FEDERAL LAW AND STATE LAW.

"Sec. 702. Notwithstanding any other law, from the date of enactment of this title until July 1, 1972, loans to local public agencies under Title I of the Housing Act of 1949 and to local public housing agencies under the United States Housing Act of 1937 may, when determined by the Secretary of Housing and Urban Development to be necessary because of interest rate limitations of state laws, bear interest at a rate less than the applicable going federal rate but not less than 6 per centum per annum."

This legislation, which relates to the two federal acts under which Wisconsin authorities obtain federal loans, provides a mechanism by which such authorities may be relieved of federal interest rate requirements greater than 6% per annum which conflict with the provisions of state statutes. You will note, however, that the effect of the law terminates July 1, 1972. Therefore, serious consideration should be given in the interim to the amendment of the interest rate provisions of secs. 66.40 and 66.431, Stats., so as to avoid future conflict between these statutes and federal law in reference to interest rates.

RWW:JCM

Platting—Assessors—Under Wisconsin platting law, all permanent survey monuments required by sec. 236.15 (1) (a), (b), (c) and (d), Stats., must be placed in the field prior to submission of a final subdivision plat for state level review; provided, however, that in the event of a waiver under sec. 236.15 (1) (h), Stats., the placement of all permanent monuments other than those required by sec. 236.15 (1) (a), Stats., may be temporarily deferred.

Under sec. 70.27 (5), Stats., the temporary survey monuments required to be set in the field prior to the submission of an assessor's plat for state level review are not made permanent until the recording of the assessor's plat.

A subdivision plat prepared in compliance with a local ordinance enacted under authority of sec. 236.45, Stats., it is not required by statutes to be submitted for state level review unless such land division results in a "subdivision" as defined in sec. 236.02 (8), Stats.

December 31, 1970.

CHARLES M. HILL, SR., *Secretary*
Department of Local Affairs & Development

You have requested my opinion on three questions relating to the state level review of subdivision and assessor plats which is conducted by the head of the planning function in your department. You first inquire as follows:

"I. If the town, village or city in which a proposed final land subdivision plat is located has not waived the placement of monuments, under the provisions of subsec. 236.15 (1), (h), Stats., is it necessary that all required monuments be placed in the field prior to submission of the plat to this office for the review of those agencies having the authority to object to the plat."

A review of the various provisions of ch. 236, Stats., relating to the plat review responsibilities of the head of the planning function in the Department of Local Affairs and Development indicates that this question must be answered in the affirmative, whether the final plat is submitted for

state level review under sec. 236.12 (6), Stats., as assumed in your question, or under the alternate procedure set forth in sec. 236.12 (2) to (5), Stats.

Section 236.12, Stats., sets forth the procedure which must be followed (except in cities of the first class and in unincorporated land in a county having a population of 500,000 or more) to obtain state level review of a preliminary or final plat under ch. 236, Stats. Compliance with the provisions of sec. 236.12, Stats., is a prerequisite to final approval of a plat by local authorities, which approval, in turn, is required to entitle a final plat of a subdivision to be recorded. Sec. 236.10 (1), Stats.

Section 236.12 (2), (a), Stats., provides that the head of the planning function in your department "shall examine the plat for compliance with ss. 236.15, 236.16, 236.20 and 236.21 (1) and (2), Stats." If the plat fails to comply with any of these statutes, the head of the planning function must notify the subdivider, among others, of any such objection. Thereafter, the plat cannot be approved or be deemed approved until all objections have been satisfied. Sec. 236.12 (3), Stats. However, any person aggrieved by any such objection to a plat, or by a failure to approve a plat which is based on an unsatisfied objection, may appeal under the provisions of sec. 236.13 (5), Stats.

Section 236.15 (1), Stats., sets forth various minimum standards relating to the physical characteristics and placement of survey monuments. Sec. 236.15 (1) (a), Stats., refers to monumenting the external boundaries of a subdivision. Section 236.15 (1) (b), (c) and (d), Stats., refer to monumenting all internal boundaries and those corners and points not required to be marked by sec. 236.15 (1) (a), Stats. It will be noted that all of the foregoing subsections of sec. 236.15 (1), Stats., require that the boundary, corner, etc., "shall be monumented in the field."

Section 236.15 (1) (h), Stats., provides that the placement of monuments in the field, *except* those indicating the external boundaries of the subdivision, may be temporarily deferred under certain circumstances. This subsection reads as follows:

"(h) The governing body of the municipality, town or county which is required to approve the subdivision under sec. 236.10 may waive the placing of monuments under pars. (b), (c) and (d) for a reasonable time on condition that the subdivider executes a surety bond to insure that he will place the monuments within the time required."

Section 236.15 (1) (h), Stats., was adopted in its present form, with one exception not here material, pursuant to the recommendations contained in Vol. IV of the 1955 Report of the Wisconsin Legislative Council, which dealt with proposed statutory revisions to the subdivision and platting laws. The following comment appears at p. 21 of that report:

"Section 236.15 (1) (h) of the proposed revision [of ch. 236] allows the governing body to waive the placing of monuments for a reasonable time so that if roads are being graded, for example, the work on the roads can be done before the monuments are placed. Otherwise, the monuments are placed and are dug up in the grading and must be replaced."

Section 236.20 (2) (b), Stats., further requires that a final plat of subdivided land show correctly on its face:

"(b) *All monuments erected,* corners and other points established in the field in their proper places. The material of which the monuments, corners or other points are made shall be noted at the representation thereof or by legend, except lot corners need not be shown. The legend for metal monuments shall indicate the kind of metal, the diameter, length and weight per lineal foot of the monuments." (Emphasis added)

Finally, sec. 236.21 (1), Stats., which sets forth the surveyor's certificate necessary to entitle the final plat to be recorded, provides, in part, as follows:

"(1) SURVEYOR'S CERTIFICATE OF COMPLIANCE WITH STATUTE. The certificate of the surveyor who surveyed, divided and mapped the land giving the following

information, which shall have the same force and effect as an affidavit:

"* * *

"(c) A statement that the plat is a correct representation of all the exterior boundaries of the land surveyed and the subdivision of it;

"(d) *A statement that he has fully complied with the provisions of this chapter in surveying, dividing and mapping the land.*" (Emphasis added)

In my opinion, the foregoing statutes indicate that, except to the extent that the placement of certain monuments in the field may be delayed pursuant to a waiver granted under sec. 236.15 (1) (h), Stats., all permanent survey monuments required by sec. 236.15 (1) (a), (b), (c), and (d), Stats., must be placed in the field prior to submission of a final plat for state level review. Even in the event of a waiver, however, the external boundaries of a subdivision must be monumented in the field as required by sec. 236.15 (1) (a), Stats., prior to submission of the final plat for state level review. Furthermore, the surveyor's certificate of full compliance with the provisions of ch. 236, Stats., in surveying, dividing and mapping the land, cannot be properly executed unless the survey has, in fact, been so monumented in the field.

I note your question suggests that a waiver under sec. 236.15 (1) (h), Stats., need only be obtained from the municipality or town in which the proposed land subdivision plat is located. Such a characterization of the statute does not appear to be accurate. The subsection actually requires that a waiver be obtained from the "municipality, town or county which is required to approve the subdivision under sec. 236.10." The provisions of sec. 236.10, Stats., indicate there are circumstances where several local authorities would be required to approve a final plat. Under such circumstances, the waiver and surety bond provisions of sec. 236.15 (1) (h), Stats., would apply as to each.

You next inquire as follows:

"II. Does the answer to question I. also apply to assessor's plats that are submitted to this office for review under the provisions of sub. 70.27 (8) ?"

Section 70.27 (8), Stats., requires assessors' plats to be transmitted by the clerk of the governing body which ordered the plat to the head of the planning function of your department for review and prohibits approval of such plats by the local governing body until the head of the planning function has certified on the face of the plat that it complies with the "applicable provisions of ss. 236.15 and 236.20, Stats." However, upon such certification and subsequent final approval by the governing body in accordance with the procedure set forth in sec. 70.27 (8), Stats., the plat is to be acknowledged by the clerk and recorded in the office of the register of deeds. Sec. 70.27 (2), Stats.

As pointed out in a previous opinion to your department, dated December 3, 1969, the "applicable provisions of ss. 236.15 and 236.20, Stats." are those set forth in sec. 236.03 (2), Stats., which reads as follows:

"(2) This chapter does not apply to cemetery plats made under s. 157.07 and assessors' plats made under s. 70.27, but such assessors' plats shall, except in counties having a population of 500,000 or more, comply with ss. 236.15 (1) (a) to (g) and 236.20 (1) and (2) (a) to (e)."

It will be noted that the provisions of sec. 236.15 (1) (h), Stats., which authorize the granting of a reasonable delay in placing the permanent monuments required by sec. 236.15 (1) (b), (c) and (d), Stats., are not applicable to assessors' plats. However, sec. 70.27 (5), Stats., which relates directly to the survey, and reconciliations of the same, which must be made by the surveyor making the assessor's plat, specifically provides, in part, that:

"(5) SURVEYS, RECONCILIATIONS. The surveyor making the plat shall survey and lay out the boundaries * * * and set *temporary monuments* to show the results of such survey which shall be *made permanent upon recording* of the plat as provided for in this section, and make a map thereof to a scale of not more than 100 feet per inch. * * *" (Emphasis added)

Therefore, in the case of an assessor's plat, sec. 70.27 (5), Stats., requires that *temporary* monuments be set in the field prior to the transmittal of the plat to the head of the planning function of your department for review and further provides that the monuments be made *permanent* upon recording of the plat.

Your final opinion request reads as follows:

"III. Are land subdivision plats which have been prepared in compliance with town, village, city or county ordinances that are more restrictive than subsection 236.02 (8), Stats., required to be submitted to this office for the review of those agencies having the authority to object to plats, and are they to be processed as all other land subdivision plats?"

I assume that the local subdivision ordinances to which you refer in your question are those authorized by sec. 236.-45, Stats. This section was revised by the 1955 legislature so as to permit those localities feeling strong pressure of rapid urban growth and development to legislate more intensively than is provided by ch. 236, Stats., for the state at large. *Jordan v. Village of Menominee Falls,* (1965) 28 Wis. 2d 608, 613, 137 N.W. 2d 442, appeal dismissed 385 U.S. 4, 87 S.Ct. 36, 17 L.Ed. 2d 3. Section 236.45 (2), Stats., as amended by ch. 286, Laws 1969, delegates power to local governmental units to enact such regulations, and provides, in part, that:

"(2) DELEGATION OF POWER. (a) * * * any municipality, town or county which has established a planning agency may adopt ordinances governing *the subdivision or other division of land which are more restrictive than the provisions of this chapter.* Such ordinances may include provisions regulating divisions of land into parcels larger than 1½ acres or divisions of land into less than 5 parcels, and may prohibit the division of land in areas where such prohibition will carry out the purposes of this section. *Such ordinances may make applicable to such divisions any of the provisions of this chapter, or may provide other surveying, monumenting, mapping and approving requirements for such division.* The governing body of the municipality, town or county may require that a map, plat or sketch of such division be recorded with the register of deeds and kept in

a book provided for that purpose. When so recorded, the lots included in the map, plat or sketch may be described by reference to it by lot number and by volume and page of the book provided for that use, for all purposes, including those of assessment, taxation, devise, descent and conveyance as defined in s. 706.01 (3). Such ordinance, insofar as it may apply to divisions of less than 5 parcels, shall not apply to:

* * *

"4. *Such other divisions exempted by such ordinances.*

"(b) This section and any ordinance adopted pursuant thereto shall be liberally construed in favor of the municipality, town and county and shall not be deemed a limitation or repeal of any requirement or power granted or appearing in this chapter or elsewhere, relating to the subdivision of lands." (Emphasis added)

Section 236.02 (8), Stats., is simply a definition of "subdivision," as normally used in ch. 236, Stats., and does not give rise to any statutory requirement susceptible of enforcement except in connection with some other provision of the statutes. Section 236.02 (8), Stats., reads as follows:

"(8) 'Subdivision' is a division of a lot, parcel or tract of land by the owner thereof or his agent for the purpose of sale or of building development, where:

"(a) The act of division creates 5 or more parcels or building sites of 1½ acres each or less in area; or

"(b) Five or more parcels or building sites of 1½ acres each or less in area are created by successive divisions within a period of 5 years."

Section 236.03 (1), Stats., more specifically provides as follows:

"(1) Any division of land which results in a subdivision *as defined in s. 236.02 (8) (a)* shall be, and any other division may be, surveyed and a plat thereof approved and recorded as required by this chapter. No map or survey purporting to create divisions of land or intending to clarify metes and bounds descriptions may be recorded except as provided by this chapter." (Emphasis added)

In addition, sec. 236.31, Stats., contains penalties for the transfer or attempted transfer of land in a subdivision as defined by sec. 236.02 (8), Stats., where the plat thereof is not recorded as required by ch. 236, Stats. The statute also provides that where a subdivision is created by successive divisions under sec. 236.02 (8) (b), Stats., the local governing body may order the subdivider or his agent to make an assessor's plat of the area. As pointed out previously, if an assessor's plat is ordered, it would be subject to review only by the head of the planning function of your department.

Based on the foregoing statutes, it is my opinion that a land subdivision plat which has been prepared in compliance with a municipal, town or county ordinance enacted pursuant to sec. 236.45, Stats., is not required by statute to be submitted for state level review unless such land division results in a "subdivision" as defined in sec. 236.02 (8), Stats. If a land division does result in such a "subdivision," however, the plat thereof cannot be filed for record under a procedure less restrictive than that otherwise required for such by ch. 236, Stats., including the provisions requiring state level review.

RWW:JCM

STATUTES AND CONSTITUTIONAL PROVISIONS, SESSION LAWS, LEGISLATIVE BILLS, AND RESOLUTIONS REFERRED TO AND CONSTRUED

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